

**Governing Land Use in Kenya: From Sectoral
Fragmentation to Sustainable Integration of Law and
Policy**

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ABSTRACT

The search for development that is sustainable often results in the complex challenge of having to reconcile the need for socio-economic activities with protection of the environment. This challenge of integrating such fundamentally important considerations that often contrast, but should be mutually supportive, is necessarily addressed by legal and policy frameworks of the country in question. These could be laws and policies with competence to manage the environment, or to manage socio-economic and political activities that impact the environment. This challenge is profound for developing countries like Kenya that experience higher levels of degradation, poverty and food insecurity. Arguably in this context, while addressing integration involves reconciliation of legal principles for a coherent legal concept of sustainability, it is also a serious matter of survival for millions of people. This raises compelling reasons to ensure that any legal reform measures positively impact how these people make decisions on the socio-economic utilization of land or forestry resources that they have access to. The research aimed to develop a legal and policy framework that will facilitate integration of environmental protection with socio-economic activities during land use decision making, as a mechanism to achieve sustainability. We investigated how a legal/policy framework, founded in the 2010 Constitution, and in environmental and tenure rights laws of Kenya, can conceptually reconcile the right (and duty) respecting a clean environment, with socio-economic rights. The research further analysed how such conceptual reconciliation can impact integration in policies, plans and decision making by sectoral laws and institutions to ensure environmental consideration across sectoral areas. To this end, we have proposed enacting a legal duty requiring tenure rightholders to integrate their socio-economic activities with environmental protection during land use decision making. We further frame mechanisms to guide the attitudes, and decisions of farmers and forest communities in making that transition to sustainable practices.

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DEDICATION

*To my dearest Wife, Purity, and lovely Daughter, Rehema.
Countless thanks for the indefatigable love and support*

**INTRODUCTION:
THE CHALLENGE OF INTEGRATION AND APPLICATION OF LAW AND POLICY TO
ACHIEVE SUSTAINABILITY**

1 INTRODUCTION

The search for development that is sustainable often results in the complex challenge of having to reconcile the need for socio-economic development with protection of the environment. This challenge of integrating two fundamentally important considerations that often contrast is necessarily addressed by legal and policy frameworks of the country in question. These could be laws and policies with competence to manage the environment, or to manage socio-economic and political activities that impact the environment. It is a challenge that is more profound for developing countries because many of these, like Kenya, have been experiencing higher levels of degradation, poverty and food insecurity. Therefore while addressing integration involves reconciliation of legal principles for a coherent legal concept of sustainability, it is also a serious matter of survival for millions of people.

Against this background, there are compelling reasons to ensure that any legal reform measures positively impact how these people make decisions on the socio-economic utilization of land or forestry resources that they have access to. Achieving sustainability must become the overall and unequivocal objective of land use, and can be accomplished by enacting a legal responsibility to integrate environmental protection and socio-economic needs in decision making. The law must also frame and support (non-legal) mechanism(s) to guide the attitudes of farmers and forest communities in making that transition to sustainable practices.

2 STATEMENT OF THE RESEARCH PROBLEM

The purpose of this research is to develop a legal and policy framework that will facilitate integration of environmental protection with socio-economic activities during land use decision making, as a mechanism to achieve sustainability. We investigate how a legal/policy framework, founded in the constitution, and in environmental and tenure rights laws of Kenya, can conceptually reconcile the right (and duty) respecting a clean environment, with socio-economic rights. The research analyses how such conceptual reconciliation can impact integration in policies, plans and decision making by sectoral laws and institutions. Significantly, and in light of the high prevalence of rural poverty connected to land and forest degradation, failing agricultural productivity, and resulting food insecurity,¹ we examine how integration in land use decision making can influence the attitudes of millions of small scale farmers and forest communities in Kenya to adopt sustainable land use practices. The research therefore explores a potential legal responsibility on tenure rights holders or assignees to integrate environmental protection with their (productive) socio-economic activities in making regular land use decisions. To facilitate a comprehensive approach in investigating this problem, the research proposes to answer the following questions:

- i). To what extent are the legal frameworks for agriculture and forestry fragmented and lacking criteria or mechanisms to integrate the objectives of sustainability?
- ii). What legal and policy measures are necessary to entrench the integration of environmental protection and socio-economic goals as the basis for agriculture and forestry land use decision making in Kenya?

¹ See notes 7 & 8, *infra*.

3 ELABORATING ON MAIN ARGUMENTS OF THE RESEARCH

The challenge of attaining development that is sustainable has been most profound for developing countries such as Kenya. We frame this challenge as featuring a three-part dilemma over how (a) to maintain environmental integrity; (b) while reasonably meeting socio-economic needs including food security and poverty mitigation; and (c) reasonably facilitating business and industry necessary for economic progress and prosperity. It is a major challenge for environmental law and policy. The scope of this study is however restricted to (a) and (b).

The environmental law concept of sustainable development urges that development should meet the needs of the present without compromising the ability of future generations to meet their own needs.² In this research, we are therefore focused on the twin issues of how to meet unfulfilled socio-economic needs, while safeguarding environmental quality of resources in order for development to be normatively sustainable. As we argue in chapter 2,³ the Rio Declaration⁴ in stating that ‘human beings are at the centre of concerns for sustainable development,’ explicitly sets out the anthropocentric leanings of sustainability. The problem with this approach emerges succinctly through principle 3 which states that the ‘right to development’ must be fulfilled so as to meet development and ‘environmental needs.’ In this sense, we argue that development is categorized as a right while the legal status of environmental protection or needs is unclear. Against this background, the provisions of

² Report of the World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43.

³ See the discussion in Chapter 2, section 2-3.

⁴ —‘Rio Declaration on Environment and Development’ in *Report of the United Nations Conference on Environment and Development* (UNGA OR, A/CONF.151/26 (Vol. I), 12 August 1992).

principle 4 that ‘environmental protection shall constitute an integral part of the development process’ raises fundamental concerns whether environmental protection is merely a ‘small portion’ in the ‘larger portion’ that is development. With the legal status of environmental protection unclear, and with development being classified as a legal right, it is quite likely for the balance of interests to favour fulfilling urgently needed (albeit short-term) socio-economic needs, at the expense of the equally needed environmental quality of resources.

Available literature, analysed at length in the subsequent chapters, is indicative of the magnitude of this challenge, reporting that a majority of the Kenyan population inhabits rural areas, and 80% of this population depends on agriculture or some form of forestry activities for their livelihoods.⁵ Poverty is concentrated in the agricultural sector particularly,⁶ validating arguments that socio-economic dependence on agricultural activities significantly raises the probability of people being poor. Other literature reports a significant decline in soil fertility, increasing land degradation, and ineffective agriculture extension services, leaving farmers with limited or no source of new skills, knowledge or technology on how to overcome the challenges.⁷ Kenya also experiences a high level of forest degradation, and deforestation, with a very low national tree cover of 1.7% of the total land

⁵ Mwangi Kimenyi, ‘Agriculture, Economic Growth and Poverty Reduction’ Kenya Institute for Public Policy Research and Analysis (KIPPRA) Occasional Paper No. 3, June 2002 at 6. See further analysis in Chapter 2, section 4. See further analysis of the literature in Chapter 3.

⁶ Alemayehu Geda, Niek de Jong, Germano Mwangi & Mwangi Kimenyi, ‘Determinants of Poverty in Kenya: Household-Level Analysis’ KIPPRA Discussion Paper No. 9, 2001 at 25.

⁷ Republic of Kenya, *Strategy for Revitalizing Agriculture: 2004 – 2014* (Nairobi: Ministry of Agriculture, 2004) at 15-17. See further analysis of this strategy in Chapter 3, section 6.2.

area.⁸ Recent reports suggest that, on average, 3-4 million people inhabit agricultural lands located within a 5 kilometre radius of protected state forests in Kenya and they, legally or illegally, utilize the forests for a variety of socio-economic needs.⁹ There is also a history of community exclusion from protected state forests. Notably, a previous attempt to permit engagement of local people in forestry activities through the agroforestry based *shamba*¹⁰ system resulted in more destruction of forests due to limited concern for sustainability.

The foregoing factual information points to two critical concerns: (1) that current environmental, land tenure and land use law and policy frameworks have failed to attain a balance between safeguarding the environmental quality, and socio-economic utilization of land and forest resources; and as a consequence (2) there is still an urgent need to meet the unfulfilled socio-economic needs (poverty) for the millions of Kenyan people who rely on degraded land or forests for socio-economic activities necessary for subsistence. These concerns point to a conceptual challenge regarding the inability of the existing legal and policy mechanisms to balance the often (but not inherently) antagonistic objectives of environmental protection and the advancement of socio-economic interests.

This continuous antagonism, in fact and law, between concerns over environmental quality and the alleviation of poverty, raises the question of how the right to development should be reconciled with the need for a clean and healthy environment. It is a concern that is

⁸ Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forests Complex* (Nairobi: Office of the Prime Minister, 2009) at 15. See further analysis and discussion in Chapter 4.

⁹ *Ibid.*

¹⁰ The term '*shamba*' means garden in the Swahili language. For an extensive discussion of the *shamba* system, see Chapter 4, section 5.

normatively affiliated to the idea of integration of environmental protection and socio-economic activities, as considerations during decision making. We argue that integration, in this context, is presented in two aspects - ¹¹

(1) The first aspect is conceptual integration, which regards legal reconciliation of the right to development with environmental protection as being essential to attain and safeguard sustainability. Environmental protection is increasingly acquiring the status of a fundamental right, similar to that enjoyed by socio-economic rights. This implies an obligation to fulfil both rights together. Further, since a right is always contingent on a duty, when people appreciate their right to a healthy environment, they also may be guided to acknowledge or observe the duty to protect the environment. As a rule of law, this approach is therefore important in framing rules to guide citizens, such as small-scale farmers, who have to make regular land use decisions.

(2) The second aspect is integration that is intended to guide decision making within legal institutions that execute legislative or policy authority over matters affecting the environment,¹² for instance sectoral activities like agriculture or forestry land use. According to Lafferty and Hovden, there will be horizontal integration, with an overall constitutional or statutory framework establishing the primary environmental management norms.¹³ Vertical integration subsequently occurs when sectoral laws, institutional policies, plans and decisions are reconciled with the environmental protection norms set up by the

¹¹ See the discussion in Chapter 2, section 3.

¹² *Ibid.*

¹³ See, *in particular*, the discussion in Chapter 2, section 3, which analyses and adopts the classification of ‘horizontal’ and ‘vertical’ integration by William Lafferty & Eivind Hovden –Environmental policy integration: towards an analytical framework (2003) 12(3) Environmental Politics, 1-22.

overarching legal framework. This is important because sectoral institutions execute mandates either to manage the environment, or to manage socio-economic activities that affect or impact the environment. Integration at this level therefore relates to practical coordination of institutional policies, plans and decisions at a more operational level.

Therefore, a holistic evaluation of sustainability should begin with reviewing the role of law in setting up a coherent concept of integration,¹⁴ and then facilitating its application –

- i). within sectoral laws and policies for implementation through sectoral institutional planning and decision processes, and
- ii). in guiding the behaviours and attitudes of the millions of citizens who have to make land use decisions regularly as they pursue urgent socio-economic needs.

We have analysed legal provisions, judicial attitudes and academic writings from comparable jurisdictions such as Uganda, Kenya, Nigeria and South Africa. An identifiable trend is the emergence of an implicit (through judicial decisions) or explicit statutory/constitutional environmental right and duty, as jurisdictions undertake reconciliation of legal principles to attain a coherent concept of integration. It is against this conceptual background that we set out to establish the role or contribution of environmental, land use law and policy to the (1) significant degradation of agriculture and forest land; (2) and continuum of unfulfilled socio-economic and cultural needs (poverty) of substantial rural populations that depend on these natural resources for basic livelihood in Kenya. The research advances further arguments as set out below.

