THE PUBLIC TRUSTEE ACT AND THE LAW OF SUCCESSION IN KENYA (AN EXAMINATION OF THE WORKING AND IMPLICATIONS OF THE PUBLIC TRUSTEE ACT AS AN ASPECT OF KENYA'S SUCCESSION LAW)

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by

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T A B L E O F C O N T E N T S

THE PUBLIC TRUSTEE ACT AND THE LAW OF SUCCESSION IN KENYA

Introduction:

The workings and implications of an institution such as that of the Public Trustee should be viewed against the function of law in society and here the concern is basically a general examination of the law of Succession, its development, and how far the Public Trustee Act facilitates the attainment of the purposes of a law of succession.

Inheritance as a legal concept has been the subject of discussion mainly in relation to two other legal concepts, these being 'right' and 'ownership' vis-a-vis property of a deceased person. Vitally affecting the attitude taken towards inheritance and succession law is a society's approach towards ownership of property, the distinction being whether property is communally held or individually held. Diverse views have been expressed concerning the inheritance laws of different societies and a brief examination of these views is necessary as an introduction to the dissertation subject, namely, "The Public Trustee Act and the law of Succession in Kenya."

For the indigenous African, the laws of succession go a long way in contributing to a full life since the idea of retaining a personal immportality ranks high in the priorities of life.[1] Towards this end, most property is communally held and the basic social unit is the

family which is central to succession law since it is a family that inherits and not any single individual.[2] The African concept of family was neatly expressed in the case of Okoe v. Ankrah (1961) PC 49 245, where it is said inter alia that

> "the family, whether maternal or paternal consists of a number of concentric circles, the innermost which is called the immediate family: upon the failure of anyone in an iner circle suitable to succeed, is had to an outer and yet outer circle called the the wider or extended family".

In the same vein, Ollenu while discussing Ghanian succession Law describes the family as:

> "the social group into which a person is born, the unit of all members of a social group lineally descended from one common ancestor"[3]

Rightly recognising the importance of family, the West African court of Appeal observed that:

> "the first enquiry must be to what family did Ayiku (the deceased)belong during his lifetime"[4]

Consonant with the assertion that the greater emphasis is on the communal well being, in African communities succession is not as of right, one person may be preferred to another with an equally good or even better right to succeed.

The Western or European concept of inheritance law generally has uniform characteristics though recent developments in Eastern European countries have tended

as a result of adoption of socialist ideology, to alter what might be regarded the traditional object of succession laws. The Western European nations basically lean towards allowing an individual maximum possible freedom in dictating how his property is to be dealt with after his death. Following this same stress on individual freedom, it should be observed that in Western society, the family normally consists of the husband and wife and their children.

More parallel to the African view is the stance taken by the East European nations that emphasises the communal existence and regards the community's rights as the primary aim of any superstructure in state machinery. Here inheritance laws are regarded as a stimulant towards the attaining of society's objectives. Hence, though there is relative similarity in pattern of all European succession law, the limitations placed by the countries of East Europe relate to the type, i.e. quality and not quantity of property owned.

> "What is prohibited is possession not of quantity generally but of certain types of property in amounts that would make possible unearned income from rentals or from hired labourers."[5]

The English concept of succession is particularly relevant in that Kenya's legal system is substnatially derived from the English legal system. Besides the historical factor of colonization that makes it necessary to examine the English succession laws, post-independence development also render such examination necessary since

both the courts and parliament in Kenya have apparently not ceased to seek guidance from the English system.

The recent history of English succession law manifests the changes that the laws of succession are subjected to as a result of other factors in society. In its feudal stages, English feudal laws were designed to protect a hereditary aristocracy.[6] This was followed by the onset of the laissez-faire era which advocated absolute freedom for the individual in the capitalist free-enterprise society. Succession laws enacted in this era evidenced the development of society, thus extreme testamentary freedom became part of English law. As the euphoria of the nineteenth century subsided, the succession laws once again reflected this change in society as statutory provisions were enacted to regulate one's freedom to the disposition of one's property after their death.[7] Since the family in English Jurisprudence is constituted by a nuclear entity, the patterns succession laws follow differ significantly from African societies which treat the family as all persons belonging to a common lineal ancestor. The English concept, therefore, regards as its primary aim, the satisfaction (as far as is possible) of the individual and his immediate family, testamentary freedom only being limited to ensure that the deceased adequately provides for members of his immediate family.[8]

Within Kenyas legal system, from the time of its introduction by virtue of the 1897 Order-In-Council, four systems of succession laws have been operative. The indigenous Kenyan has mostly been governed by customary law, Hindus by their customary law complimented by the Probate and Administration Act 1881 and the Hindu Wills Act 1870. Muslims have been governed by Islamic Law in matters of succession while Europeans have been governed by the Indian Succession Act of 1865, the common law and statutes of general application. As has been noted above, English succession laws have fluctuated with social change as a consequence to these changes. Though the provisions of the Indian Succession Act was consonant with the views on succession in the second half of 19th century Britain, British Law has changed significantly to cater for later developments. Kenya law in this respect has not been the subject of relevant change. The decadent provisions of this Act were in some respects applied to Africans (who wished to make wills) as recently as 1961. The passing of the Ordinance, now the African Wills Act[9] is no doubt a step further in the attempt to westernize or 'civilize' the African as was evidenced by the comments of the mover of the Bill. Post-independence developments, particularly the attempt at unification of succession law as evidenced by the passing of the Law of Succession Act in 1972 clearly indicates that the present legal system intends to continue to rely on imported concepts of law.

An important question that demands an answer is the place of the Public Trustee Act[10] in the frame of succession Laws in Kenya. It should from the onset be noted that the institution of the Public Trustee is a child of the English Legal system.[11] Basically the Kenyan Act is one of the few statutes relating to successio law that may apply to anybody with some provisoes limiting its application in certain areas. The Act operates to complete the spectrum of an English orientated system of succession. The Act is further notable in that it evidences state intervention in personal law. The institution of the Public Trustee is therefore important in that it deals with two growing aspects of succession law in the country these normally being estates where there is conflict and instances where it is not clear what succession law should apply.

In examining the Act, Part III of the Act, dealing with Trusts will not be the subject of discussion. Chapter I of the paper will, therefore, briefly deal with the theory of inheritance as envisaged by various communities after which a more particular examination of the history and evolution of the office of the Public Trustee will be undertaken in Chapter II. Having laid the foundation via the English position in the foregoing, Chapter III will attempt to view Kenyas Succession Laws and how the Public Trustee Act fits in with the theory of inheritance obtaining in Kenya if any. The post-independence functions and practical workings of the

institution will be the subject of discussion in Chapter IV. From the substance laid down by the four chapters, an attempt shall be made to reach a conclusion dwelling on a critical appraisal of the Act, its workings in relation to Kenya's Succession Law objectives and finally a submission of what changes, in the writers opinion, might favourably affect the workings of the Act and those of succession laws generally.

CHAPTER I

THE THEORY OF INHERITANCE

Death is a common denominator in all human societies. Each society develops its own peculiar ways of dealing with the sense of loss normally occasioned by death after which an attempt is made, again in differing ways, to revert to the routine of that particular society. Since death is common to mankind, some of its consequences are catered for similarly by the laws and norms of different societies. Thus, laws of succession are universal, or rather, the theory of inheritance is universal and is fitted in the social framework of every society.

It is submitted that the importance attached to succession laws differ in various communities and, therefore, a meaningful examination of inheritance law should take several communities and seek to gauge the extent to which they affect these communities. From these it would then be valid to draw conclusions, either singular, that relate to individual communities, or plural, those that can be given a common object of all succession laws regardless of origin. For the purposes of this discussion, two broad categories will be examined, these being,[12]

(i) the African or customary type of inheritance system and
(ii) the European succession system.

The above stated general propositions should not be understood to imply detailed uniformity in either the African or European succession laws when dealing with smaller

sub-groups within the two broad categories.

(i) The African/Customary type of Inheritance system:

Upon the death of an African,

> "Control and authority over his person and property vest absolutely in his family."[13]

Inheritance is not to any individual person but to a family, the smallest social entity in a society where social organization rests on communalism. Here

> "there are no rigid laws of inheritance as a European understands codified law. There are only very usual practises which the elders are at liberty to modify in any way they deem fit. They do not administer the law, they administer what to them seems justice and wisdom".[14]

This assertion is further strengthened by the findings of the Kenya commission on the Law of Succession which found as a common characteristic of all customary laws that succession rules are not rigid and that the administrator-successor has a very wide discretion to vary the rules having regard to:

(1) the means of the beneficiaries

(2) the maintainance of widows and unmarried daughters

(3) the pending marriage of unmarried sons and the need for dowry.

For the African, therefore, inheritance laws constitute an integral part of a peoples personal laws and is affected by and accordingly affects substantially other

circles of activity and legal relationships.

In Kenya, as with much of Africa, most communities are partrilineal so that their succession rights particularly favour the male issue who were originally never expected to leave the family home. This leaning in favour of the male issue is not without due regard for the rights of other persons in society such as wives of a deceased person or his daughters.