¹⁴ The coherence of the principle of integration, for instance at international law, has been evaluated as a legal norm that creates a responsibility on states to ensure that social and economic development decisions do not disregard environmental considerations, and not undertake environmental protection without taking into account the relevant social and economic implications. See the analysis in, Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, & Prospects* (New York: Oxford University Press, 2004) at 103-104.

3.1 CONSTITUTIONAL AND STATUTORY ENVIRONMENTAL RULES LAY NORMATIVE BASIS FOR INTEGRATION

The 1999 framework *Environmental Management and Coordination Act (EMCA)*¹⁵ established the legal norms for environmental management in Kenya.¹⁶ This was notably through introduction of a statutory environmental right, which includes a duty ‘to safeguard and enhance’ the environment.¹⁷ We argue that the *EMCA*, as the norm setting environment statute, is silent regarding mechanisms of how this duty should be given effect as a legal responsibility binding everyone in Kenya whose activities affect the environment, including those individuals involved in regular land use decision making. Consequently, high levels of land degradation, and deforestation have continued in the decade since *EMCA* came into force.

It is notable that the legal position has changed significantly with enactment of a new constitution in August 2010.¹⁸ It reinforced the statutory environmental right, with enactment as a fundamental right.¹⁹ We suggest this has two effects: First by including an environmental right alongside socio-economic (including property) rights in the Bill of Rights, the constitution attained conceptual integration of legal principles. Secondly, this constitution requires implementation of the environmental right through ‘legislative and other measures’ that are set out in article 69. These include a duty on every person to

¹⁵ Act No. 8 of 1999.

¹⁶ The preamble to the *EMCA* says it is an Act of Parliament ‘to provide for the establishment of an appropriate legal and institutional framework for the management of the environment...’

¹⁷ *EMCA*, Kenya section 3(1).

¹⁸ *Constitution of the Republic of Kenya, Revised Edition 2010* [Constitution of Kenya, 2010]. It came into force on 27 August 2010.

¹⁹ *Ibid*, article 43.

cooperate with other people, and with the Kenyan state, to conserve the environment, and ensure ecologically sustainable development. Therefore, in addition to seeking to promote conceptual integration, the new basic law also established a constitutional environmental duty, whose envisaged outcome is realization of ecologically sustainable development. In providing for an environmental right and duty, the constitution has therefore established a framework for horizontal integration. If *EMCA* and sectoral land tenure and land use laws give effect to this constitutional environmental duty, they will achieve vertical integration. Further, our analysis of literature and comparative statutory provisions has revealed that integration of environmental and socio-economic considerations in decision making is core to realization of ecologically sustainable development.²⁰

3.2 A SYSTEM OF ETHICS IS NECESSARY TO ADJUST HUMAN CONDUCT TOWARD INTEGRATED DECISION MAKING

We argue that there is need to move beyond the constitutional and environmental right and duty in order to find legal and policy mechanisms to incorporate integration into sectoral laws or institutions. Similarly, it is necessary to examine the legal tools that grant land owners or occupiers the authority to undertake land use decision making. We argue that implementing constitutional legal rules that aim to ensure ecologically sustainable development involves influencing the practical behaviour of those people that have to make decisions regularly. This is a process associated with implementing the values and principles of ecologically sustainable development, such as the concept of integration. We further suggest that these values and principles, in light of the need to influence the personal or

²⁰ See discussion and analysis in Chapter 2, section 6.

collective behaviour and attitudes of people toward integrating environment protection with socio-economic activities in decision making, relate more closely to a set of ethics or values than to any single legal rule.

After reviewing contrasting anthropocentric and non-anthropocentric ethics, we identify the Land Ethic, proposed by American Forester Aldo Leopold,²¹ as conceptually and normatively linked to the constitutional environmental duty. Notably, the land ethic proposes that people should exercise an ecological conscience, which is an individual responsibility to safeguard the environmental quality of land, even while utilizing land as a resource. Therefore the land ethic not only seeks to protect ecological wellbeing but also envisages human socio-economic activities on land. The land ethic in this case points toward a possible reconciliation where ethical values may combine with legal responsibility to result in a balance between the socio-economic objective of property rights in land and the environmental right, including the duty to protect the environment. This land ethic, we argue, therefore stands to provide the ethical foundation necessary to introduce key sustainability values necessary to implement any legal duty on individuals to undertake integration.

²¹ See discussion and analysis in Chapter 2, section 7.2.3. See also Aldo Leopold, *A Sand County Almanac with Other Essays on Conservation from Round River* (New York: Oxford University Press, 1981) and reprinted in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 215-224.

3.3 EXERCISE OF PROPERTY (SOCIO-ECONOMIC) RIGHTS HAS A POTENTIAL ROLE AS LEGAL ANCHOR FOR ENVIRONMENTAL RESPONSIBILITY

Property rights represent, in a concrete manner, the fundamental legal basis by which significant numbers of people are entitled to make land use decisions. They can either be land tenure or forest tenure rights.

Land tenure confers a broad quantum of rights on a land owner or occupier, which includes the control and user rights to make crucial decisions on activities that may be undertaken on land. We argue, upon analysis, that tenure rights in land under Kenyan law confer broad and relatively secure authority to make decisions over socio-economic utilization of land, but lack a contingent duty to incorporate environmental protection as a major consideration of the decision making.²² There is therefore absence of a responsibility akin to Aldo Leopold's ecological conscience. In the absence of such responsibility on tenure rights, it is the regulatory authority of the state that is applied ostensibly to offer guidance to farmers on sustainable land use practices, and to determine land use standards. The *Agriculture Act*,²³ applicable in Kenya for agriculture land use, sets one of its objectives as the preservation of soil fertility, a goal that is fundamental to sustainability. Upon reviewing available literature and the provisions of the *Agriculture Act*, we contend that this law fails to set out any pre-stated minimum sustainability responsibilities for land owners or occupiers to implement as a guide towards integrated decision making.²⁴ Instead, the system confers significant discretionary authority on public officers, to prescribe 'orders' to farmers, ostensibly after

²² See discussion in Chapter 3, Part I.

²³ *Agriculture Act*, Cap 318, Laws of Kenya.

²⁴ See discussion in Chapter 3, Part II.

environmental harm has occurred, thereby vitiating the utility of sustainability as a preventive or anticipatory principle. With the existing high levels of land degradation, poor soil fertility, and resulting food insecurity, any arguments suggesting that this legal framework has been effective must therefore collapse.

Forests tenure represents the breadth of control and user rights that entitle a person or entity to make decisions over the utilization and conservation of a forest.²⁵ Kenyan law categorizes forests as private, local authority and state forests. We primarily focus on private and state forests. The 2005 *Forest Act* recognizes sustainable forest management as its overarching objective. This implies that, *prima facie*, there is vertical integration with the *EMCA* duty to ‘safeguard and enhance’ the environment. A review of management plans that are intended to guide socio-economic and conservation decision making however reveals that the sustainability objectives of these plans are unclear and equivocal. This is a cause for concern because while the *Forest Act* provides for community participation in management of state forests, a historical analysis suggests that ambiguous sustainability responsibilities for communities will undermine forest conservation.

The management of state forests in Kenya has traditionally involved exclusion of communities that have ancestral claims to the forest land, as well as forest-adjacent communities. There was a previous attempt to permit individuals to participate in managing state forests by allocating people a garden (*shamba*), and requiring them to tend to tree seedlings while growing foods, in a system referred to as the *shamba* system. The system

²⁵ See discussion and analysis in Chapter 4.

caused significant forest degradation because the sustainability objectives were unclear and weak. In the current circumstances, there is evidence of nearly 4 million people inhabiting agricultural lands adjacent to forests. With population growth, and increased stress on farmland, it is possible that human pressure on forests will increase. It is therefore justifiable to engage forest-adjacent communities in a constructive exercise that will build their values and capacity in sustainable forest management. We argue that this legal and policy effort will require setting out an unequivocal legal and ethical responsibility for local communities to conserve forests, as they undertake their socio-economic and cultural activities.

We contend that legal obligations to undertake integrated decision making, without more, are insufficient. There is need for mechanisms to offer guidance to farmers by influencing behaviour towards integrated land use decisions. Agricultural and forestry extension, as a system of education and communication, is conceptually suited to offer practical guidance on values and knowledge that may change the behaviours of land owners by providing knowledge on sustainable land use choices. Our analysis however finds that agriculture and forestry extension have played a useful but minimal role in changing the attitudes of farmers, because of conceptual and operational limitations. Notably, agriculture extension service is focused on enhancing production, and is only offered in restricted areas, or on demand. Even though forest extension is anchored in statute,²⁶ we suggest there is need for law and policy to frame forest extension as a primary or default tool available to facilitate implementation of sustainable forest management.

²⁶ See discussion and analysis in Chapter 4, section 7.

3.4 MOVING FROM A CONSTITUTIONAL PRINCIPLE TO A STATUTORY AND ETHICAL DUTY FOR INTEGRATED DECISION MAKING

After establishing the absence of a legal responsibility to integrate environmental considerations in land use decision making, we argue it is imperative to design a legal and policy framework to implement and give effect to the new constitutional environmental duty. We anticipate this step will have two effects. First, the currently ambiguous environmental duty set out by *EMCA* will be redefined and set out in clear and unequivocal legal terms, such that citizens can be aware of their general environmental responsibility. Secondly, enactment of provisions to provide for a duty will vertically integrate sectoral land use laws with the Constitution and *EMCA*. We therefore, in chapter 5, argue in favour of a general statutory duty of care to protect the environment. We further contend that a specific duty on land owners would be useful to set out the responsibility to prevent foreseeable land degradation that may adversely affect the sustainability of the duty holder's land, or the land of another land owner. It is necessary that the statutory duty of care is abundantly clear in terms of identifying the duty holder; to whom the duty is owed; and the circumstances under which the duty is applicable.

Similarly, it is imperative for the standard of care, defining the expected conduct of land owners, to be pre-stated and affirmative in order for land owners to be clear on what legal stewardship responsibilities are expected of them. We argue that it is necessary for land owners or forest communities to participate in development of the standard of care, to ensure the responsibilities truly represent local knowledge, values, culture and any scientific

knowledge that may be available to facilitate stewardship activities.²⁷ We acknowledge the limitations of laws alone, in circumstances where the challenges of poverty significantly influence land use decisions. For this reason, the research recommends combining the land ethic with extension service to promote sustainability extension. This legal/policy tool would assist implementation of the statutory environmental duty of care to bring about behavioural change in individual decision making in agriculture and forestry.

4 THIS DISSERTATION AS A CONTRIBUTION TO KNOWLEDGE

Land tenure and land use law and policy in Kenya have hitherto not been equipped with legal tools to facilitate the balancing of interests necessary to realize development that is sustainable. For this reason, the idea of integration where a legal duty of care requires a holder of tenure rights to exercise a responsibility of stewardship presents an opportunity to advance the urgently required goals of sustainable land use. Integration, through the statutory duty of care, is envisaged to achieve several objectives: (1) While the provisions of the 2010 Constitution offer a framework of horizontal integration through the environmental right, duty, and goal of ecologically sustainable development, revision of the *EMCA* level environmental duty completes this integration in a legally coherent manner. (2) The further enactment of the statutory duty of care through sectoral land tenure and land use legislation facilitates their (sectoral laws) vertical integration with the Constitution and *EMCA*. (3) The statutory duty of care, in furtherance of the constitutional environmental duty, offers a legal mechanism to guide small scale farmers/forest communities in Kenya to change their attitudes and behaviour and adapt to sustainable land use practices. Therefore, in terms of the

²⁷ See the legal proposal in section 4.4.3.2.

legal and policy mechanisms to define sustainability as the unequivocal objective of the constitutional environmental right and duty, and the environmental and land use laws/policies in Kenya, the proposal of a statutory duty to safeguard land sustainability is the beginning point to fill the legal and policy lacunae. This is our contribution to knowledge.

5 METHODOLOGY

5.1 LITERATURE REVIEW

In this thesis, we have undertaken extensive review of literature to develop the conceptual and thematic arguments in response to the research questions. The scope of information that is reviewed includes primary literature such as treaties, constitutions, statutes, and policies. We have also analysed secondary literature, including academic writings such as books, book chapters and journal articles. The literature review is carried out at chapter or section level because the research involves analysis of very specific fields of law and policy, and it was effective to interrogate the primary and secondary literature when writing the various sections of each chapter.

Our methodology further involved analysis of statutes and/or policies from selected legal jurisdictions which face comparable challenges of sustainability, or which have enacted legal mechanisms seeking to address issues of integrated decision making that this research has been investigating. We have also undertaken commentary on judicial decisions from several of these other jurisdictions. We applied this comparative approach as an avenue to identify existing models and best practices, since the concept of ecologically sustainable development, and the constitutional environmental duty are new to Kenya. The

comprehensive bibliography set out at the end of this research is illustrative of the scope of primary and secondary literature analysed or referred to in this thesis.

5.2 FIELD RESEARCH AND CASE STUDIES

In addition to the assessment of relevant literature, including the comparative experience of selected African jurisdictions, the analysis presented in this research is supported by several case studies developed on the basis of field research in Kenya. The field research collectively comprises field trips, visits and discussions that I had with a number of public officials, or community members, as well as visual observations made during those interactions. This is the background. In May 2009, I departed Ottawa for Nairobi Kenya to spend 5-6 months carrying out three important tasks. First, I was to search for and review literature from government of Kenya sources, namely, policy documents, policy papers, and other specialized documentation pertinent to my research questions. This task was very successful, and I have had the opportunity to analyse government policies and other literature, including recent ones released from 2008 to date. Second, I spent the period working from offices at the School of Law, University of Nairobi, and had a chance to hold discussions with Kenyan specialists in land use, environmental law, and other fields connected with my research. Third, I had the opportunity to schedule appointments and hold interviews with some public officers implementing agriculture and forest policy. During these sessions I would pose open-ended questions in order to allow the officials to add any information they considered pertinent to my inquiry. I also had the privilege to travel and accompany these public officers on field trips, especially as they offered extension services to farmers. This enabled me to observe them at work, and listen to the questions being asked

by farmers. I remain grateful to the International Development Research Centre (IDRC) for the doctoral research fellowship award that facilitated this stage of my thesis inquiry.

In order to proceed to the field research visit in Kenya, my proposal underwent research ethics evaluation by the Social Sciences Research Ethics Board (REB), University of Ottawa. We developed an open-ended questionnaire, as the research tool to guide our inquiry regarding agriculture and forestry land use respectively. The questionnaires, as the research protocol, were refined over a period of time under review of the REB. The Certificate of Ethical Approval dated 5 February 2009 indicated that the terms of the research protocol that was approved by the REB could not be modified or varied. Notably, the research ethics protocol explicitly required that the identities (including names and any official positions) of all my respondents be kept anonymous. The identity of respondents can only be discussed with my doctoral supervisor, Prof Jamie Benidickson. It is for this reason that footnote citations of interview respondents only refer to their general field of specialization, and the period of interview.

In developing the case studies and illustrations this research was guided by information from interviews and visual observations. It is a thesis that is nonetheless structured as a legal research project, meaning that the field research was not an empirical survey, and did not have any quantitative approaches. The information arising from the field research provided qualitative value and is only applied to support or disprove the applicability or failure of legal provisions or policies. I have made efforts to clarify that the interview responses cited in the research or the field visit observations were only undertaken in selected parts of Kenya

and statistically do not represent the entire country. However, to the extent that Kenya applies environmental and land use laws and policies nationally, the findings are extrapolated to critically review the applicability and effectiveness of those laws, or to support proposals for legal reform.

6 SUMMARY OF THE FOLLOWING CHAPTERS

Chapter 2 sets out the analytical framework for the research, which reviews the challenge of balancing environmental and socio-economic interests in developing countries such as Kenya. The chapter analyses the legal concept of integration, and its potential contribution to realization of sustainability. We analyse various approaches to integration, and review comparative statutory provisions regarding integration of legal principles, and sectoral land use functions. The discussion argues that implementing a constitutional or statutory environmental duty towards ecologically sustainable development requires a system of values or ethics that will guide the attitudes of people to adopt sustainable practices. We explore various theories of ethics, contrasting between anthropocentrism and non-anthropocentrism, and conclude that the land ethic is more consistent with the idea of a legal responsibility to exercise land stewardship.

Chapter 3 reviews the impact of land tenure, and land use law and policy on sustainable agricultural land use. We argue that property rights in land represent the decision making authority over individual land use choices. The chapter reviews whether there is vertical integration of the *EMCA* environmental duty with land tenure, and agriculture land use law. The chapter also reviews the role of agriculture extension, as a system of transmitting skills and values on sustainable land use practices.

Chapter 4 analyses the impact of community forestry on sustainable management of forests. We argue that the sustainability objective of community forestry should be unequivocal and clear. We examine whether management plans for state forests and community forest management units explicitly set out the responsibility to integrate conservation and socio-economic activities of forest communities. The chapter also examines the role and function of forestry extension, which is identified by the *Forest Act* as a mechanism available to guide people involved in forestry to adopt and maintain sustainable forestry practices.

Chapter 5 outlines a proposal for legal reform. Drawing upon conclusions from the foregoing chapters, we set out to identify legal and ethical mechanisms that would facilitate development of a duty or responsibility on individuals to practice land stewardship. We explore the potential role of the common law duty of care, and statutory duties of care. The chapter also examines the appropriate standard of care, representing the expected sustainability responsibilities of land owners or forest communities. We suggest that a new concept of sustainability extension is a suitable policy mechanism to guide farmers and forest communities to implement their sustainable land use responsibilities.

CHAPTER TWO: A LEGAL AND ETHICAL FRAMEWORK OF INTEGRATION FOR SUSTAINABILITY

1 INTRODUCTION

Sustainable development, as a legal concept, has evolved over several decades to become a prevailing paradigm. In contrast with preservationist-oriented norms, sustainable development is framed to guide decision making by human beings on the productive use of environmental resources. This idea of sustainable development resulted from concern over an increasing rate of environmental degradation, caused by human development activities.¹ In a cyclic fashion this environmental degradation further undermines the human economic activities.² In the context of the developing countries, especially those in Sub-Saharan Africa like Kenya, the continuing and widespread poverty and environmental degradation provokes concerns over fulfillment of the rights of the poor to socio-economic development. This raises the question of how the right to development should be reconciled and integrated with concern for a clean and healthy environment. These challenges further provoke thoughts on the idea of integration of environmental and developmental concerns in decision making. This integration relates to decision making in two aspects.

The first aspect regards integration of the right to development with environmental protection to attain and safeguard sustainability. This is important because often it is human needs and entitlements that determine the choices which people make. Further, environmental protection is increasingly acquiring the status of a fundamental right, similar

¹ Report of the World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 3. [WCED, “Our Common Future”]. I will use the references Our Common Future and Brundtland Commission interchangeably throughout this chapter.

² *Ibid* at 3.

to that enjoyed by socio-economic rights. This implies an obligation to fulfil both rights together. Further, since a right is always contingent on a duty, when people appreciate their right to a healthy environment, they also maybe guided to acknowledge or observe the duty to protect the environment. In this sense the first aspect is a conceptual integration that involves reconciling the two rights, and it facilitates development of rules to guide decision making by people who have to make land use choices regularly. Such decisions are made, not only by officials, but also by citizens. In this latter category would be small-scale subsistence farmers who face the challenge of integrating the rights to utilize their land for economic benefit, with a duty to care for the environmental quality of the land.

The second aspect regards integration to guide decision making within legal institutions that execute legislative or policy authority over matters affecting the environment, for instance sectoral activities like agriculture or forestry land use. These institutions have diverse mandates either to manage the environment, or to manage socio-economic activities that affect or impact the environment. It is therefore imperative to underscore that sectoral laws, institutional policies, plans and decisions should be integrated with the idea of environmental protection. This integration should be undertaken whether the concerned institutions deal with environmental management, or manage other socio-economic and political decision making which impacts the environment. In this sense, the mandates of these institutions are critical to realization of the rights to development, and to environmental protection. This second aspect of integration therefore relates to practical coordination of institutional policies, plan and decisions at a more operational level. It should commence with integration of sectoral laws.

The concern with sustainability should therefore begin with reviewing the role of law in setting up a coherent concept of integration, and then facilitating its application at sectoral institutional policy, planning and decision stages. Sustainability should, importantly due to concerns about poverty and degradation, examine how this conceptual and institutional integration can facilitate people in changing their behaviours and attitudes towards making sustainable land use decisions and choices.

To comprehensively demonstrate the significance of both the conceptual and sectoral institutional integration on human attitudes to the balancing of environmental protection with socio-economic activities, it is important to analyse the legal concept of sustainable development, and its treatment of integration. Therefore, section 2 of this chapter reviews the nature of sustainable development as a legal concept. Section 3 examines integration and decision making within the concept of sustainable development. The analysis in this section examines conceptual reconciliation of the right to development with an emerging environmental right. We also examine the role and function of integrated sectoral policy and planning in institutional decision making. Here, we highlight the existence of horizontal integration whereby an overall law or policy structure establishes environmental or sustainability norms. Vertical integration involves synchronization of sectoral policies, plans or decisions with that overarching environmental or sustainability norm.

Section 4 reiterates the utility of integrated legal, policy, planning and decision making in light of poverty, land degradation and the challenge of sustainability in Africa. We suggest that poverty is indicative of unfulfilled socio-economic needs, and, in addition, a high prevalence of poverty results in environmental degradation. We argue that this situation

highlights the link between the right to development and the right (and duty) to a clean environment, which are central to integration of laws, policies and decision making for sustainability. The section highlights the conceptual and practical nexus between poverty, food insecurity and environmental degradation. We use the example of Kenya, showing the relationship between poverty and degradation, as a demonstration underscoring the importance of an integrative law and policy response.

Section 5 is a comparative review of sustainability approaches in two African legal systems: Kenya and South Africa. We examine both conceptual and institutional integration in this context, choosing South Africa because of similarities in the constitutional and statutory approaches. There is also a contrast because the South African framework environmental law was enacted to give effect to constitutional provisions, while the constitution in Kenya was enacted after the framework environmental law. We argue that constitutions, framework environmental laws, and property laws comprise the basic structural laws of a legal system that set out and determine environmental norms in a legal system, and they are normatively suited for implementing integration within a legal system. The analysis in this section discloses that both South Africa and Kenya constitutions introduce the concept of ecologically sustainable development, and impose obligations on the respective states to take ‘legislative and other measures’ to attain this ecological balance in sustainable development. However, it is clear that the legal provisions do not manifest tools or mechanisms to guide and facilitate integrated decision making by small-scale land users –especially because their land use activities fall outside the scope of the regular integration tools, such as environmental impact assessment. We note the role of the 2010 Constitution of Kenya, and

its creation of a duty on every person to cooperate with other people and the state, to ensure ecologically sustainable development. We further urge that the constitutional linkage of ecologically sustainable development with an environmental duty on people presents a potential legal or policy avenue to design tools that may guide the small-scale land users towards adoption of integrated decision making.

Section 6 of the chapter examines the legal concept of ecologically sustainable development. The review involves a comparative analysis of ecologically sustainable development concepts from Australia, South Africa, and the new constitution of Kenya. The comparative analysis assists in framing the fundamental legal principles that underlie ecologically sustainable development, key among them integration, precaution, and conservation. We conclude that ecologically sustainable development provides a useful conceptual basis to guide integration in individual decision making, through implementation of the constitutional duty. However, we suggest this is not sufficient, without more, to change the behaviours of small-scale land owners or occupiers, especially when there is existing high level of land degradation, poverty or hunger. We suggest that there are diverse bases of knowledge, with a legal foundation, such as ethics or local knowledge that can play an important role and impact the personal choices of people towards sustainable land use.