The statement of the court in SONTI v. SONTI[15] that:

> "on the death of a native his estate devolves on his eldest son or his eldest male descendant. If the eldest son has died leaving no male issue, the next son inherits ... and so on through the sons respectively."

holds true for most customary succession laws. If no male descendant or ascendant of the deceased is available, then the nearest male relative in the collateral line inherits. An attempt must here be made to clarify the terms employed. Inheritance might be to a successor-administrator, the heir who in most senses, becomes the head of the family and stands in 'loco parentis' to other members of the family or there might be a different administrator from the successor. The difference here is that in some communities, the heir succeeds directly and immediately to the deceased's position while in others there has to be an appointment of an administrator, though he is normally the heir unless he is passed over for special reasons. Thus with the Kikuyu, an administrator may be appointed by clan elders on an intestacy.[16]

He exercises overall supervision over the property and other obligations of the deceased. With the Luo, the heir, or successor administrator automatically assumes responsibility and no formal appointment is necessary. Though such succession is automatic, this does not excuse the heir from being subject to the supervision of clan elders.

On the death of a person, there is normally a person who steps into'his shoes' in most respects, normally a brother or a son of the deceased depending on what type of duty it to be performed. The widow of the deceased and his family are to be cared for. The duties of the administrator or successor are deeper than those demanded of the bearers of similar office in the European concept of succession because the performance of these duties is basically a socially and customarily accepted obligation with much more import.[17] In the division of assets, account must be taken of the widows right to maintainance from her husband's property if she does not re-marry. More particularly she has a servitude over the portions of her late husband's land allocated to her and a personal right against the heir to be maintained. The devolution of property is of course affected by the widow's (or widows') choice to remain in her late husbands compound,enter a leviratic union or marry a male relative of her late husband. Kerr rightly observes of widow-inheritance:

> "good sense and reason behind the custom since it preserves the continuity of the family of claims and liabilities in connection with bride-price and the interests of children and gives a home and protection to widows."[18]

The entrance into a leviratic union also offers similar security and continuity since the widow is maintained both materially and in other respects. Where the deceased leaves no male issue and seed is raised up by a brother and the issue inherits the deceased's property as he is considered to be a child of the deceased.

For the majority of African societies, communal ownership and polygamy are common features. Due to the societies' concept of ownership and the polygamous nature of matrimonial structure, it is, therefore, also common for a person to make a disposition of his property during his lifetime. Thus, referring to the Luo, Cotram states that land will normally have been already allocated before death and the occupant remains in possession.[19] If a person is a polygamist, shares will normally have been appropriated to each house and considered the inheritance of the senior son of that house subject to shares to the junior sons or with reference to what their father may have specially given them. Here African succession laws differ significantly from European laws because, as observed by Shepstone with reference to South African customary succession laws:

> "family arrangements made gradually during a number of years can be taken as being tantamount to a published and accepted testamentary disposition of property attached to the Kraal because it is made with reference to what is to be the distribution and position of different members of the family after the father's death."[19]

Evidently, in African society, succession and inheritance laws tend to occupy a more significant and decisive role in that their execution covers the totality of the social structure by their effectively being in motion during the lifetime of the deceased. Inheritance of property after the death of the deceased is only a portion of what succession laws deal with because for most purposes inheritable property will already have been disposed of. Among many tribes for instance, a plot is allotted to a son on his marriage and it can safely be deduced that for some types of property or property-rights, succession is determined by other social factors besides death. Depending on the particular community, the intricacy of succession laws vary. The intricacy of systems developed can be seen from the complicated factors that courts have to determine in connection with succession of Africans in South Africa. In a Zulu polygamy, there is the "great house"; other wives houses are lined on the left or right hand of the 'great house' by virtue of the particular house having paid dowry for the latter's marriage. The inheritance of dowry paid for the daughter the woman allied to a particular house (i.e. the house that paid for her dowry) goes to that particular house to which she is so allied.[20] This example shows

that for the African Succession law is timeless in its being so interwoven in the social fabric that it is difficult to isolate this aspect of the law from the rest of the social fabric.

It would seem, from the foregoing that in African society succession laws contribute to a greater whole which is determined by the communal nature of property ownership[21] and the African concept of interlinking life and death coupled with the idea of personal immortality. Succession law stretches into the past and future at any particular point in time and aims at catering for the needs of deceased's family before and after his death and more significantly, provide for not only material well-being but also the non-material well being of the deceased's family and thus to the general good of his community.

Bequests are not unknown to customary law[22] but the administrator/s of an estate need not feel bound by these as there may already exist established patterns depending on how each community treats death. The wishes of the deceased are not the primary factors to be considered in the administration of his estate. Substantially pre-determined rules deal with the devolution of most property and the deceased would normally be conversant with patterns that govern succession and is unlikely to make bequests that would vary greatly from the accepted ones where circumstances demand the bequests will be varied and especially so if they are onerous. Otherwise, bequests are normally honoured.

(ii) The European inheritance System:

European succession laws are, like those of other societies, regulated and channelled by its attitudes towards property, and right to ownership of property. The fundamental factor leading to divergence between the European and African concepts of succession is the property-right concept[23] as differently seen in the two categories and to some extent, the European definition of the family as a nuclear entity. The social structure defines the interest involved in succession to be the freedom of testation confined only in the interests of the immediate family.

The origin of European succession law has been said to be in the feudal system where the fundamental idea related to ownership of land and the heir was normally the eldest son since he was thought the most able to perform services on the land. The primary aim of these feudal laws was the protection of a hereditary aristocracy.[24] Trends in European succession laws have developed and receded with ideas in currency in certain eras. One factor that has been persistent throughout the development of European succession law is the idea of sanctity of private property. Prior to the laissez-faire period and the industrial Revolution in Europe, the class factor was sharply evident in that the aristocracy owned the land (which in any society is a major economic factor) and it was thus bound to design laws that ensured the perpetuation

of family wealth. It was in furtherance the 'family wealth' idea that a testator could tie up land in perpetuity by indicating its devolution and thereby determining almost as if he were alive, the hands into which such land would fall for generations after his death.

Capitalism gradually replaced feudalism. The onset of the laissez-faire period had its slight impact on the institution of succession but left the foundations laid by history intact. Added to the sanctity of private property, capitalism now advocated liberty. Liberty here meant the 'freedom' of the individual to own as much property as one could and to be free to dispose of it in any way one pleases. This latter freedom which Maine contended implied "the greatest latitude ever given in world history to the volition or caprice of the individual,"[25] only lived to see the ~~late~~ early ~~nineteenth~~ twentieth century when the emergent welfare capitalism was forced to curb the extreme liberty afforded a testator in the preceeding era.

The European law of succession as it stands today still has only rid itself of undue attention to the individual bequest in areas where there are dependants who by current ideas might rightly protest the disregard of their legitimate rights. The enactment in 1938 of the Inheritance (Family Provisions) Act in Britain evidences

the recognition by the state, that some intervention was necessary in the community's interest. Eastern Europe goes further than western Europe in placing qualitative limit to what an individual may inherit. Despite this apparently greater state-control orientated towards a socialist society, because of its common origin with West European succession law, East European succession law has the basic characteristics of the Western law and the difference has been said to be more in objectives and aims rather than any revolutionary difference in content.[26]

Unlike its African counterpart, the European law of succession does not directly cover any areas of a community's social fabric. The scope of operation of succession is much more limited. It is submitted that the restricted nature of these laws can be attributed to the European outlook to life, and particularly on death which is here regarded much more a single event and is little related to other beliefs in society. Succession laws deal basically with the material aspects of life and are little concerned with other aspects of well-being of a deceased's dependants. Parry's attempt to define the law of succession within the English legal system exhibits its concern with a smaller area than an African community's succession Law. He writes that:

> "upon the death of a person, his assets divolve upon a new owner and some clearly defined pattern of devolution and institutions charged with its control

> must exist to preserve peace and order among the community, the law of succession provides this pattern."[27]

Central to the law of succession in the European viewpoint therefore, is the idea of devolution of a deceased's material assets upon a new owner and the institutions charged with its control exist to preserve 'peace and order' as far as the division of a deceased's assets go. Succession law is thus materialistic and impersonal in that it does not directly cater for the non-material and is rigid to the extent of ignoring circumstance except some aspects. A will properly executed may be regarded as unfair by a certain section of a deceased's dependants by, for example, unduly favouring a particular child; but as long as these other dependants are sufficiently provided for, a court of law would be powerless to intervene though the testators apportionment be manifestly unfair. The freedom of testation on the one hand and the regard for formality on the other have exposed European succession laws to criticism. Morton in criticising western succession laws claims that the underlying princip of succession law seems to be imperfectly understood or acted upon and holds up succession laws as the most striki example of unreasoning legislation. This attack can be summarized in saying that with the laying of emphasis on procedure and formality, the legal system lost sight of what ought to be the ultimate goal of a society's law of succession. Justice is, therefore, forfeited in striving for the minor virtues of consistency.

In todays modern states, the state normally has a stated objective towards which the legal system strives and laws dealing with particular aspects of the society's life ought to conform to that objective. The emergence of two distinguishable 'types' of succession laws in Europe is evidence of the assertion that the underlying principles and objects of a state's 'moral philosophy' affects all its laws and the laws so affected guide the state towards its broader objectives.

In a welfare-capitalist society, the sanctity of private property is all pervasive and accordingly the aim of succession laws are deemed to be consideration of the former owners wishes, the security of adequate provision for his family and dependants and finally to promote the equalization of fortunes by democratic process. These aims cater for the free-enterprise concept of testatory freedom while restricting this freedom in the interests of the immediate family of the deceased. The interest of the community at large is considered as a tertiary objective after the first and second and impliedly more important, have been catered for. Individual and family interests are thus viewed as the nobler aim giving succession laws a lesser significance than in socialist society where the concept of equality is viewed in a more realistic sense. In reality, welfare-capitalist succession laws still aim at perpetuation of family fortunes and the claim to equalization of fortunes by democratic

process are embodied in taxation is a mere pretence since taxation can be selective and exemptive and its significance in the equalization of fortunes is, therefore, minimized. The functioning of institutions set up to deal with the administrative aspect of succession laws are inevitably affected by the underlying principles and the court adjudicating a succession law problem or the Public Trustee's decision as to who to award letters of administration if determined according to the law, will have been grounded in the principles underlying succession law.