Section 7 of the chapter examines theories of ethics, which may play a role in changing how people utilize or conserve their land. Such theories include anthropocentrism, biocentrism, animal rights movement, and the land ethic. We contend that the land ethic is the theory of ethics that is most consistent with the constitutional environmental duty as it urges an ecological conscience, which is basically a human responsibility to safeguard vitality of the

land, even while using land as a resource. We conclude that this land ethic, and human ethical responsibility is consistent with the balance required by integration between the right to development, and the right to a clean environment.

2 THE CONCEPT OF SUSTAINABLE DEVELOPMENT

A definition of sustainable development was given by the 1987 report of World Commission on Environment and Development (Brundtland report). This report, also known as *Our Common Future*,³ explained sustainable development as: *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*³ The Brundtland report further classified this conception of sustainable development as comprising two key concepts.⁴ The first is that priority should be given to the needs of the world's poor; the second is recognition of the limitations on the environment's ability to meet the present and future needs.

The 1992 Rio Declaration,⁵ a soft international law instrument on the environment, provided further legal impetus to sustainable development. The Rio Declaration proclaims that *human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature.*⁶ This principle highlights the attributes of the human rights based or anthropocentric⁷ approach to making decisions affecting the

³ *Ibid* at 43.

⁴ *Ibid.*

⁵ *—Rio Declaration on Environment and Development* in *Report of the United Nations Conference on Environment and Development* (UNGA OR, A/CONF.151/26 (Vol. I), 12 August 1992). [*—Rio Declaration on Environment and Development*]

⁶ *Ibid* at Principle 1.

⁷ For a discussion on anthropocentrism, see section 7.1 of this chapter.

environment. It further raises concerns about how this human entitlement or right to a productive and healthy life is integrated with the interest to protect and safeguard environmental quality. This question of integration is now at the heart of principles, legal rules and policies designed to attain sustainable development.

There are some general principles concerning this human right to productive, healthy life and its correlation to the natural environment. These principles, developed by the Expert Group on Environmental Law⁸ to the Brundtland Commission, offer some insights to the debate on the conceptual perspective regarding integration. In the principles, the first article frames a fundamental human right through which all human beings have the basic right to an environment that is adequate for their health and wellbeing. The accompanying commentary states that the framing of this right intended its direct and immediate object to be the maintenance and/or restoration of an adequate environment.⁹ In the *Draft IUCN Covenant on Environment and Development*,¹⁰ article 8 provides that peace, development, environmental conservation, respect for human rights and fundamental freedoms are interdependent values crucial to humanity. The accompanying commentary,¹¹ further explains that full and effective exercise of these human rights and values is not possible without environment and development since some of the basic rights including right to life and health are jeopardized without access to sufficient food and water.

⁸ World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Dordrecht: Martinus Nijhoff, July 1986) at 39. [WCED, “Environmental Protection and Sustainable Development”]

⁹ *Ibid* at 41.

¹⁰ IUCN Commission on Environmental Law, *Draft International Covenant on Environment and Development. Third Edition: Update Text* (Gland: IUCN, 2004).

¹¹ *Ibid* at 39.

Legal scholar Klaus Bosselman however contends there is a deficiency that is evident in the sustainable development definition. He argues that the definition discloses only two aspects: concern for the poor people, and for future generations of human beings. This, Bosselman argues, leaves out the crucial component to require humankind to practice concern for the planetary ecosystem.¹²

It is conceivable to apply Bosselman's arguments to advance the view that since sustainable development is anthropocentric, the definitional lacunae may encourage people to favour economic considerations over environmental health concerns. This is not to suggest that it is inappropriate for people to perceive the natural environment as resources for human benefit. Legal systems already confer extensive human rights to socio-economic development and to property rights.¹³ The challenge of responding to Bosselman's critique is how to provide a conceptual and operational basis to guide institutions and people to ensure they integrate their socio-economic needs with the right to a healthy environment when they make decisions impacting the environment. In the next two sections, we examine how legal principles, concepts and provisions have treated the idea of integration as a legal rule.

¹² For a detailed discussion, see Klaus Boesselman, "A Legal Framework for Sustainable Development" in Klaus Bosselman and David Grilinton (eds) *Environmental Law for a Sustainable Society* (Auckland: New Zealand Centre for Environmental Law, 2002), at 147.

¹³ See for instance, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, which at article 3, incorporates a guarantee by State Parties to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." See also, *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, [Constitution of South Africa] which at article 25, 26, and 27 provides the right to property; housing; and healthcare, food, water and social security respectively. See further the *Constitution of the Republic of Kenya, Revised Edition 2010*, [Constitution of Kenya, 2010] which at article 40 provides a basic right to property; and article 43, which provides a basic right to socio-economic rights that include healthcare, housing, reasonable sanitation, right to food, clean and safe water, social security and education.

3 INTEGRATION AND DECISION MAKING WITHIN CONCEPT OF SUSTAINABLE DEVELOPMENT

The integration of environmental protection with development considerations comprises a major exercise in making decisions and choices in pursuit of socio-economic needs. This is mainly because if human needs are to be met on a sustainable basis, the earth's natural resource base must be conserved and enhanced.¹⁴ Whether the development is sustainable therefore depends on how the balance between human needs and environmental conservation is determined during decision making. In order to comprehensively outline the character of integration arrangements in law, we propose to first address conceptual integration using a human rights approach; and subsequently analyse operational or institutional integration with a focus on sectoral policy, planning and decision making.

3.1 INTEGRATING THE RIGHT TO DEVELOPMENT AND ENVIRONMENTAL PROTECTION IN DECISION MAKING

As set out by the Brundtland report, the idea of sustainable development highlights two key concepts. The first is giving priority to the needs of the poor; and the second is recognition of limitations imposed by the environment.¹⁵ In his separate opinion in the International Court of Justice (ICJ) case of *Gabcikovo-Nagymaros*¹⁶, Justice Weeramantry defines sustainable development as a right to development that...is relative...to its tolerance by the environment.¹⁷ Legal scholar Dire Tladi contends that this view by Justice Weeramantry is

¹⁴ WCED, "Our Common Future," *supra* note 1 at 57.

¹⁵ WCED, "Our Common Future," *supra* note 1 at 53.

¹⁶ *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, [1997] ICJ Reports, Separate Opinion of Vice-President Weeramantry., 88-116. [*Gabcikovo-Nagymaros*, "Separate Opinion of V-P Weeramantry"]

¹⁷ *Ibid* at 92.

perhaps the best starting point when considering sustainable development from a human rights perspective.¹⁸ Tladi further argues that the Weeramantry definition is noteworthy in this respect because the definition assumes the existence of a right to development.¹⁹

This view is vindicated by the Rio Declaration, at Principle 3 when it states that the human right to development must be fulfilled so as so as to equitably meet development and environmental needs of present and future generations.’ (Emphasis added) Tladi contends that while development is posited as a right, the need to protect the environment is not awarded the same status in this definition.²⁰ Principle 3 introduces development as a right that is in competition with environmental needs thereby raising concern that development may stand in priority to the environmental needs of present and future generations. Further, principle 4 of the Rio Declaration states that environmental protection shall constitute an integral part of the development process. With the view that development is a right, without indication on the legal (rights) status of environmental protection, principle 4 can be interpreted to place the ‘environmental considerations’ as a small portion to be integrated into the large portion that is the development process.

In contrast however, the 1987 Brundtland report had boldly asserted that the concept of sustainable development provides a framework for the integration of environmental policies

¹⁸ Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria: Pretoria University Law Press, 2007) at 67 [Tladi, ‘Sustainable Development in International Law’]

¹⁹ *Ibid.*

²⁰ *Ibid.*

and development strategies.²¹ The challenge to this view, as noted by Bosselman and Dire Tladi, arises from arguments that development is presented as a human right, while environmental protection is not. Perhaps noting this challenge, Justice Weeramantry argued that “the law necessarily contains within itself a principle of reconciliation.”²² This latter reasoning, from the *Gabcikovo-Nagymaros* case, has been explicitly upheld by the ICJ in the 2010 decision of the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*.^{22a} Here, the principle of reconciliation was aptly highlighted when the court ruled that sustainable development of the disputed Uruguay river should take into account “the need to safeguard the continued conservation of the river environment and the rights of economic development...”^{22b} These statements and reasoning have been put to test by treaties, municipal legal systems, and judicial decisions that have attempted to reconcile the right to development, with protecting or conserving the environment.

3.1.1 RECONCILING THE RIGHT TO DEVELOPMENT WITH A RIGHT TO A HEALTHY ENVIRONMENT

The reconciliation spoken of by Weeramantry and others may be accomplished or facilitated where environmental protection as a factor conditioning the primary goal of development is replaced with a right to a healthy environment that enjoys equal legal status with the right to development. As illustrated below, the right to a healthy environment may be established implicitly and explicitly in various legal instruments. In the past, the right to development

²¹ WCED, “Our Common Future,” *supra* note 1 at 40.

²² *Gabcikovo-Nagymaros*, “Separate Opinion of V-P Weeramantry” *supra* note 16 at 90.

^{22a} *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep (20 April 2010) at 32 (para 76)

^{22b} *Ibid*, at para 77.

technically surpassed environmental protection because laws and constitutions did not include justiciable or enforceable environmental protection provisions. Nigeria presents an example.²³ Instead of enforceable environmental rights provisions, the Nigerian constitution affirms environmental protection under the Directive Principles of State Policy. These principles, at article 20, create a duty on the Nigerian state to protect and improve the environment and safeguard the water, air and land, forest and wildlife. However, article 6(c) of the same Constitution stipulates that these directive principles of state policy are non-justiciable. It however makes provision for a fundamental right to life.²⁴

This seemingly subordinate treatment of environmental protection was tested and reversed by the Nigerian judiciary, resulting in the implicit creation of a constitutional environmental right, in the case of *Jonah Gbemre v Shell Petroleum Ltd.*²⁵ This case involved a complaint against environmental degradation and harm to human health resulting from economic activities. The suit was filed against Shell Oil for flaring poisonous gases overnight. The High Court held that the constitutionally guaranteed fundamental right to life inevitably included the right to a clean poison free, pollution free, and healthy environment. This judicial decision demonstrates a court innovatively creating an implicit right to a healthy environment, coterminous with the right to life, in order to reconcile with the existing

²³ See, the *Constitution of the Federal Republic of Nigeria, 1999*,
online : http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_4

²⁴ *Ibid* article 33.

²⁵ *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005) reproduced in Africa Human Rights Case Law Data Base, online: <http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahr-lr-151-nghc-2005.html> [-Gbemre v Nigeria”]

developmental right. By so doing, the court created a legal avenue to find that economic activities which undermine a healthy environment are in contravention of the constitution.

This view has been adopted by the High Court of Kenya, for instance in *Peter K. Waweru v Republic*,²⁶ and *Charles Lekuyen Nabori, Samson Lereya & 9 Others vs. Attorney General, & 3 Others*.²⁷ In both case, judges reasoned that the right to life cannot be fully realized without a clean and healthy environment, which made the two fundamental rights to be coextensive. In Kenya, these decisions were helpful because the Constitution at the time (repealed in 2010)²⁸ did not contain a single provision on environmental protection. We review the evolution from implicit to explicit environmental rights in the Kenyan legal system in section 5.3.1 of the chapter.

3.1.2 TREATY LAW, CONSTITUTIONAL AND STATUTORY RIGHT TO A HEALTHY ENVIRONMENT

The other approach of reconciling the right to development with environmental protection has involved explicit creation of environmental rights through treaty law, statutes or constitutional provisions. This approach has resulted in emergence of definitive environmental rights. At treaty law, African continental charters and conventions address the right to a healthy environment. The *2003 Revised African Convention on Nature and Nature Resources*²⁹ incorporates the right of all peoples to a satisfactory environment favourable to

²⁶ High Court Miscellaneous Civil Application No, 118 of 2000, reported in [2006] eKLR, online: www.kenyalaw.org

²⁷ High Court of Kenya Petition No. 466 of 2006, [2008] eKLR, online: www.kenyalaw.org

²⁸ *Constitution of the Republic of Kenya* [Revised 2008] (repealed 27 August 2010 on the promulgation of a new constitution. Section 71 of the now repealed constitution provided for a fundamental right to life.

²⁹ *African Convention on the Conservation of Nature and Natural Resources* (Revised) (2003/), 11 July 2003 reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 95. [2003 Revised African Convention]

their development.³⁰ The *1981 African Charter on Human and Peoples Rights*³¹ equally guarantees all peoples the right to a general satisfactory environment favourable to their development.³² We look at the African charter since unlike the not-yet-in force Revised Convention, it has been in force since 1986, and has undergone judicial examination of its provisions.

It is useful to note that the African treaties link the right to a satisfactory environment, with development. While there is a separate right to socio-economic and cultural development,³³ the African charter correlates environment and development by framing environmental protection as a primary obligation. This argument is judicially endorsed by the African Commission on Human and Peoples Rights³⁴ in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*³⁵ decision. This case, otherwise known as the *Ogoniland case*, involved a complaint that the Military government of Nigeria had been involved in petroleum exploitation, and that these activities had caused environmental

As of August 2010, the revised convention had not yet entered into force. The Republic of Kenya has signed but has not deposited the instruments of ratification, see online: <http://www.africa-union.org/root/au/Documents/Treaties/List/Revised%20Convention%20on%20Nature%20and%20Natural%20Resources.pdf>

³⁰ *Ibid* at article 3.

³¹ *African Charter on Human and People's Rights* (1981/1986), 27 June 1981, reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 29 [African charter]

³² *Ibid* at article 24.

³³ *Ibid* at article 22.

³⁴ The African Commission on Human and People's Rights is established by Part II of the *African Charter on Human and People's Rights*. The human rights mandate of the African Commission is set out in article 45 of the African Charter.

³⁵ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 330-341. [–Ogoniland case"] 336 para 52.

degradation, which resulted in environmental and health problems amongst the Ogoni people.³⁶ The African Commission reiterated that the right to a general satisfactory environment guaranteed by the African Charter imposes clear obligations upon a government to prevent pollution and ecological degradation, to promote conservation, and secure ecologically sustainable development and use of natural resources.

Municipal legal systems have now enacted rights to environmental protection in statutes and constitutions. Article 39 of the *Constitution of Uganda*³⁷ establishes a fundamental right to a clean and healthy environment for every person. This right has been enforced in several instances. In *Advocates Coalition for Development and Environment v Attorney General and NEMA*,³⁸ the judge stated that the right to a healthy environment entitles Ugandans to a right to an environment adequate for their health and well-being.³⁹ In this case, the applicants challenged the change of use of the protected Butamira forest reserve on grounds that such use violates their environmental rights.

3.1.3 A CORRESPONDING DUTY ON THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment has therefore been determined by statute, constitution or judicial interpretation. The question arises however whether this right presumes any obligations or duties to protect and enhance the environment. This is an important concern

³⁶ *Ibid* at 330 & 336, para 52.

³⁷ *Constitution of Uganda, 1995*.

³⁸ *Advocates Coalition for Development and Environment v Attorney General and NEMA* Misc. Cause No. 0100 of 2004 (High Court of Uganda), (unreported)

³⁹ Ben Twinomugisha, "Some Reflections on judicial protection of the right to a clean and healthy environment in Uganda" (2007) 3/3 *Law, Environment and Development Journal* (2007), 244 at 249 (see footnote 41), online: <http://www.lead-journal.org/content/07244.pdf>

because after the conceptual reconciliation of development and environment through environmental rights (the first dimension of integration), the identification of a clear duty will reinforce the requirement for integration of environmental and development considerations in decision making for sustainability by institutions, and in practice by citizens such as individual land owners (the second dimension of integration).

Looking at the *Gbemre* decision from Nigeria, the court implied the existence of a duty on the Nigerian government to take measures to ensure economic activities did not harm the environment, or human health. It is also important to reiterate the interpretation of the right to a satisfactory environment under the African Charter in the *Ogoniland* case. In its decision, the African Commission found that this right imposes clear obligations on governments to take ‘reasonable and other measures’ to prevent pollution and ecological degradation, to promote conservation, and secure and ecologically sustainable development and use of natural resources.⁴⁰

On the constitutional right to a healthy environment in Uganda, legal scholar Emmanuel Kasimbazi contends that realization of this right requires a healthy and habitable environment including clean water, soil and air that is free of pollution and other hazardous substances resulting from development activities.⁴¹ Kasimbazi argues that this right

⁴⁰ ‘*Ogoniland case*’ *supra* note 35 at 336 para 52.

⁴¹ Kasimbazi, Emmanuel, ‘Development and Balancing of Interests in Uganda,’ at 5-6. (Paper presented during a peer review workshop on implementation of environmental law in Africa, in preparation for a publication edited by Michael Faure & Willemien Du Plessiss by the title *Balancing of Interests in Environmental Law in Africa*. The workshop was held on 7-9 December 2010, at the Faculty of Law, University of Pretoria, South Africa) [unpublished manuscript]

subsumes a duty, but the duty does not only depend on the affirmative action of the state.⁴² He suggests there should be a duty on all persons, noting that the behaviour of all persons engaged in different development activities should be geared towards the realization of this right. Kasimbazi's views are supported by the Ugandan judiciary in *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,⁴³ where the applicants were granted a declaration to stop the respondent (a private company) from discharging unpleasant, noxious and choking dust from the respondent's premises.

In Kenya, the *1999 Environmental Management and Coordination Act (EMCA)*⁴⁴ establishes a right to a clean and healthy environment. This is a statutory right, and until the High Court in *Waweru* linked this environmental right with the right to life, it was a subordinate right in the hierarchy of the legal system. It is important to note that section 3(1) which establishes the environmental right is in two parts: The first part set out the right to a healthy environment for every resident of Kenya. The second part states that *every person has a duty to protect and enhance the environment.*⁶

When considering sustainable development from the prevailing human rights or anthropocentric approach, there is significant evolution of legal rules in integration of socio-economic and environmental considerations. The original idea that sustainable development inherently supported integration of environmental and developmental considerations has

⁴² *Ibid.*

⁴³ *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd* Miscellaneous Cause No. 181 of 2004 (High Court of Uganda) (unreported).

⁴⁴ *Environmental Management and Coordination Act, Kenya (EMCA)*, Act No. 8 of 1999, Laws of Kenya. [-EMCA, Kenya"]

been undermined by the superior status of the right to development. Subsequent enactment and judicial interpretation of treaty, constitutional, or statute laws has established the basic framework not only for integration, but also for fulfillment of urgently required socio-economic needs, especially in developing African countries. Further, since a right is always contingent on a duty, when people appreciate their right to a healthy environment, they may also be guided to observe the duty to protect the environment. In this sense, the integration of the two rights facilitates development of rules to guide decision making by people who have to make land use choices regularly trying to meet their socio-economic needs. The challenge, after the legal rules are set up, is implementation to ensure that legal rules for instance exhort an influence towards sustainability, on farmers in developing countries, in the daily and regular process of land use decision making. Equally there is a challenge on integration at the institutional level for policy, planning and management level for coherent plans to fulfill the object of sustainable development. In the next section, we examine the legal rules on institutional integration.

3.2 INTEGRATING SUSTAINABLE DEVELOPMENT INTO DECISION MAKING BY SECTORAL INSTITUTIONS

Agenda 21 was one of several documents adopted at the end of the United Nations Conference on Environment and Development in 1992. Agenda 21 addressed the complex issue of integrating environment and development in decision making at the policy, planning and management levels.⁴⁵ On institutional integration, Agenda 21 noted that the prevailing

⁴⁵ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (New York: United Nations publication, Sales No. E.93.I.8 and corrigenda). vol. I: Resolutions Adopted by the Conference, resolution 1, annexes I and II.

See also, Agenda 21, online: http://www.un.org/esa/dsd/agenda21/res_agenda21_08.shtml

systems for decision-making in many countries tend to separate economic, social and environmental factors at the sectoral institutional levels.⁴⁶ This lack of integration influences the actions of all groups in society, including Governments, industry and individuals, and undermines the balance necessary to achieve the sustainability of development. Agenda 21 therefore called for a fundamental reshaping of decision-making, to place environment and development at the centre of economic and political decision-making, in effect achieving a full integration of these factors.⁴⁷ This view was supported a decade later by the Johannesburg Plan of Implementation⁴⁸ which called for integration of socio-economic development, and environmental protection, classifying them as interdependent and mutually reinforcing pillars of sustainable development.⁴⁹ This, in effect, further reinforced the arguments that socio-economic development and environmental protection are both necessary, but individually insufficient components of sustainable development.

3.2.1 THE ROLE OF INSTITUTIONAL INTEGRATION IN DECISION MAKING

The pursuit of integration at institutional decision making level is therefore very necessary for two reasons. First, the integration of environment and socio-economic priorities at the sectoral law, policy, planning and management level is useful to achieve a balance of priorities in environmental or economic decision making. This implies that environmental authorities will adequately integrate socio-economic needs as part of environmental

⁴⁶ *Ibid*, online: http://www.un.org/esa/dsd/agenda21/res_agenda21_08.shtml

⁴⁷ *Ibid*, online: http://www.un.org/esa/dsd/agenda21/res_agenda21_08.shtml

⁴⁸ United Nations, *Plan of Implementation of the World Summit on Sustainable Development*, online: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf

⁴⁹ *Ibid*, at para 2.

protection. It further implies that political and economic sectors, whose activities impact the environment, sufficiently consider environmental quality in decision making. Secondly, this institutional integration will provide a technical baseline to give effect to the mutually reinforcing rights to socio-economic development, and right to a healthy environment, plus the corresponding duty. This is because often it is public officers that work hand-in-hand with a range of individuals like small-scale farmers or local forest communities. In this sense, the officers have the role to guide these farmers or local communities to internalize integration in their land use choices. Alternatively, the public officers may have the role of monitoring and enforcing sustainability, and therefore institutional integration of sustainability in policy and planning provides a sound legal basis for official decision making.

3.2.2 THE NATURE OF INSTITUTIONAL INTEGRATION FOR DECISION MAKING

Environmental policy scholars Lafferty & Hovden have discussed institutional integration, arguing there is vertical and horizontal integration.⁵⁰ Legal scholar Hans Christian Bugge also concurs with this classification.⁵¹ Vertical and horizontal integration is mainly defined by the nature of public administration and government which tends to be structured alongside specialized sectoral agencies or departments. There will also, in some cases, be a

⁵⁰ William Lafferty & Eivind Hovden –Environmental policy integration: towards and analytical framework (2003) 12(3) Environmental Politics, 1-22 [Lafferty & Hovden –Environmental policy integration”]

⁵¹ Hans Bugge, –The Principle of Integration and its dilemmas” Conference presentation, 7 IUCN Academy of Environmental Law, Wuhan China, November 2009, online: http://www.iucnael.org/index.php?option=com_docman&task=doc_details&gid=346&Itemid=5&lang=en [Hans Bugge, –Principle of Integration and its dilemmas”]

principal or framework environmental law establishing the environmental norms and rules.⁵²

We now analyse vertical and horizontal integration -

a) Vertical integration

Lafferty & Hovden, argue that vertical integration indicates the extent to which a particular governmental sector has adopted and sought to implement environmental objectives as part and parcel of the core objectives assigned to that sector.⁵³ Hans Christian Bugge concurs, noting that institutional integration of sustainability objectives requires facilitating and convincing sectoral authorities to work with objectives that they do not consider or identify as primary tasks.⁵⁴ Lafferty and Hovden contend that each sector will be left to implement and execute its core objectives, but will be required to explain how these objectives impact the environment.⁵⁵ Further, the integrating law or policy may require the sectoral agency or department to prepare plans or strategies on how to mitigate or reduce the impacts on the environment.