Inheritance has been placed in a much clearer and better defined perspective by the East European states whose governments profess to be socialist and whose avowed objective is, therefore, egalitarianism. The primary observation here is that the laws of succession appear to be not the cause but the consequence juridical product of economic organization in society.[28] Reform of society involves the reorganization of priorities and this is what has been done in the USSR and Yugoslavia. Socialist inheritance law has put as its objects the equalization of fortunes by democratic process, the security of adequate provision for family and dependants and the wishes of the former owner; in that order. The steps taken to concretize this reorganisation is evidence of an attempt to make equality more than just theory.

As opposed to the West European concept of ownership which confers a right of use and abuse, the socialist stance emphasises the "critical role played by property in a nexus of specific relationship"[29] and the idea of absolute ownership is greatly restricted to fit within the society's broader egalitarian aims. In a paper[30] discussing Soviet succession laws, Soon-Tay rightly recognises that

> "the key distinction between bourgeois and socialist inheritance lay in the conception of 'personal' property acquired by personal exertion and used for the lawful enjoyment by the individual himself without exploitation or harmful social consequences."

The socialist states are, therefore, quick to emphasise that it is not the inheritance right that creates the possibility of abuse but rather the property right that is transmitted.[31] Neither is the accumulation of property regarded as a hindrance to socialist aims. On the contrary accumulation is regarded as an inducement to produce which contributes towards abundance of community wealth because of the stategic imposition of qualitative control on inherited property. Poland and Yugoslavia for example, do not allow a peasant family to inherit land in excess of the statutory maximum afforded a household and neither is extreme subdivision of plots allowed in pursuance of inheritance rights.[32]

Similarly, in the U.S.S.R., a family may own only one dwelling house at a time and if another is inherited, the heir has to choose one and convert the other into other forms of property so as to ensure that succession is not allowed to house laws that give opportunity to ownership that may lead to the inheritor getting an 'unearned income'.

Though the major features of socialist laws of inheritance are defined by the laws of property generally, as in capitalist society, inheritance laws are of a greater defined value since they are made responsible for safeguarding and making effective the various institutions established by society. Besides its primary aim of the prevention of exploitation and in this way contributing to equalization of fortunes, socialist inheritance law also aims at stimulation of production. To this end, the restriction placed on succession rights are framed so that they do not stifle incentive to produce since a man's property is for the most part, inherited by his family. In this sense, inheritance laws in recognising the right of family and dependants use these laws to make the concept of family contribute to the general social security. Laws made in pursuance of safeguarding the family in socialist society take dimensions unknown to the statutory laws in West Europe. Thus the Russian Republic's code grant, on an intestacy, the minors and dependants of a deceased person a considerate two-thirds[33] of his estate obviously giving due regard to circumstance

and attempting to administer justice in the spirit of equity.[34] The limited freedom of testation and the more humane rules of intestacy, therefore, cater for the social security while simultaneously strengthening the family as society's basic unit and also contribute to abundance in the increase or stimulation of productivity while at the same time strengthening social property in providing a balance between the personal and collective interest.*

Socialist inheritance laws though similar in pattern to other European inheritance laws, have the distinctive feature of being clearly definitive of object which has resulted in its reversal of priorities as seen by the welfare-capitalist states. Professor Blagojeurc in discussing Yugoslave inheritance law rightly argues that:

> "the concepts of the family, the status of illegitimate children, relation of man and woman in society and the family, the content of matrimonial relationship between spouses"

are all ... closely connected with and affects in considerable measure the institution of inheritance. He further observes that the attitude of society:

> "towards such categories of institutions as freedom, equality and equal rights and formalism"

similarly affect and are in turn affected by the institution of inheritance.

It is possible from the above glimpse at socialist

inheritance laws to assert that they are broader in outlook and are in this sense akin to the African concept of succession. The stated aims and the systematic aim to their achievement combines the idea of Montesquieu and Gray that the power of testation is neither a natural nor constitutional right with the recognition of the deeper nature of man as a being with non-material needs and thus providing by way of compromise, certain rights (as seen in the laws which relate to forced heirship) that cannot be explained in any way except that they are a deceased's dependants inalianable rights. To support the contention that the right to inherit is an-inalianable right, the inclusion of that right as inalianable by the United Nations World Convention on Elimination of Racial Discrimination[35] shows that the body of nations in recognising the right to inheritance gives it a universal claim to being a basic human right.

All inheritance systems, irrespective of origin are grounded on the concept of family. Differences spring up when account is taken of system of family or extra-familial factors like a community's ideological orientation or its mode of production. The prosperity of society is another common concept but again differences arise in the determination of how that prosperity is to benefit society.

African customary inheritance laws are, as we have seen above, designed to cater for more than the material need and therefore their implementation affects society

in a much more fundamental way than those of European origin that cater mainly for material needs only and are accordingly less important in their contribution to the complete social organisation. The shift by modern socialist states from the emphasis on absolute ownership by the individual to a more communal concept and the resulting parity between socialist objects and the objectives that were attained by uncorrupted customary inheritance laws indicate that a controlled type of communal ownership and the orientation of property-right concepts towards communal ownership give inheritance laws their deserved significance in any legal system.

Despite their numerous differences in detail, the substance of all inheritance systems contain an administrative aspect. In African society, there are two patterns in reference to the administrative or procedural aspect of inheritance laws. Some societies provide for the administration of a deceaseds estate by an appointed person who might not necessarily be a direct beneficiary but is often related to the deceased. The appointment may be made by clan elders or a meeting of the deceased's family. The duties of the administrator vary according to who he is since in some cases, becoming a new head of family dictates a continuous responsibility. Unlike his European counterpart, the African administrator does not just 'wind up the estate' of a deceased person but is normally

involved in the funeral rites at the deceased's funeral and performs subsequent rites and duties as an understood obligation from custom. A variant of the above system of administration exists where a given heir, normally the deceased's eldest or eldest married son or the eldest son of the senior wife automatically assumes administrative capacity. This is only a variant of the basic norm because in both cases, machinery exists that ensures the supervision by other persons, (usually clan elders) of the heir who has so succeeded the deceased.

European succession laws exhibit a similar division. West European states favour the vesting of property in an intermediary person who is not necessarily a beneficiary from the deceased's estate. The intermediary's job is normally, purely the winding up of the deceased's estate after which he is under no further duty vis-a-vis the estate or members beneficiary. Administration strictly deals with the supervision of the devolution of assets either by the directions of a deceased's will or by the rules of intestacy in the absence of a will. East European states differ slightly in that the necessity for an intermediary is nullified by the passing of title to inherited property directly to the heirs though in the event of dispute, notarial offices are available to resolve conflicts.

Succession laws therefore exist in every society and along side these administrative and procedural laws to ensure the control of the institution of succession and its orientation towards contributing to a society's concept of a meaningful and complete life.

CHAPTER II

THE HISTORICAL BACKGROUND OF THE PUBLIC TRUSTEE ACT AND KENYAS SUCCESSION LAWS

BASIS AND POLICY

Kenya has inherited various structures whose foundations are directly traceable to its colonial background. One significant inheritance is the present legal system which can be taken as, fundamentally, a child of the system that has grown after establishment by the 1897 East Africa Order in Council.[36] This Order-in-Council and most of the laws it fathered followed the pattern dictated by the colonial constitutional theory that sought to pacify and cow the indigienous inhabitants of the territory into directly or indirectly serving the foreign administration while at the same time catering for those administrators and settlers of European origin. The settlement of disputes was to be in the British legal tradition and a dual court system was established, with the racial distinction of 'Native' and 'non-Native'[37] providing the distinguishing factor. The laws of succession well illustrate the multiple systems that later emerged and which followed the original racial distinction but were directly influenced by cultural and religious differences.

EUROPEANS:

The single most important piece of legislation relating to succession for Europeans, throughout the colonia[1] era and after, is the 1865 Indian Succession Act which

was to apply to 'Non-Natives' and the disapplication of section 331 of the Act broadened its ambit to include Hindus, Muslims and Budhists who were therefore to be similarly treated to Europeans in matters of succession. This Act which codified English succession law of the mid 19th century, catered for testate and intestate succession and also made provisions as to administration. As far as persons of European origin are concerned, there has been little change in succession law. Amendments that took place were to 'update' the Act following changes in Britain but these amendments did not in any substantial way alter the Act.[38] The present law therefore embodies the principles of the laissez-faire period in Britain, notably, freedom of testation with little restriction, disregard of difference of sex and fixity of share in order of inheritance in cases of intestate succession. Unlike the law of succession of other groups, the law applicable to Europeans has thus been clear and uncomplicated and the only significant addition relevant to this discussion is the 1909 Administrator General's Ordinance[39] which was intended to cater for intestate deceased of European or Indian Origin. In some specified cases, the Ordinance also applied to the testate deceased.[40]

HINDUS:

Succession law affecting the Hindus has not been as straightfoward as that of the Europeans. The position at the outset was uncertain since the 1865 Act which was applied to Hindus embodied concepts foreign to the Hindu community. Legally, the 1865 Indian Succession Act was a statute that provided for all aspects of succession but the Hindus remained a well-knit cultural community and in practise the impact of the Act was not felt because the position soon changed. This change took the form of an 'order'[41] by the secretary of state, that applied the section of the Act that excluded its application to Hindus among others. Further, the Hindu Wills Act 1870 and the Probate and Administration Act 1881 was applied to Hindus. It is submitted that this move only clarified the 'legal' position since both Acts were not a written form of Hindu customary law of succession but borrowed from English ideas of succession as embodied in the 1865 Act. Despite these changes, intestate succession among Hindus still posed a problem as it was not specifically provided for by any law. Not until 1946 was the position clarified by the Hindu Marriage, Divorce and Succession Ordinance[42] by which Hindu customary succession law was applied to Hindus. There has nevertheless been some Anglicization of Hindu

personal law as evidenced by the 1870 and 1881 Acts whose effects have been buttresed by a more noticeable trend in connection with the laws of marriage and family. The provision for succession according to Hindu law was, even in the 1946 Ordinance, subtracted from by provisoes whose effect is to delete Hindu customary law of succession.[43] Few express changes have occurred in Hindu succession law except when in 1961, two Ordinances replaced the 1946 one, and whose effect was to separate marriage laws from succession laws and to restructure Hindu family law to lean towards English concepts of family.[44] Though not expressly affecting succession, these changes indirectly affected inheritance since for any community family and succession laws are inter-related and re-organisation of family inevitably has repurcussions on succession law.

MOSLEMS:

Like the Hindus, Moslems in the protectorate (later colony) were initially victims of the lack of clarity created by the disapplication of the Indian Succession Act's s. 331 which meant the application to Moslems, concepts of succession that are English. The 1897 Native Courts Regulations[45] promulgated under the 1897 East Africa order-inCouncil defined 'native' so as to include Moslems. The Regulations, besides including "any native of Africa not of European or American origin" further covered persons not of European or American origin but who were subject to the Jurisdiction of the Sultan of Zanzibar though such persons were not born in

Africa. Persons in this class were largely Moslems, African and Arab, living on the Kenya coast. Though it has been asserted that the legal basis for the application of Islamic law to Moslems is uncertain, accompanying the setting up of a British administration were constant reminders in legislation that "within the Muhammendan coast or in dealing with Muhammedans",[46] the courts were to be guided by and have regard to the general principles and the law of Islam. The provision relating to Kadhis courts was more to the point in stating that Kadhis courts were to take cognisance of all matters affecting the personal status of Mohammedans such as marriage, divorce and succession and were to follow the law and produce that had hitherto been observed in the Sultanate of Zanzibar.[46a] With its base in the legal history of the Sultanate, coupled with the predominance of Islam whose 'sharia' specifically and in a detailed manner provided for the succession of Moslems, any confusion in the law was purely the creation of legislation. The 1907 Courts Ordinance gave the Kadhis courts full juriddiction over Muslims in matters relating to personal law and removed any doubt that might have been created by previous legislation.

In 1920, the Mohammedan marriage, Divorce and succession Ordinance was promulgated to 'inter alia' "amend the law ... relating to intestate succession in certain cases." This Ordinance specifically provided that when a

person married according to Mohammedan law, or was a child of such union, died:

> "the law of succession applicable to the property ... both movable and immovable shall be in accordance with Mohammedan law, any provision of any other ordinance notwithstanding,[47] Muslims have therefore been governed by a law of succession originating in religion and statute law has been merely declaratory as to the kind of law that would apply but has refrained from any attempt at setting out or altering the substance of the Islamic law of succession.

AFRICANS:

There should be little if any doubt that the law of succession of peoples of African origin has always been guided by their customary laws of succession. The 1897 Native Courts Regulations made this clear but simultaneously started the process of legal dilution by removing from the ambit of customary law of succession those African who were Christians.[48] This move was crystalised when the 1902 East Africa Marriage Ordinance made it clear that a 'native' married in accordance with that ordinance was to be governed by the laws of succession of England.[49] Two years later, the Native Christian Marriage Ordinance removed the African from the field of alien succession law and reverted to customary law.[50] There has been little express interference with customary succession laws by way of statute though the existence of various options as 'type' of marriage has resulted in conflicts thereby giving the courts an opportunity to advocate the implied

superiority of English law at the expense of customary law. The African Wills Ordinance[51] provided an opportunity for Africans to make wills following the provisions of the Indian Succession Act but limited testatory freedom so that one could not will away property that by customary he would have been unable to dispose of.

From the administration point of view, the need to cater for 'intestate' natives seems to have been recognised early and led to the passing of the Administration of Native Estates Rules and Orders in 1899.[52] These 'Rules and Orders' were intended to cater for that category of natives who were severed from their original communities and therefore did not have at their time of death, persons to look after and administer their estates. Those indigenous Africans or Arabs who the rules meant to cover it can be argued, were those that had settled in urban areas having come from their homes in search of work or those that had embraced a different culture so that the original and novel ways of life clashed in seeking to administer an estate,[53] each in what way it considered just and those that might have owned property that in the eyes of the system, could not be handled by indigenous laws relating to administration of estates. An examination of the early cases dealing with administration reveals that the majority concerned people living in what was then

the Sultan's domain which by virtue of situation, was the first area to be subject to foreign influence and urbanization.[54]

The interference with customary succession law by the 'Rules and Orders' can be viewed from two angles: That it was a necessary move to ensure the safety of personal property of those uprooted natives who needed foreign institutions to bolster the short-comings of customary laws of administration or that they provided an indirect way in which the legal system could impose its values. As will be evidented later in this paper, the apparent neutrality of the Rules and Orders and later legislations dealing with administration is suspect and can be used to inculcate and impose foreign concepts of succession in the name of justice and morality and in the spirit of racial supremacy that provided for the courts to be guided by customary law "so far as it is applicable and is not repugnant to justice and morality"[55] both of which were viewed from the stance of English jurisprudence.

The origins of the present Public Trustee Act can be found 'in the 1909 Administrator General's Ordinance which was "to make provisions for the appointment of an official administrator of intestate estates" and to define his powers and duties. The 1909 Ordinance was to function alongside the 'Rules and Orders'

of 1899 and was not to affect its provisions except that the High Court or other subordinate courts other than the Native subordinate courts, had the power to specifically appoint the Administrator General to administer the estate of a native within its jurisdiction. Two amendments in 1919 and 1921 had the effect of excluding the Administrator General from the estates of natives living in rural areas and fixing new changes for administration by the official administrator.

In 1925, amendments were made to the Ordinance that inter alia changed its name to the 'Public Trustee Ordinance' and gave the powers of trustee to the then Administrator General thus giving "additional duties performed by the Public Trustee in England."[56] Section 27 of the 'new' Ordinance repealed the Native Estates Administration Rules and Orders and all previous versions of the Administrator General's Ordinance and therefore had the effect of bringing all persons whose estates could be administered by a public officer, under the same ordinance regardless of creed or colour. Further changes occurred in 1937 whose effect was to further extend the powers of the Public Trustee, notably, with regard to personal property owned by a native, the administration of estates of persons who died outside the colony, preferential right to administration from a court order:

> 'even though there be persons who in the ordinary course, would be legally entitled to administer the estate...',

provision for service of notice to next of kin and the revocation of grants to the Public Trustee.

The present Public Trustee Act is virtually a reproduction of the 1937 Ordinance though it has been the subject of several amendments. Section 2A provides that:

> 'Nothing in this Act shall confer on the Public Trustee or his agents any powers in respect of
>
> (a) the estate of an African living among members of his tribe or community in accordance with their customary mode of life, who has no property purporting to belong to him as an individual or
>
> (b) land registered under the Land Adjudication Act."

Besides the legislative history of the Act, it is necessary for a complete overview, to briefly cast a glance further back in time, and place Act in its original social context, that is, the development of the English concept of administration of estates. Holdsworth[57] writes of early English law of succession that there was no law of executors though some germs which might have gone into the making of the representative in later law were discernible. He writes that

> 'the dying man by his last words hands over his property to his friends or to the priest ... to see the fulfilment of his wishes. Sometimes a testator would appoint guardians and request a bishop to see to the due fulfilment of the wishes."[58]

He further asserts that a definite representative of a deceased person was hardly needed at this period since other laws were also in their infancy and simple rules

of distribution sufficed.[59] The recurring reference to a priest or bishop in matters of administration suggests that the idea of a 'public' person being involved in personal law is not recent and that for the English, the supervision of an estate was not an affair essentially involving a family as the deceased's relatives.[60]

As society became more secular and functions performed by the state spread into more spheres of individual citizens lives, personal laws also became the subject of state interest, administration of estates included. Maine perhaps puts the idea of administration most neatly when he stated that universal succession occurs:

> "when one man is vested with the legal clothing of another becoming at the same moment subject to all his liabilities and entitled to all his rights, ... the transition must be such as to pass the whole aggregate of rights and duties at the same moment and in virtue of some legal capacity."[61]

He further specifies that the English law makes "the executor or administrator the representative of the deceased to the extent of his personal assets."[62] The English administrator does not therefore need a personal tie with the deceased and the obligation to act as administrator has been boiled down to amount an obligation of a legal nature and the stress is on the deceased's personal assets, the material aspect of the deceased's affairs

Spicer and Peglar state that the object of the legislature in creating an office of Public Trustee was to establish a public department to which administration of trusts could be committed by those not desirous of opting private individuals as trustees or executors. The commitment of administration of estates to a public department can be said to have been formed with the similar aim of making available to the public, a department which essentially saw to the safety of intestates estates and thereby safeguarded the sanctity of private property which is a cardinal principle of a society grounded in free enterprise and individual ownership. Further, it is in the interest of the state that estates should be administered and executorship law, having rid itself of extra-legal obligations could very well be dealt with by the Public Trustee. Besides guarding the reverend principle of the sanctity of private property by assuring the safety of intestate's estates, such an office created several convenient appendages. The wide powers given the Public Trustee meant that a large number of smaller estates did not get further than the department, thus easing the burden of the courts with regard to disputes. By making provisions to enable testators to appoint the Public Trustee as executor or for him to act where an alternative executor was unable or unwilling to act, more opportunity was given to the Public Trustee to act as administrator.