⁵² See, for instance the *Environmental Management and Coordination Act*, Kenya (EMCA), Act No 8 of 1999. The preamble states that EMCA is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment in recognition that improved legal and administrative co-ordination of the diverse sectoral initiatives is necessary in order to improve the national capacity for the management of the environment. (emphasis added)

⁵³ Lafferty & Hovden "Environmental policy integration" *supra* note 50 at 12.

⁵⁴ Hans Bugge, "Principle of Integration and its dilemmas," *supra* note 51. Hans Bugge further argues that institutional integration requires that all sector authorities must take responsibility for their environmental effects." See, Hans Christian Bugge, "1987-2007: 'Our Common Future' Revisited" in Hans Christian Bugge & Christina Voigt (eds) *Sustainable Development in International and National Law* (Oslo: Europa Law Publishing, 2007) at 9.

⁵⁵ Lafferty & Hovden "Environmental policy integration" *supra* note 50 at 13.

An illustration can be found in the relatively new Namibian *Environmental Management Act* of 2007 (EMA).⁵⁶ Section 23 requires the various organs of state that ‘exercise functions that may affect the environment, or are entrusted with powers and duties aimed at achievement, promotion or protection of a sustainable environment’ to prepare environmental management plans. These environmental management plans are intended to facilitate coordination, and harmonization of the environmental policies, plans or programmes of these state organs whose roles affect the environment.

The EMA law is specific that the environmental management plans should abide by principles set out in section 3 of the EMA. Thematically, these principles aim to uphold environmental protection, including among others: generational equity; community participation; protecting cultural and natural heritage; polluter pays principle; and precautionary principle. It is however notable that the specific integration of socio-economic and environmental considerations in decision making is not among the listed principles. This is unlike the South Africa *National Environmental Management Act*⁵⁷ (NEMA) which specifically notes that sustainable development requires integration of social, economic and environmental factors in planning, implementation and evaluation of decisions. This South African law is examined in depth in section 5.2 of the chapter. It is also notable that in its

⁵⁶ *Environmental Management Act*, Namibia, Act No. 7 of 2007 (as published in Government Gazette 27 December 2007). [–EMA, Namibia”]

⁵⁷ *National Environmental Management Act*, South Africa, Act 107 of 1998, (as last amended by National Environmental Laws Amendment Act 14 of 2009) reprinted in Van der Linde, Morne & Feris,, Loretta (eds) *Compendium of South African Environmental Legislation* (Pretoria: Pretoria University Press, 2010) at 32-87. [–NEMA, South Africa”]

principles, the NEMA law also stipulates that _development must be socially, environmentally and economically sustainable.⁵⁸

In spite of the highlighted shortcoming, the Namibian EMA law, in providing for vertical integration through environmental management plans aims to minimize the duplication of procedures and functions; and promote consistency in the exercise of functions that may affect the environment.⁵⁹ The object of these provisions thus concurs with the view expressed by scholar Ute Collier, that integration aims to remove contradictions between policies and within policies; and to make policies objectives mutually supportive.⁶⁰

b) Horizontal integration

Lafferty & Hovden also discuss the idea of horizontal integration. They argue that horizontal integration occurs when a central authority has put in place a comprehensive cross-sectoral strategy for integration of environment and development. The authors suggest the central authority could be a government, a government ministry, or an agency or commission that has been entrusted with an overarching responsibility for sustainable development.⁶¹ It is plausible that an overarching treaty or municipal environmental law which establishes general and binding rules for implementation by the various sectors is a manifestation of

⁵⁸ *Ibid*, section 2(3). The structure for integration under this law is examined in section 5.2 of this chapter.

⁵⁹ –EMA, Namibia,” *supra* note 56, section 23(a)(i&ii).

⁶⁰ Ute Collier, *Energy and environment in the European Union* (Avebury: Aldershot, 1994) at 36.

⁶¹ Lafferty & Hovden –Environmental policy integration” *supra* note 50 at 14.

horizontal integration. The *Treaty of the European Community*⁶² for instance takes this approach. Article 6 stipulates ‘environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities... with a view to promoting sustainable development.’ This horizontal integration further embraces a vertical integration approach by specifically highlighting the sectoral policies that should especially integrate environmental protection requirements.⁶³

Often, municipal framework environmental laws that embrace horizontal integration also tend to establish ‘authorities’, ‘agencies’ or ‘commissions’ with powers to supervise compliance. The Namibian statutory illustration discussed above also incorporates elements of horizontal integration. This is evident as a mechanism to guide and supervise implementation of vertical integration of environmental considerations by sectoral laws or policies for the decision making processes. The Namibian law therefore sets up the office of an Environmental Commissioner,⁶⁴ whose powers include evaluating the environmental management plans for compliance with the law.⁶⁵ The Kenyan *EMCA* also sets up a National Environmental Management Authority (NEMA) as the principal public agency ‘to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the

⁶² *Treaty Establishing the European Community* (Consolidated Version) reprinted in Official Journal of the European Union (29 December 2006), online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>

⁶³ *Ibid.* The full article 6: Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development. (emphasis added) See article 3 for an indepth listing of the sectoral policies and activities.

⁶⁴ ‘EMA, Namibia,’ *supra* note 56 Section 16-17.

⁶⁵ *Ibid.*, section 25.

environment.⁶⁶ It is important to highlight that the Kenyan NEMA has a statutory mandate⁶⁷ to evaluate environmental impact assessment study reports and issue licences for development projects that require prior impact assessment.⁶⁸ This function manifests the horizontal integration role with *EMCA* setting the requirement for impact assessment, and NEMA (as a central authority) executing the environmental impact assessment requirement for other public and private economic activities. The *EMCA* is however deficient in vertical integration structures that require sectoral agencies to take definitive measures of internalizing provisions of environmental law or policies into their policies or plans. This potentially undermines an opportunity to ensure sectoral laws, policies, plans or decisions balance their core economic priorities with their non-core environmental objectives. The structure of the *EMCA* is examined in depth in section 5.3.1 of this chapter.

To ensure sustainable development, it is important that institutional integration of environmental and development considerations is both vertical and horizontal. When legal rules internalize both vertical and horizontal integration, they achieve what Dire Tladi calls ‘_vice versa’ integration. This means on the one hand, that institutions and sectoral policies with responsibility to manage the environment or aspects of the environment integrate socio-economic considerations. It also means, on the other hand, that institutions concerned with socio-economic policies effectively integrate environmental considerations into their policies and decisions. This ‘_vice versa’ integration in decision making is mutually reinforcing with

⁶⁶ –EMCA, Kenya” *supra* note 44, section 9(1).

⁶⁷ –EMCA, Kenya” *supra* note 44, section 58-60.

⁶⁸ These projects are listed in the Second Schedule to *EMCA*.

the conceptual integration of human rights to development, with the right to a clean and healthy environment.

4 POVERTY, LAND DEGRADATION AND THE CHALLENGE OF SUSTAINABILITY IN AFRICA

In this section, we examine the state of the environment, especially the link between poverty and degradation in developing countries of Africa. We suggest that poverty is indicative of unfulfilled socio-economic needs. We further argue that a high prevalence of poverty results in environmental degradation. This highlights the link between the right to development, and the right (and duty) to a clean environment, which was explored in the last section as being central to integrated decision making for sustainability. This is further correlated with the high percentage of people engaging in subsistence land use (like agriculture) to meet socio-economic needs; and the percentage of such people living in poverty as a result of falling productivity resulting from extensive land degradation. This connection further highlights the cyclic nexus between a degraded environment and the failure to fulfil socio-economic needs.

Therefore we first highlight the conceptual nexus between poverty, food insecurity, and land degradation. After establishing this conceptual connection between poverty and land degradation, we highlight the factual situation with a dominant focus on the land use and socio-economic situation in Kenya. At the end of the section, we conclude that this poor state of environmental and socio-economic affairs reflects a failure of law and policy. We contend that it is possible that there is insufficient conceptual and institutional integration, thereby the people engaging in small-scale land use activities as well as the sectoral law and

policy mechanisms charged with guiding them, are left without means to balance socio-economic activities with environmental protection.

4.1 CONCEPTUAL LINK BETWEEN POVERTY, FOOD INSECURITY AND DEGRADATION

The eradication of poverty has been identified as an indispensable requirement for sustainable development, which is necessary to undo disparities in standards of living, and meet the needs of more people.⁶⁹ This challenge of poverty is highlighted regularly by the United Nations Development Programme (UNDP) in its yearly Human Development Index Reports (HDR).⁷⁰ UNDP, in the 2010 HDR report, frames poverty as a multidimensional concept that is beyond the simple notion of lack of income.⁷¹ This conception is useful to highlight the broad parameters that define poverty. The UN Economic and Social Council, defines poverty as human condition characterized by the sustained or chronic deprivation of resources, capabilities, or choices.⁷² Poverty also includes deprivation of the power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. This deprivation denies people the resources necessary for dignified livelihoods including the lack of access to certain natural resources for water, food and other basic necessities.⁷³

⁶⁹ –Rio Declaration on Environment and Development,” *supra* note 5, principle 5.

⁷⁰ UNDP, –Human Development Reports, online: <http://hdr.undp.org/en/>

⁷¹ UNDP, *The Real Wealth of Nations: Pathways to Human Development* (New York: UNDP Human Development Report 2010) at 7. Online: http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf

⁷² Economic and Social Council, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2001/10, CESCR, 25th Sess., UN Doc 10/05/2001.(23 April-11 May 2001), para 8, Online: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.2001.10.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.2001.10.En?Opendocument)

⁷³ Charo Quesada, Amartya Sen and the Thousand Faces of Poverty, para 5. (Inter-American Development Bank, 2001), <http://www.globalpolicy.org/socecon/develop/2001/1205sen.htm> (Accessed on 27 February

Although there are other consequences of poverty, such as disease, or illiteracy, the lack of food security remains one of the greater environmental challenges especially where the means to secure a basic livelihood are derived from land based activities like agriculture or forestry. Food insecurity is therefore closely linked to, and often becomes the main manifestation of poverty particularly in developing countries. The UN Food and Agriculture Organization (FAO) argues that food insecurity exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active, healthy life.⁷⁴ This food insecurity may be caused by the unavailability of food, insufficient purchasing power or the inappropriate distribution or inadequate use of food. Conversely, food security, exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.⁷⁵

According to the United Nations Economic Commission for Africa in its ‘State of Food Security in Africa’ report series, food security requires all-time availability and universal access to food in adequate quantity and quality or what the World Bank terms as access by all people at all times to enough food for an active healthy life.⁷⁶ It is crucial to note that the

2009). See also Michael Lockwood and Ashish Kothari, —Social Context” in Michael Lockwood, Graeme Worboys and Ashish Kothari (eds) *Managing Protected Areas: A Global Guide*, London: Earthscan, 2006, 56. [Lockwood and Kothari, —Managing Protected Areas”]

⁷⁴ Food and Agriculture Organization (FAO), *Food insecurity: when people live with hunger and fear starvation*, (Rome: FAO, 2001) at 49.

⁷⁵ *Ibid.* See also generally, FAO, *Trade reforms and food security: conceptualizing the linkages*, Rome: FAO, 2003, chapter 2.