As opposed to the Public Trustee office in Kenya which handles an insignificant number of trusts, the English counterpart deals with a large number of trusts.[63]

Though the idea of administration of estates exists in all peoples succession laws, each community has its peculiar way of administering an estate. The English idea, discussed above is evidently impersonal and secular and has developed in a society whose concept of ownership is fundamentally varied from the African communal structure where administration is more than a mere legal obligation and is governed by familial or clan relationships.[64]

The existence of four systems of succession law throughout the colonial era and the continuity in post-independence Kenya lend weight to the assertion that all communities have a complete law of succession and any state intervention, if it is not to be unconstitutional, must recognize the limit of its applicability. The office of the Public Trustee in Kenya should be purely administrative in that all communities can call for its help for the processing of administration affairs but thereafter each community is governed by its own indigenous law.

CHAPTER III

PUBLIC TRUSTEE AT WORK

After having traced the history of the Public Trustee Act and briefly, Kenya's other succession laws as provided for by pre-independence legislation, it now remains to examine the actual functioning of the provisions of the Public Trustee Act. This chapter of the paper largelly consists of an analysis of the Act as it is on paper and much of the material included here is gathered from unpublished material and interviews with personnel at the Public Trustee section in Nairobi.

The Public Trustee is a body corporate established under the Public Trustee Act, with an official seal and has perpetual succession of office.[65] The trustee largelly administers estates and sometimes manages trusts. The Act provides for the appointment of "some fit and proper person to be the Public Trustee."[66] At present, the Registrar-General also holds this post. Although the Public Trustee is a government officer, he normally undertakes the administration of an estate when requested to do so by such persons as heirs or creditors. Estates are administered (without regard to race or religion) where a person dies leaving whole or part of their property in Kenya or where a Kenyan dies and leaves property abroad.[67]

Though the portion of the Act dealing with trusts is not to be the subject of discussion, it is

necessary to briefly explain that the Public Trustee also manages trusts on behalf of minor children and some organisations. The Public Trustee may also be appointed to manage the property of persons of unsound mind under the Mental Treatment Act.[68] The volume of work handled in relation to trusts is minimal if taken vis-a-vis causes dealing with administration as is evidenced by the figures given below.[69]

Year	Estates Undertaken for Admin.	Trusts Accepted
1964	670	25
1969	1,152	33
1973	2,061	29

The highest number of trusts accepted in any one year between 1964 and 1973 is 55 for the year 1971 while the lowest number of estates taken for administration in any one year between 1964 and 1973 is 670 in the year 1964.[70] It can, therefore, be safely asserted that the main duties of the Public Trustee office in reality, consist in the ascertainment and realization of all assets of an estate, the settlement of all just and proved claims out of that estate and the distribution of the residue to the proved rightful heirs.

When the estate of a deceased person is reported to the Public Trustee by his agents, the widow or widower or relative or any other person with an interest in the deceased's estate,he starts the usually long and complicated

process of pursuing administration by completing the "Probate and Administration Particulars" and the Report of Death to the Public Trustee" forms. These forms collectively provide the necessary information as to the deceased's particulars, his next of kin, his property, occupation etc.

Preliminary enquiries are carried out if the estate qualifies for administration by the Public Trustee.[71] The object of the enquiries is to ascertain the information supplied in these forms by writing to all persons interested, employers, companies and any organisation where the deceased had an interest. The ascertainment of heirs is done by reference to the District Commissioner of the deceased's home area. Known debtors and creditors ought to be informed. A list of claims and a schedule of property is then drawn up while an estate duty affidavit is submitted to the commissioner of estate duty.

After ascertainment of heirs, having obtained their consent[72] and gathered all information on the deceased's property, a notice[73] that the Public Trustee intends to apply for letters of administration or a grant of probate in the rare instance that the deceased has left a will is published. This publication is taken as being sufficient to rouse any creditor or other interested persons such that no claim can be entertained if it is not presented to the Public Trustee within two

months of the notice published in the 'Gazette'.[74]

A distinction is drawn by the Act according to the monetary value of estates. Where the gross value of an estate is less than 4,000/-, the Public Trustee may issue a "certificate of summary administration"[75] where approved persons are keen to administer the estate provided they comply with the requirements basically similar to the preliminary duties carried out by the Public Trustee in administration of an estate. Estates of gross value above 4,000 but less than 10,000/- are administered by the Public Trustee after he issues himself with a 'certificate of summary administration.'[76] For estates whose gross value is above 10,000/-, the Public Trustee must apply for letters of administration from the High Court.[77]

The grant of letters of administration whatever the value of the estate, gives authority to the person or persons whose names are stated therein to realize all assets due to the estate. Suits may be instituted by or against the person so named on behalf of the deceased. Besides other liabilities, there are fees due to the Public Trustee which vary with the value of the estate and may only be charged on estates whose value is above 200/- as calculated on varying percentage basis.[78] These fees are only second to funeral expenses and death bed charges.[79] Whatever remains after all liabilities have been cleared is then distributed to

ascertained heirs whereafter a statement of final account is drawn up balancing liabilities and assets. The file is then closed and in cases where the value of the estate exceeds 10,000/-, a copy of the statement of final accounts has to be delivered to the Registrar of the High Court for monies spent. A certificate is issued to the Public Trustee after the final administration accounts have been passed and the figures therein are normally deemed the final authoritative statement as to the assets and liabilities of the deceased.[80]

The Head Office of the Public Trustee is situated in Nairobi and an attempt at decentralization has resulted in the opening of branch offices in Mombasa and Kisumu. While the Mombasa office has powers equal to those of the Head office, the Kisumu office has jurisdiction to deal with estates of up to 10,000/- in value. An agency office in Malindi serves Kilifi and Lamu.

Apart from the above mentioned areas where offices have been specifically established to cater for administration of estates, District Commissioners all over the republic are ex-officio agents[81] and have the power to deal with the states of Africans where the gross value of such estate is below 10,000/-. As we have seen earlier in the chapter, the Head Office relies heavily on District Commissioners for information concerning

heirs, their share and also to help ascertain according to what law the residue should be distributed. Even the distribution of the residue frequently falls back on the District Commissioners since many beneficiaries are persons living in the rural areas. The work load of the Nairobi office is in this way meant to be appropriately reduced by delegating it to government officials who are generally closer and more familiar with the residents and the social structure of their respective districts.

A recent addition to the work of the Public Trustee comprises the introduction in 1974, of the "Civil Servants Group Accidents Scheme" by which scheme civil servants who die in accidents are acredited money which amounts to five times the deceased's annual income. This development was the result of an agreement between the treasury and the Kenya National Assurance Company for the benefit of employees in the civil service. This money is payable to the deceased's dependants. How dependants are determined poses a difficult question as to what criteria qualify a person to be a 'dependent.'[82]

From research carried out at the Head Office in Nairobi, it is evident that above 50% of the estates administered originate from deaths in accidents, mainly road accidents.[83] It is therefore not surprising that the ages of deceased person oscillated between 26 and 55 years with the occasional case falling below or above

the given years. Deaths from 'natural cause' of course constitute most instances where 'accident' is excluded. Most applications arise after the usually, untimely death of a male person employed in urban centres and have families either living with them or living with their other kinsfolk in the deceased's area of origin. This invariably results in protracted correspondence between the interested parties and the Head Office in Nairobi. The four most frequently recurring items that inflate estates that would otherwise be meagre are insurance policies, bank accounts, death gratuities and pensions. Virtually all the organisations concerned with the above, (ranging from the Government to a small company in which the deceased may have been an employee) have their headquarters in Nairobi which tends to throw back to the centre, even those problems that should rightly be dealt with by ex-officio agents in the districts. Shares in companies and 'immovable' assets are not as frequent as the above mentioned four but where immovable assets exist, they are normally of substantial monetary value and therefore the subject of frequent disputes among the would be heirs and/or dependants.

The sources of information that lead to the motion of administration machinery are various. Though the names of a deceased's next-of-kin are those that appear on the 'Report of Death' form, the initial mover

who advices persons on what course of action to take appears to be the offices of the District Commissioner for outside - Nairobi cases and the personnel at the Public Trustee's section in Nairobi. Advocates also frequently refer persons to the Public Trustee; it has been suggested,[84] for one or two reasons. Either because firms consider the protracted and heavy correspondence not worth their while or because after having made what can only be called a half-hearted attempt, the advocate comes to the not infrequent dead end when an administration bond of double the value of the estate is required of the applicant before they can be granted administration letters. This pre-requisite is of course beyond most applicants the majority of whom are semi-literate widows and are invariably referred to the Public Trustee by the advocate whose initial fees are already paid.