⁷⁶ United Nations Economic Commission for Africa, *The state of food security in Africa: progress report 2003*, http://www.uneca.org/csd/CSDIII_The%20State%20of%20Food%20Security%20in%20Africa%202003%20as%20sent%20for%20approval.doc at 2; see also The World Bank, *Poverty and hunger: issues and options for food security in developing countries*, (Washington, D.C.: The World Bank, 1986) at 1.

three definitions of food security above underline access to food *at all times* and in *adequate/sufficient* quantities. Sufficiency is usually measured in terms of caloric intake relative to physiological requirements for a specified period of time.⁷⁷ Food must also be sufficient denoting that a household must meet its nutritional requirements without depleting its endowment of resources.⁷⁸ Access can also mean food sufficiency under all possible circumstances, preventing vulnerability and should prevent shocks arising in situations of famine, and other unpredictable shocks.⁷⁹ A complete definition of food security should therefore incorporate the three dimensions of sufficiency, sustainability, and vulnerability⁸⁰

Sufficiency, sustainability and vulnerability of food are closely linked to the quality of the natural environment from which food is derived. Deficiency in quality of the environment and resources raises the levels of vulnerability especially in situations of poverty, which in turn exacerbate food insecurity situations. A 2010 report by the United Nations Environment Programme (UNEP)⁸¹ confirms this, noting that there is an increase in environmental unpredictability, droughts and famine which are resulting in a rising vulnerability of the poor peoples in the developing world.

⁷⁷ Daniel Maxwell and Keith Wiebe, *Land tenure and food security: a review of concepts, evidence and methods*, Madison: University of Wisconsin Land Tenure Centre, Research Paper No. 129, 1998, 7. [Maxwell and Weibe, —Land tenure and food security”]

⁷⁸ *Ibid.*

⁷⁹ Maxwell and Weibe, —Land tenure and food security”, *supra* note 77 at 8.

⁸⁰ *Ibid.* Sustainable access also means food being accessible for both present and future generations. See further: Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 2: The right to adequate food (art. 11), 3. <http://www.fao.org/righttofood/kc/downloads/vl/docs/General%20Comment%20No.12.pdf>.

⁸¹ See Nellemann, C., MacDevette, M., Manders, T., Eickhout, B., Svihus, B., Prins, A. G., Kaltenborn, B. P. (eds) *The environmental food crisis – The environment’s role in averting future food crises: A UNEP rapid response assessment* (Nairobi: United Nations Environment Programme, February 2009)

4.2 POVERTY AND ENVIRONMENTAL DEGRADATION IN KENYA

The relationship between agricultural poverty and environmental degradation may also be seen more specifically in the Kenyan context, where, again, the nature of the combined challenge underscores the importance of an integrated law and policy response. The majority of the Kenyan population inhabits rural areas, and 80% of this population depends on agriculture or some form of forestry activities for their livelihoods.⁸² A national household survey established that poverty is concentrated in rural areas in general and in the agricultural sector particularly.⁸³ This signifies that dependence on or employment in the agricultural sector significantly raises the probability of people being poor. In Kenya therefore poverty is closely linked to food insecurity. Indian scholar, Marc Ravallion notes that in developing countries, such as Kenya, the agriculture-based economy accounts for a substantially higher share of absolute poverty.⁸⁴ However, Ravallion also positively suggests that fostering conditions for growth in rural economies is central to effective poverty reduction strategies.

Writing about Kenya, Gibbon, Mbithi, Phiri et al.,⁸⁵ highlight that interaction of the poor with the environment results in undesirable consequences like poor farming practices or charcoal burning, as short-term survival needs conflict with protection of viable agricultural

⁸² Mwangi Kimenyi, "Agriculture, Economic Growth and Poverty Reduction" Kenya Institute for Public Policy Research and Analysis (KIPPRA) Occasional Paper No. 3, June 2002) at 6.

⁸³ Alemayehu Geda, Niek de Jong, Germano Mwabu & Mwangi Kimenyi, "Determinants of Poverty in Kenya: Household-Level Analysis" KIPPRA Discussion Paper No. 9, 2001 at 25.

⁸⁴ Martin Ravallion, "What Is Needed for a More Pro-Poor Growth Process in India?" 35(13) Economic and Political Weekly at 1090.

⁸⁵ Gibbon, H., Mbithi D., Mugo, E.N., and M. Phiri, "Forest and Woodland Management in East and Central Africa: Emerging Models for Improvement in Livelihoods and Natural Resource Management in Kenya and Zambia" 7(3) 2005 International Forestry Review, 193 at 195-196.

and forestry ecosystems. They cite two densely populated counties in Kenya, Kiambu and Kakamega, which account for a combined 10% of poor households nationally, where this is most marked. Kimalu, Nafula, Manda et al.,⁸⁶ further suggest that poor people in Kenya depend on natural resources for their livelihoods and are more likely to live in vulnerable areas, putting them at higher risk to suffer from deterioration of the environment. This literature reinforces the view that human land use behaviour, in circumstances of unfulfilled socio-economic conditions, leans towards unsustainable environmental practices. This in turn undermines the capacity of the environment, where people predominantly depend on environmental resources, to meet the urgently required socio-economic needs.

This problem persists in other African countries where constitutional, legislative, and judicial means have directed the need to integrate economic and environmental considerations to ensure sustainable development. In Nigeria for instance, in spite of the judgement in *Gbemre*,⁸⁷ and the African Commission ruling in the *Ogoniland case*⁸⁸ the UNDP published a 2006 report that recorded a very high level of environmental degradation in the oil-rich Niger delta, and very high prevalence of human poverty.⁸⁹ The facts represented by the UNDP report ostensibly undermine any contention of effectiveness by environmental legal instruments, at least in the Niger Delta, at integration.

⁸⁶ Paul Kimalu, Nancy Nafula, Damiano K. Manda, Germano Mwabu & Mwangi Kimenyi, —ASituational Analysis of Poverty in Kenya” January 2001 KIPPRA Working Paper No. 6, at 14.

⁸⁷ —*Gbemre v Nigeria*,” *supra* note 25.

⁸⁸ —*Ogoniland case*,” *supra* note 35.

⁸⁹ United Nations Development Programme (UNDP) *Nigeria, Niger Delta Human Development Report* (Abuja: UNDP, 2006).

The Kenyan and Nigerian illustrations concur with findings by the UNEP African Environmental Outlook report⁹⁰ that land degradation, compounded by climatic change, contributes to a general reduction in environmental quality, which minimizes land use options, and reduces land productivity for the poor, who mostly rely on such resources.⁹¹ These findings magnify the link between poverty, land use activities like agriculture and forestry, and environmental degradation in developing countries like Kenya. This conclusion suggests a need to review the integration approach taken by the law, and the tools offered to guide land use decision making both at institutional and individual level. Such a review is urgent, just as overcoming these socio-economic and environmental challenges, especially since rural poverty has reached almost 60% in many rural areas, and about 51% of the Kenyan population is classified as food insecure.⁹² The urgency for legal and policy action is equally emphasized by the *UN Convention to Combat Desertification.(UNCCD)*⁹³ The Convention calls on Parties, when implementing measures to combat desertification and mitigate the effects of drought, to give priority to affected African country Parties, in the light of the particular situation prevailing in that region...⁹⁴

The current state of affairs, illustrated in this section, therefore suggests there is a possible failure by law and policy to set up rules and mechanisms to facilitate integration of

⁹⁰ United Nations Environment Programme (UNEP)/GRID-Arendal, *African environmental outlook: Past, present and future perspectives* (Hertfordshire: EarthPrint, 2002) Online, <http://www.grida.no/publications/other/aeo/> chapter 3.

⁹¹ *Ibid.*

⁹² Republic of Kenya, *Food Security Situation* (Nairobi: Ministry of Agriculture, 2009) at 7.

⁹³ *United Nations Convention to Combat Desertification*, 17 June 1994, UNTS 33480, online: <http://www.unccd.int/convention/text/convention.php?annexNo=-2>

⁹⁴ *Ibid.*, article 6 and 7.

environmental protection and socio-economic concerns at institutional/sectoral policy level decision making. This also points to inadequate or lack of mechanisms to facilitate integration of environmental and socio-economic concerns by people, like small scale farmers, who have to make land use decisions on a regular basis. In the next section, using a comparative analysis of two legal systems, we review the approach applied to internalize legal rules that facilitate integrated decision making for sustainability in Kenya and South Africa.

We chose South Africa because of the similarity and contrasts with the Kenyan legal system. The South African framework environmental law was enacted in 1998 four years after the 1994 Constitution came into force, in order to give effect to article 24 of the Constitution on the environment. The Kenyan framework environmental law was however enacted in 1999, a decade ahead of the adoption of environmental rights, duties and objective of ecologically sustainable development, in the 2010 Constitution. The comparative analysis with the South African experience therefore enables this research to examine experience and challenges in application and implementation of the legal rules.

5 A DUAL COMPARATIVE REVIEW OF SUSTAINABILITY IN AFRICAN LEGAL SYSTEMS

In this section, we undertake a review of the integration and decision making approach in the South African and Kenyan legal systems. In particular, we examine integration from the two approaches adopted earlier in this chapter. The first approach is conceptual integration of the right to development, and the right to a healthy environment, with its contingent duties to protect the environment. In this context, the discussion will disclose that these two legal systems have adopted a human rights approach to sustainable development. This approach is

obviously significant and important for African countries in light of the prevalence of unfulfilled socio-economic needs, and the indicative failure to meet the right to a healthy environment and breaches of the duty to protect the environment. We therefore highlight some academic and judicial attitudes on balancing the competing socio-economic rights, with the environmental right.

The second approach involves reviewing how these two legal systems are structured to integrate environmental and developmental considerations in decision making for sustainability at the institutional or policy level. The analysis discloses that both the South African and Kenyan constitutions introduce the concept of ecologically sustainable development, and impose obligations on the respective states to take legislative and other measures to attain this ecological balance in sustainable development. The discussion in this section commences with a conceptual analysis of the central and unifying role played by constitutions and framework environmental laws as basic structural laws in a legal system. This analysis is intended to demonstrate the potential of these structural laws to influence human and institutional character and attitude towards sustainability. In comparison, the other non-structural laws in a legal system such as pollution or zoning laws derive their principles and norms from the structural laws.

5.1 THE CONCEPTUAL ROLE OF CONSTITUTIONAL AND FRAMEWORK ENVIRONMENTAL LAW PROVISIONS

Legal systems are structured to promote goals and desires that the society seeks to advance, as well as to encourage concrete behaviour change.⁹⁵ Joseph Sax, a leading American environmental law scholar, suggests there is a distinction, within the legal system, between basic structural laws and regulatory regimes.⁹⁶ A good number of legal systems are based on legal positivism, which is useful to analyse the proposition by Sax, as positivism construes a legal system as a system of norms which have certain criteria to distinguish legal norms from other kinds of norms.⁹⁷ Theories of legal positivism have therefore attempted to define a basic hierarchy of a legal system.

In this context, legal positivist Hans Kelsen has advanced a theory of basic or grund norm as the foundation of a legal system. Kelsen urges that a legal system is a structure of norms, with the multiplicity of legal norms constituting a legal unity, order or system whose validity can be traced to a single basic of grund norm.⁹⁸ This basic norm can only be the fundamental rule, according to which other legal norms are to be produced.⁹⁹ The basic norm, which lays down the structure and spirit of the legal system, can be related with constitutions which tend to form the bedrock of legal systems. Many legal positivist jurisdictions practice the

⁹⁵ Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York, Rusell Sage Foundation, 1975) at 50;

⁹⁶ Joseph Sax, "Environmental Law Forty Years Later: Looking Back and Looking Ahead", in Michael Jeffrey, Jeremy Firestone and Karen Bubna-Litic (eds) *Biodiversity, Conservation, Law + Livelihoods: Bridging the North-South Divide* (New York: Cambridge University Press, 2008) at 10. [Sax, "Environmental law forty years later"]

⁹⁷ Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 138.