Processing of a cause from its beginning to when final administration accounts are passed and the file closed is normally a long and painstaking affair on the part of the deceased's family. The shortest time within which the more straightforward and uncomplicated causes are processed is four to six months. These cases are the minority since most estates take more than one year to finalise. Some difficult estates take much longer and files are still open which were opened before 1968.

Reasons that explain the common protracted nature of the administration of estates are manifold but it is submitted that the root cause is the alien procedure involving legality, bureaucracy and formal correspondence with which on the one hand, the deceased's family are normally not familiar and on the other, the shrewd and formally educated personnel employed by organisations which may owe money to the estate are fully conversant. An example from the estate of one Kilian Obala Oran[85] will adequately illustrate this point. In attempting to gather the assets of the deceased, the Public Trustee wrote to a company, Mawe Farm Limited, to whom the deceased had sent 1,700/- in the hope of being alloted shares in the said company. A prompt reply was received by the Public Trustee informing him that shares had not as yet been alloted after which despite persistent enquiry by the Public Trustee, the company declined to communicate the final state of affairs. The correspondence between this company and the Public Trustee started in 1968, only came to an end when in May, 1974, the widow of the deceased actually travelled to the company offices situated in Nakuru and was informed that shares had been alloted her deceased husband. Refusal to react to correspondence here contributed to the lengthy period taken in the administration of an estate.

Another source of delay is ironically, the Public Trustee section itself. These instances can be attributed to lack of sufficient personnel and the necessary attention to detail and formality in dealing with legal affairs. In the estate of Adan Eymoy Ahmed,[86] the deceased died in 1975 and prior to that, was a government employee in the Administration police in Wajir. It is only in March, 1977 that the widow was sent to Nairobi by the District Commissioner, Wajir, to find out the position about payment of her late husband's dues as she and her children were in a 'desperate condition.' After the making of this application, further delay was caused when the process of administration came to a halt since the widow had given the name 'Ahmed' while the records of the Pensions Officer had 'Mohammed'. The widow was by virtue of this anomally denied an advance from the estate and payment was only made to her after she came back to Nairobi and ascertained that Ahmed and Mohammed can be interchangeably used by a Muslim. The precaution taken in the ascertainment of the deceased's name while commendable, carried along with it delay whose practical consequences might outweigh such care. Justification of such formality is difficult where a widow and her children, wholly dependent on a deceased person lack maintainance whereas the probability of actual mistake is remote.

Where there is some certainty as to the existence of assets due to an estate, soon to be realized, the Public Trustee normally pays advances within a safe margin to heirs and dependants of the deceased. The collection and realization of assets being lengthy, the payment of advances is a usual part of administration. Not always does this practise meet with understanding on the part of the deceased's relatives. Here, delay is again attributable to formality because the Public Trustee is impotent in winding-up before all assets are ascertained and realized. In the estate of Oron referred to above, the father of the deceased wrote to the Public Trustee as follows:

> "speaking as father of the deceased, I am sorry that you still intend to give advances to meet the children's expenses. According to tribal laws, you should now hand over the cheque to the District Commissioner who will distribute the money according to the laws. We are against giving advances."

Here, the father was of course assuming that authority that would vest in him customarily will be recognised by the Public Trustee. He believes in his customary law of succession whose functioning is interrupted by the super imposed authority of a non-indigenous legal system. Whereas the deceased's father was against advances, the widow preferred the piecemeal payment because it meant getting a greater share eventually than she and her children would have got if the payment was made in bulk.

Conflicts between persons entitled to shares in estates is not unusual. This reflects a difference in outlook as between those who live according to customary law and those who hold views divorced from the customary. The occurence of these disputes embraces families within which two philosophies of life clash, where it is not clear that there is a law applicable to a given union and therefore also blurring succession norms and sometimes, even where there is cultural homogeneity. Most common, is the clash of interests between what the deceased's extended family considers its rights and those claims of the widow of her rights.[87] The problems experienced here follow closely from those of family law since it is necessary to determine whether or not a given union constitutes a marriage by any standard recognised by the law before the question of who is a widow and to what she is entitled if at all.[88] The existence of several types of marriage law at an individual's disposal complicates whatever dealings would follow on the decease of one of the parties since different beneficiaries may wish for administration by different laws. The clarity of the law of succession is therefore deceptive in so far as conflicts of laws and situations that are apparently subject to none of the four operating systems arise. It is in these areas that the courts have had to take a stand and have done so to the detriment of some

systems of succession and family law.

Though disputes between interested persons are common, the majority do not go beyond the Public Trustee's office for two reasons, the finality of the Public Trustee's decision in the smaller estates and the 'persuasion' of the parties to each a 'compromise' since it is suggested that where there is deadlock,[89] a weapon frequently used is the warning that failure to abide by the Public Trustee's arbitration means litigation (in the larger estates) which is lengthy and expensive.[90] Alteration of mode of distribution submitted to the Public Trustee is common, though validly questionable. In the estate of Ochieng[91] after assets had been realised and the District Commissioner had given what figures he thought fit, the Public Trustee replied that the given mode of distribution was (not fair' and adjusted the same as indicated below:

Name	Relationship	Age	D.C.'S %	P. Trustee's %
M.A. Orwa	wife	42	20	12
P. Ochieng	son	18	2	2
A. Orwa	wife	37	17	12
C. Odhiambo	son	17	8	4
G. Asoyo	son	17	9	5
I. Atieno	Daughter	16	5	4
F. Okeyo	son	14	5	6
R. Akinyi	Daughter	11	3	7
B. Omondi	son	9	5	9
M. Ochola	wife	31	12	12
A. Orwa	daughter	4	4	8
R. Ngala	son	3	7	10
E. Akoth	Daughter	1	3	9

Since the figures obtained from the commissioner are supposed to be those that came from the elders in the deceased's area who are familiar with customary law of succession that is applicable to Africans, it is difficult to see how the Public Trustee can again alter these. The decision as to what is fair cannot be absolute and these changes take little cognisance of the width of ground covered by customary laws relating to administration.

As shown above instances arise where legitimate rights are infringed on by the Public Trustee in dealing with deceased's estates. It is evident from applications that came several months or years after a person has died that such applicants were not at all aware of the existence of a public office for the administration of estates and have only come to learn of its existence as the result of the death of a relative. Further, the jealousy with which entitled persons might guard their rights is effectively lessened by the procedure and formality which are persevered with only as a means to realizing the deceased's dues but not because ordinary Kenyans understand and accept those norms.

CHAPTER IV

THE PUBLIC TRUSTEE - AN APPRAISAL

Within the present framework of succession laws, the importance of the Public Trustee Act cannot be over-emphasised since it is one of the few Acts that deal with personal law and operates across all the four broad categories of succession law. The Act takes over and provides for practical action by a public, government institution which offers several advantages in dealing with estates.

The Public Trustee, unlike any individual person who may apply for letters of administration or probate grant, is not required to enter into any security or bond.[92] This provision has the effect of directing to the Public Trustees office, much that would otherwise be handled by interested individuals or advocates. Being an office set up for the convenience of administration, the fees charged are modest and are not subject to rapid change. Another advantage the appointment of the Public Trustee as administrator is his perpectual succession in office[93] whose effect is to gurantee a continuity much more dependable than that of an individual person or other institution. An advantage that might not be at once obvious is the fact that in dealing with a government institution under the wing of the judiciary, persons or organisations owing money to the estate or in any way interested are wont to be cooperative since government machinery is at its disposal and can easily be called upon to ensure cooperation.

Judging from the steady increase in the number of causes handled by the Public Trustee each year, there can be no doubt that the Act and the institution it creates are assuming a heavier responsibility each year.[94] From a workload point of view, the power granted the Public Trustee enabling him to act in a judicial capacity is commendable as far as it has the effect of disposing of a large number of disputes which would worsen the already clogged courts and thereby result in extreme delay in the administration of estates.

The salutary aspects of the institution are not unattended by provisions that can be used to propagate undesirable trends. S. 3 of the Act provides for the appointment of 'some fit and proper person' by the Attorney-General to be the Public Trustee but provides no guidelines whatever as to the qualities and criteria to be used in the appointment of such officer. Though it may be of little or no significance, it is worthy of note that both the offices of Assistant and Public Trustee are held by non-Africans.

S. 4 which specifies the circumstances in which the Public Trustee may act, proceeds on the erroneous assumption that Kenyans are in the habit of reporting deaths to government officials. The court is empowered to grant letters of administration to the Public Trustee even though there might be persons better qualified. This provision can be used to bulldoze heirs and dependants into accepting administration by the Public Trustee.

The provision for the publication of a notice to interested parties, s. 6, cannot really be said to serve its purpose because few people have access to or know that there is a government 'Gazette' while only few people have access to newspapers and the "conspicuous place at the law courts Nairobi," where the court is concerned with the safety of assets, the issue of a notice might be dispensed with altogether. Shrewd interested parties can use this proviso, after convincing the court, to speed up administration at the expense of creditors who might have been roused by the notice. Revocation of a grant to the Public Trustee is possible under section 7 but is subject to there having been no unreasonable delay on the part of the alternative applicant.

While s. 8 seems to be a remnant of the original Ordinance in providing for the Public Trustee to take charge where property is left by an agent of a person not in Kenya, s. 11 provides for the conversion into money all movable property and in certain instances, immovable property provided all interested consent in writing, payment of debts in order of coming and the payment of residue to beneficiaries. The effects of provisions to ss 11 (4) are to enable the Public Trustee to transfer the residue to the 'unclaimed property account and to deal with the property of persons not domiciled in Kenya through their agents or a consular

office. In ss. 11 (5) the winding-up of an estate is anticipated with a provision for 'escheat' to government limited by the power given to the 'minister' to distribute such assets to kindred with a reasonable claim. This proviso recognises the remoteness of an African dying and having no next of kin.

Immovable property may be partitioned by order of court if such partition is considered beneficial to all parties and disputes are to be referred to an arbitrator.[95]

Part IV of the Act generally deals with regulations as to powers of expenditure of, and instances in which the Public Trustee shall be held liable and s. 29 empowers the minister to make rules defining duties, powers and liabilities, appointments, custody of funds and the making of provisions for the better functioning of the Act.

In the light of the foregoing the claim that the Public Trustee weilds wide powers is obviously true. The argument that will now be put forward is that these powers can and have been used to implement an underlying policy. Firstly, the body of the Act borrows heavily from the English Act and embodies values of English Law of administration of estates. Secondly, the personnel actually involved in the process of administration are government employees who will in practise be guided by the attitudes of their superiors

among whom should be policy makers following a given trend. Thirdly, the power as to dispute-solution by the Public Trustee is consciously being used to tamper with non-English systems of succession.

Though only a minority of disputes become the subject of litigation, the handful notable disputes that have been the subject of adjudication by Kenyan courts are telling in that they offer a leadership that adjudicators in smaller capacities, such as the Public Trustee office, have followed. Kenya being a country largelly populated by indigenous Africans, the most frequent clash seems to be between the penchant of the courts to apply English law to Africans and therefore diminish the rights as protected by the constitution. Lack of change of law has been buttressed by the continuity of thought by some judges of the post-independence era.

The remarkable short sightedness inherent in the case of Obiero v. Opiyo[96] makes it deserve first mention. In that case the plaintiff sued possession and a perpetual injunction to refrain the defendants from trespassing on the land that was in dispute. Since the plaintiff was the registered proprietor of that land, customary laws of succession were rejected outright as those rights arising under customary law were not listed among 'overriding interests.' This decision is worthy of note in three respects.[97] It applied the law with no reference at all to the social context in which that law

was to operate, it sought to entrench the idea quite unknown in African society that land could be individual property,[98] thus striking at the African's concept of ownership and inheritance, it used a popular weapon wielded by courts in resort to the formal letter of the law. The decisions of Kenyan courts when faced with disputes in succession law has been in the line of Obiero's case.

An abnormally tenuous distinction was made between the 'transmission of property' (which was taken to be a matter of general law) and the 'devolution of property' (which was held to be a matter of personal law) in Re Maangi.[99] By previous practise, the High Court did not grant letters of administration to Africans by virtue of s.9 of the Indian (Amendments) Act whose effect is to apply Indian Acts to Africans in cases expressly stated and no express provision existed for the administration of estates. The argument that s.9 of the above Act was 'discriminatory' within the meaning of s. 26(1) and (3) of the Kenya constitution in precluding Africans from the provisions of the Indian Probate and Administration Act 1881 was accepted because by virtue of its being procedural, the Probate and Administration Act dealt with the 'general law.' Underlying the niceties, the policy implications are obvious. The Kenya constitution was here used as a vehicle to help diminish the customary law of administration of estates while giving force to English laws of administration

The bold statement of Madan J. in Re Kibiego[100] that application to an African's estate the customary law rule that made an oldest son de jure administrator of his deceased father's estate "would be going back to a medieval conception... which is obviously unsuited to the progressive society of Kenya." In this case, the widow, the applicant applied inter alia, for the letters of administration to her husband's estate. Though the court had before it Cotrans Restatement which has been the subject of repeated judicial reliance, in this instance, "... today's Kenya" could only best be served, in the opinion of the honourable judge, by the grant of the letters to the widow and thereby the English ideas ousted customary law.

The foregoing High Court decisions represent the law and are surrounded by other authorities that show clearly the preference afforded 'written' or English law vis-a-vis customary law. Legislation to cover Africans as is evidenced by the decision of the court in Wambua v. Okumu which applied the Guardianship of Infants Act to Africans whereas the custody of children clearly falls within s. 2 of the Magistrate's Courts Act 1967 which provides for claims under customary law. The issue was the custody of a child and the court held inter alia that customary law was inconsistent with s. 17 of the Guardianship of Infants Act, which Act is not

intended to apply to Africans since the area it covers is catered for by customary law. The decision of the Court of Appeal for East Africa in the case of Yawe v. Public Trustee[101] is relevant in sofar as it provided an opportunity for the highest court of appeal in East Africa to answer questions on conflict of laws, domicile, whether the appellant was the deceased's wife, whether the children of the appellant were entitled to share in the estate, whether deceased's Ugandan relatives should share in the estate and finally, what share was to be paid any entitled person.

The Public Trustee applied to the High Court by way of a petition for directions on the above questions after he had received particulars of the deceased's Ugandan relatives from the Administrator General of Uganda since the deceased was a Mganda by birth but at the time of his death, was resident in Nairobi. Living with him was a woman who claimed to have been married to him according to Kikuyu customary law and there were four children, the result of this union. Not satisfied with the High Court's findings that inter alia, she was not the deceased's wife, she appealed to the East African Court of Appeal.

Apart from not addressing itself to the question of conflict of laws, the only notable finding of the court was that in allowing the appeal, the court resorted

to the common law presumption of marriage from long cohabitation which was afforded the compliment of universal applicability. Consideration of validity or otherwise of the marriage would have obviously resulted in the application of a 'hybrid' law (bearing the circumstances) if the marriage was held to be invalid. It is possible for the court to have reached the same decision without falling back on English law.

It is submitted that in view of the leadership provided by the courts, the Public Trustee Act, the office and the power established thereunder provides ample opportunity for the working of the law of succession of the Africans, Hindus and Moslems to be departed from and English law and concepts of succession to be filtered into the three systems. It is undeniable that Kenya is continuing to look to England for guidance as is evidenced by the attempt at unification of succession law embodied in the Law of Succession Act 1972.[102] This Act is based largelly on the recommendations of the Commission on the Law of succession whose task was to examine existing succession laws and so far as may be practicable provide a uniform code.

Without examining the new law in detail, and as to how it relates to Hindu and Islamic of succession a brief examination of the Law of Succession Act and the Commission's report as mirrored against customary law of succession suffices to expose the policy implications

and underlying principles.[103] The Commission among others, emerged with the opinion that customary succession laws were defective as they did not provide women with inheritance rights,[104] did not provide for allotment of specific shares[105] and did not deal fairly in distribution by way of 'houses' and not the 'member in each house.'[106] Two of its suggestions that are particularly relevant to this paper are that customary succession law was unable to deal with 'modern' property such as cars, bank deposits[107] and that the position that the administration of an estate normally fell on the deceased's son or brother who was no longer subject to traditional authority of elders.[108] In drawing its conclusions the Commission assumed that the extent of change was rapid and had such impact as to justify a new law relating to succession among Africans. The guiding principle was of course the urge to enhance the national unity.[109] The stress laid on economic development that necessitated amendment of laws to propagate that development shows the extreme concern with material prosperity without due regard to other aspects of human existence. The effect of the provisions of the Act have generally been to dismantle the customary laws of inheritance and to replace them with notions consonant with the theory and practice of English succession law as embodied in the 1865 Indian Succession Act. Variance in the specific provisions in the two Acts does not hide the parity in

principle.

In express reference to administration of estates, the Commission found this to be

> "probably the most serious defect in the customary law ... system" of succession

the Commission further stated that

> "in order to safeguard the rights of legitimate beneficiaries, a stricter control of all administration by the courts or Government officials was now essential."

Also contained in the report, was the reference to the Public Trustee Act and a conclusion that its provisions were working adequately and effectively.[110] This brief reference to the Public Trustee Act and the satisfaction with its provisions is very telling. Since the new law of Succession Act is founded on the English concept of Succession, if the Public Trustee Act can function satisfactorily side by side of the new Act, there is no escape from the logical conclusion that the values embodied in the Public Trustee Act are consonant with those of the Act which is yet to come into force and whose provisions will be to put a legal stamp for the application to the Kenya nation, a law that is essentially English.

The Public Trustee Act, like all other laws of Kenya is law by virtue of and is subject to the Kenya Constitution.[111] Kenya's moral philosophy is embodied in Chapter Five of the Constitution that entitles every

individual to 'fundamental rights and freedoms' whatever 'his race, tribe, place of origin... colour, creed or sex.' Despite its not being a theocratic state, the provisions of the constitution and the ideas embodied in "African Socialism And its Application to Planning in Kenya,"[111a] offer some guidance to the type of society, in theory, Kenyans are striving to build. The guarantee of equality is given effect by s. 78 which provides for freedom of conscience and the protection from discrimination is found in s. 82 (4) (b).

With the constitutional grant of equality in mind and the superiority of its provisions,[112] a law of succession that does not allow all Kenyans the freedom to choose their succession law is to the extent of that divergence from constitutional provision, void. The specific provisions of the Public Trustee Act taken at face value do not derogate from the Constitution but in its actual operation as shown in chapter 3 of this paper, much can be done under that Act that would amount to defying the constitutional provision for the equality of all systems of personal law.

The commitment to African socialism has been betrayed since Kenya is getting deeper grounded in the capitalist mode of production inherited from its colonial background. Stress is therefore on the sanctity of private property and individual ownership which is not a

guiding feature of African society.[113] The Public Trustee Act as it is, functions well in the free-enterprise climate that sanctifies individual ownership though many of those that come into contact with it do so from necessity rather than wilful understanding.

CONCLUSION:

From the discussion on the theory of inheritance, we can draw a conclusion that the Public Trustee Act falls in neatly with the West European theory that considers its primary aim the individual wish and the welfare of the individual family. The unsuitability of applying English law in the administration of estates is by virtue of its obvious inadequacy in dealing with the estates of Africans since the African theory of inheritance has always been and is founded on the concept of community life and the administration of estates has much more than material significance. The failure of the Public Trustee Act to cater for the non-material aspects of the administration of estates cannot be criticized since it would function perfectly in the correct social context, which context is what Kenya, constitutional rhetoric aside, striving for. Similarly, it is not possible to draft a law that will allow for the administration of estates by all the communities represented in Kenya without offending some.

Succession law is part of a community's personal law and therefore goes to the roots of any community because in life, property is factor in ensuring physical existence. But, the non-material aspect of life is also important in so far as human beings have values and it is these values that ought to be most jealously safeguarded by any law. The applicability of the Public Trustee Act should therefore be enforced with caution and due respect to every community's personal laws as provided for by the Constitution which is Kenya's supreme law.

In conclusion, if the legal system is to be respected and understood, it should reflect the values of the people it governs and be understood by them and all laws which the laws of succession and administration of estates are but a fraction should be geared to the service of all Kenyans regardless of class and should be a genuine attempt at peaceful co-existence.

FOOTNOTES - Introduction

1 G.K. Kuria - Laws of Marriage and Property in English Speaking Africa at pg. 77

2 For this emphasis on family, see Akumanyi v. Peprah (1956) WALR 112 at page 114.

3 Ollenu Testate and Intestate Succession in Ghana at p.

4 Amarfio v. Ayokor (1954) 14 WACA, 554, at page 566

5 J.N. Hazard, Communists and their Law, U.C.P. "Inheritance as an Anacronistic Stimulant."

6 Morton, Theory of Inheritance, 8 Harvard Law Review at page 161

7 The Inheritance (Family Privisons) Act 1938, Cap. 46

8 Morton, Theory of Inheritance, Supra.

9 Cap. 169, Laws of Kenya.

10 Cap. 168, Laws of Kenya.

11 This is clearly evidenced by changes being effected following amendments in Britain, for example, from the 1925 Legislative Council debates (Govt. Printer, Nairobi the then Attorney-General proposed the alteration of the name 'Administrator General' to 'Public Trustee' following similar change in England.

Chapter I

12 Ollenu - Testate and Intestate Succession in Ghana.

13 Field - "The Social Organization of the Ga people"

13a Paragraph 126: Report of the Commission on the Law of Succession, Kenya - Govt. Printer 1968.

14 1929 NAC (C & O)23, at p. 24

15 E. Contran: Restatement of African Law, Succession Kenya.

16 Supra: Contran rightly observes that an administrator-successor would hesitate to refuse to take up such responsibility for fear of supernatural consequences.

17 Kerr: Native Law of Succession in South Africa at p. 5.

18

19 Shepstone, from Kerr, Footnote 6 above, at page 68.

20 Ref. Sikwikwikwi v. Ntakkumba (1948)1 NAC (S) 23.

21 For an illuminating discussion on the communal nature of ownership in Africa, see generally J.K. Nyerere: Essays on Socialism, O.U.P. 1964.

22 See Cotran's 'Restatement', (4) above, Ollenu (1) above and Kerr (6) above.

23 See Gluckman: Politics, Law and Rituals in Tribal Society: Basil Blackwell, Oxford, 1965 - at p. 45, in reference to property, "ownership cannot be absolute" - compare the European stance of right of use and abuse of property one owns.

24 Morton: The Theory of Inheritance:8, Harvard Law Review at p. 161.

25 From Morton: supra

26 Hazard: Inheritance as an Anachronistic Stimulant.

27 Parry - The Law of Succession.

28 Morton, (13) supra

29 B.T. Blagojevic, 'The Yugoslav Law of Inheritance.

30 AE Soon-Tay- 'The Law of Inheritance in the New Russian Civil Code of 1964.

31 J. Hazard: (15) supra.

32 J. Hazard: supra

33 J. Hazard: supra

34 B.T. Blagojevic, in (18) above refers to classes of heirs and of the idea of 'forced heirship.'

35 Article 5, paragraph D (6).

Chapter II

36 Promulgated under the 1890 Foreign Jurisdiction Act.

37 Article 1, Native Courts Regulations 1897.

38 Amendments took place in 1938 & 1952

39 No. 17 of 1909

40 See s. 4, Administrator General's Ordinance

41 No. 22 of 1898.

42 No. 43 of 1946.

43 See s. 3(1) of the Hindu Marriage, Divorce and Succession Ordinance.

44 S. 9(1) of the Hindu Marriage and Divorce Ordinance

45 No. 55 of 1897.
(a) See Anderson on Islamic Law in EA (Frank and Cass 1970) The uncertainty was caused by the disapplication of s. 331 of the ISA.

46 Article 3, Native Courts Regulations 1897

46a Article 55, Native Courts Regulations 1897.

47 1920, Muhammedan Marriage, Divorce and Succession Ordinance, Pub. Frank and Cass. For a comprehensive discussion of Islamic law, see Anderson, Islamic Law in E. Africa.

48 Determination of Christianity was a matter for confirmation by European Missionaries or administrative officials.

49 No. 9 of 1904.

50 S. 9, 1904 Native Christian Marriage Ordinance.

51 Now the African Wills Act, Cap. 169, Laws of Kenya Pub. Govt. Printer 1945. See Recommendations in the Report on Native Tribunals, Arthur Phillips, para. 933.

52 No. 11 of 1899.

53 As in Ali Ganyuma v. Ali Mohammed 11 KL.R. 30 the dispute was rooted in the conflict of Islamic Law with customary law.

54 Amrolia, Probate and Administration in Kenya, Appendix.

55 Article 20, East Africa Order-in-Council 1902.

56 1925 Legislative Council Debates, Vol. II, p. 138.

57 Holdsworth, The History of English Law Vol. II at p. 96.

58 Holdsworth, The History of English Law, Vol. II.

59 The English Law of Contract is cited as an example.

60 Holdsworth, The History of English Law Vol. II at p. 93.

61 Maine, Ancient Law, at p. 179.

62 Maine, Ancient Law

63 L.J. Woodburn, Interview 5/4/78.

64 E. Cotran, in Restatement of African Law II, Succession, Kenya suggests that there are spiritual matters involved.

Chapter III

65 S. 27(1), Public Trustee Act, Cap. 168 Laws of Kenya.

66 S. 3. The Public Trustee can also act of his own notion sometimes, s. 4.

67 Section 2A and 4 (3) qualify certain estates only.

68 S.22

69 1973 Annual Report of the Registrar-General, Appendix 20, p. 47.

70 1973 Annual Report of the Registrar-General, Appendix 20

71 S. 4(3).

72 Rules to the Act, Cap 168

73 S. 6

74 S. 11 (2).

75 Proviso (ii), s. 4(4).

76 Proviso (i) s. 4 (4).

77 Proviso

78 Rules to the Public Trustee Act, Cap 168

79 S. 13.

80 Accounts can be re-opened if further assets come to light.

81 Rules to the Act,

82 M.C. Mahiri, Interview, 6/4/78

83 "Report of Death "Forms, where cause of death has to be stated.

84 L.J. Woodburn, Asst. Public Trustee, interview 5/4/78.

85 Public Trustees Cause No. 52 of 1966.

86 Public Trustees Cause No. 63 of 1977.

87 Yawe v. Public Trustee Civil Appeal No.13 of 1976, EACA discussed in Ch. 4.

88 Yawe v. Public Trustee

89 L.J. Woodburn, Interview 5/4/78.

90 L.J. Woodburn, Interview 5/4/78

91 Public Trustees Cause No. 41 of 1966

Chapter IV

92 S. 23 of the Public Trustee Act.

93 S. 27 (1).

94 See Appendix, Annual Report of the Registrar-General at p. 47, Govt. Printer 1976.

95 s. 11 (1).

96 1972 EA 227.

97 The Reasoning of the court shows the uncompromising tenacity to the letter of the written law.

98 M. Gluckman, Politics, Law and Rituals in Tribal Society - Basil Blackwell - Oxford 1965.

99 (1968), EA 637.

100 1972 EA 179.

101 Civil Appeal No. 13 of 1976.

101a Other related decisions here include In Re Ruengi and In Re Gachamu.

102 No. 14 of 1972.

103 A useful discussion of the Act can be found in G.K. Kuria's "comments on the Report of the Commission on the law of Succession."

104 Paragraph 52 of the Report

105 Para. 53.

106 Para. 54

107 Para. 56

108 Para. 57

109 See the Commission's Terms of Reference and comments of the Attorney-General in moving the Bill.

110 See Report of the Commission on the Law of Succession, Govt Printer, 1968

111 No. 5 of 1969.

111a Sessional Paper No. 10 of 1965.

112 S.3 of the Kenya Constitution

113 See Mbiti's discussion of the traditional of Africans, in African Religions and Philosophies, Heinman 1969 at p. 16.

ABBREVIATIONS

EACA	-	East Africa Court of Appeal
EALR or (EA)	-	East Africa Law Reports
H.L.R.	-	Havard Law Review
K.L.R.	-	Kenya Law Reports
O.U.P.	-	Oxford University Press
W.A.C.A.	-	West African Court of Appeal
W.A.L.R.	-	West African Law Reports

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