⁹⁸ Hans Kelsen, *Pure Theory of Law*, Part IV *reprinted* in M.D.A Freeman, *Lloyds Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001) at 279. [Freeman, "Loyds Jurisprudence"]

⁹⁹ *Ibid* at 280.

concept of constitutional supremacy,¹⁰⁰ such that the validity of any other law is evaluated vis-a-vis consistency of that law with constitutional provisions. The basic or structural position of a constitution therefore confers supremacy, but also means the constitutional values must be reflected in all ordinary legislation and policy.

With regard to environmental protection, Brandl and Bungert concur with the unique role played by basic laws in a legal system.¹⁰¹ Writing about constitutional enactment of provisions to safeguard environmental protection, they argue that such enactment provides environmental protection with the highest rank amongst legal norms at which a given value trumps every other statutory provision.¹⁰² The authors highlight two other issues. First, constitutional enactment of environmental provisions may take the form of a fundamental right to a clean environment.¹⁰³ They argue that this ensures environmental protection enjoys the same status as other fundamental rights. This aspect, as explained earlier in the chapter is important to conceptual integration of the development needs arising from socio-economic rights, with environmental rights and duties.¹⁰⁴ The second issue the authors raise relates to

¹⁰⁰ See, *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11*, section 52, which provides that ‘The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.’ See also article 2(1)&(4) of the Constitution of Kenya, 2010 which provides that ‘This Constitution is the supreme law of the Republic and binds all persons and all state organs...’ Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

¹⁰¹ Ernst Brandl and Hartwin Bungert, ‘Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad’ (1992) 16 *Harvard Environmental Law Review* 1 at 4. [Brandl & Bungert, ‘Constitutional entrenchment of environmental protection’]

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

the impact of constitutional provisions on citizens.¹⁰⁵ They contend that being supreme law of a country, constitutional provisions promote a model character for the citizenry to follow, and they influence and guide public discourse and behaviour.

Turning to the argument by Sax, on the role of basic structural laws, there is therefore a link with the thesis advanced by Brandl and Bungert. Sax contends that basic structural laws traditionally drive human behaviour by creating a deep structure of incentives and disincentives that influence people,¹⁰⁶ for instance, to make land use choices. Sax gives the example of property laws, which define the basic quantum of rights and duties in land that are held by a person as part of the basic structural laws.¹⁰⁷ Property laws therefore fundamentally guide the land use direction taken by a society. Sax also proposes a subsidiary category of laws, which he calls the regulatory regime, including enactments on land use standards, pollution abatement or land zoning. He argues that this category of regulatory laws follows the direction given by the basic structural laws within a legal system.

After examining the normative nature of the basic structural laws in a legal system, a conclusion can therefore be drawn that constitutional and framework environmental provisions fit into this category. Sax also places property laws in the same category, and we further analyse the foundational role of property rights and law in determining land use options in chapters 3 and 4. Framework environmental laws are enacted to provide overarching environmental principles and provisions that other statutes with environmental

¹⁰⁵ *Ibid.*

¹⁰⁶ Sax, "Environmental law forty years later," *supra* note 96.

¹⁰⁷ *Ibid.*

management competence should follow. Illustratively, the framework environmental laws of Kenya¹⁰⁸ and Uganda¹⁰⁹ require all pre-existing written laws relating to environmental management to be modified to accord with the framework law. According to Okidi, by 2008 nearly forty-two African countries, out of fifty four had enacted framework environmental laws of different levels of sophistication.¹¹⁰ Many others have enacted constitutional provisions for environmental protection. We have previously but briefly analysed or highlighted diverse provisions from the constitutions, framework environmental laws and judicial decisions from Nigeria, Uganda and Namibia to reinforce legal perspectives on integration of environmental and developmental considerations in decision making. In this section however, we restrict the analysis to a comparative review between the South African and Kenyan legal systems.

5.2 SUSTAINABILITY AND INTEGRATION IN THE SOUTH AFRICAN LEGAL SYSTEM

The legal provisions regarding integration and decision making for sustainability decision making in South Africa can be drawn from constitutional provisions, and the framework environmental law. The laws have been further analysed through judicial interpretation during dispute settlement. The 1994 constitution preceded the framework environmental law of 1998. We shall therefore first examine the constitutional environmental provisions.

¹⁰⁸ –EMCA, Kenya,” *supra* note 44, section 148.

¹⁰⁹ *National Environment Act* Cap 153 Laws of Uganda, section 108.

¹¹⁰ See Charles Okidi –Progress in Capacity Building in Environmental Law in African Universities” in Jamie Benidickson, Antonio Herman Benjamin, Ben Boer and Karen Morrow (eds) *A Legal Critique of Ecologically Sustainable Development* (Edward Elgar, 2011) Forthcoming We have included the expected new Republic of Southern Sudan in the count.

5.2.1 CONSTITUTIONAL INTEGRATION FRAMEWORK

The 1994 Constitution of South Africa establishes an extensive Bill of Rights. Two aspects of the constitutional provisions are relevant to the current analysis on integration of environmental and development considerations in decision making. The first aspect concerns the fundamental rights to socio-economic development, and the right to a clean and healthy environment. The second aspect concerns the framework for cooperative institutional governance.

5.2.1.1 Basic rights to a clean environmental, and development

The Constitution of South Africa has adopted the human rights trend we demonstrated earlier, by enacting environmental protection as a fundamental right, to match the legal status of the right to development. It guarantees everyone the right to an environment that is not harmful to their health or well-being.¹¹¹ The constitution also guarantees everyone the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures. These measures, when taken, would aim to prevent pollution and ecological degradation, and promote conservation. The measures would also secure ecologically sustainable development, and the use of natural resources while promoting justifiable economic and social development. This Constitution also provides for certain socio-economic guarantees as basic rights. Section 26 establishes the right to have access to sufficient food and water; health care and social security.

¹¹¹ –Constitution of South Africa,” *supra* note 13, Section 24.

5.2.1.2 Basic framework for cooperative governance

The South African constitution also makes provision regarding cooperative governance. Section 40 specifies a broad framework to be followed by all spheres of government and organs of state in enhancing cooperation. Cooperative governance is an important legal tool for integrating environmental and development considerations at the policy, planning and management levels of government. In this sense, the Constitution directs that organs of state will provide effective and coherent government; respect separation of functions while cooperating with each other in mutual trust; assist and support each other. These organs are also required to coordinate their actions and legislations, and to consult with each other on matters of common interest. The Constitution thereafter directs that statutory law will provide further directions on implementation of cooperative government. This constitutional framework has laid the normative foundations for the cooperative environmental governance structure that manifests vertical and horizontal institutional integration in the framework environmental law examined next.

5.2.2 THE SOUTH AFRICAN FRAMEWORK ENVIRONMENTAL LAW

The 1998 *National Environment Management Act (NEMA)* as variously amended,¹¹² was enacted to give effect to the provisions of the Constitution and provide overarching principles and provisions on environmental management. We examine its provisions by looking at the integration of the human right to development, with a right to a healthy

¹¹² –NEMA, South Africa,” *supra* note 57.

environment. We then highlight provisions on integration of decision making at the institutional level.

5.2.2.1 Integrating the right to development, and environmental health

In its preamble, the South African NEMA law revisits the fundamental environmental right in the constitution, noting in part that ‘everyone has the right to have the environment protected for the benefit of present and future generations.’ Section 2 set outs the national environmental management principles, several of which are relevant to the current discussion. First the NEMA law highlights the importance of meeting the needs of people, noting that ‘environmental management must place people and their needs at the forefront of its concern, and serve their physical, physiological, developmental, cultural and social interests equitably.’¹¹³ These principles resonate with Principle 1 of the Rio Declaration, which places human beings at the centre of concerns for sustainable development, entitled to a healthy and productive life in harmony with nature. The NEMA law is different in two aspects. First, while it places the needs of people at the forefront, this is done within a framework where environmental protection has acquired the status of an explicit constitutional right. Secondly, the NEMA law introduces culture, as one of the human interests that should concern environmental management.

Additionally, the NEMA law requires that development ‘must be socially, environmentally and economically sustainable.’¹¹⁴ The principles also highlight that sustainable development requires consideration of all relevant factors. These factors include minimizing disturbance

¹¹³ *Ibid*, Section 2(2).

¹¹⁴ *Ibid*, Section 2(3).

or loss of biodiversity; and minimizing or avoiding pollution and degradation. The principles set an important concept when they state that ‘responsibility for environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.’ This serves to set a basis on responsibility for liability for any damage resulting from a project. Further, the principles expressly require that the socio-economic and environmental impacts of activities should be considered and decisions appropriately made in light of the assessment.

5.2.2.2 Integration of decision making at institutional level

In its preamble the NEMA acknowledges the constitutional guarantees, stating in part that ‘sustainable development requires integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions.’ The preamble also recognizes that the environment, in South Africa, is a functional area of concurrent legislative competence, and urges cooperation, consultation, and mutual support in administration. There are several mechanisms for integrated decision making within the NEMA law such as environmental management plans; environmental implementation plans; environmental authorizations; and environmental cooperation management agreements. In this section, we focus on the environmental management; and implementation plans, as they manifest the basic structure of cooperative environmental governance. This in turn relates to integration of policies, planning and management for decision making by sectoral organs of state.

Cooperative environmental governance is set out in chapter 3 of the NEMA legislation. It makes extensive provisions regarding integration of environmental and socio-economic

considerations in two aspects. First it requires every national department (and province) exercising functions which may affect the environment to prepare an environmental implementation plan every four years. This category of departments includes environmental affairs, tourism, land affairs, agriculture, water affairs, forestry, transport, defence, and housing.¹¹⁵ Second, it requires every national department (and province) exercising functions involving the management of the environment to prepare an environmental management plan every four years. This category of departments includes environmental affairs, tourism, water affairs, forestry, minerals and energy, land affairs, and health.

It is notable that these sectoral functions include roles that require intensive land use activities that impact the environment extensively such as agriculture, water, or forestry. Agriculture, for instance, is classified as an activity likely to affect the environment while forestry and water are classified as activities likely to affect the environment but also involve management of the environment. The requirement that responsible departments should clearly set out how they will comply with the framework environmental law in decision making is therefore important. The environmental implementation plans, for instance, make provision for a department like agriculture to integrate their policies, plans, programmes or functions with environmental protection obligations. Therefore the implementation plan should demonstrate intended plan of compliance with legislative provisions, norms and principles¹¹⁶ set out in the framework environmental law¹¹⁷ and constitution.¹¹⁸ This implies

¹¹⁵ NEMA, –South Africa,” *supra* note 57, Schedule 1.

¹¹⁶ NEMA, –South Africa,” *supra* note 57, Section 13.

¹¹⁷ NEMA, –South Africa,” *supra* note 57, Section 2.

that sectoral policies, plans and activities that involve intensive and extensive land use, and are likely to affect the environment, such as forestry or agriculture will integrate environmental management with the sectoral socio-economic objectives. This integration, will in turn guide decision making processes, to ensure that socio-economic considerations are carried out within the limits that sustain environmental health.

5.2.2.3 Analysis of implementation and impact of the legal rules on integrated decision making

The general implementation of the human rights based and institutional focused arrangements for integrating environmental and development considerations in decision making has generated some interesting debate in South Africa. Judicial decisions are, for instance, illustrative of the challenges that institutional decision making faces in giving effect to the rights to development, and the right to a healthy environment. In this section, we will highlight a few landmark South African judicial decisions that addressed the question of integration, and some academic opinions on the same issue.

South African scholar Michael Kidd notes that for some time after the constitutional and legislative provisions were put in place, judicial opportunity was lost when in his words, the courts ‘got it plainly wrong’.¹¹⁹ He points to the decision in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*¹²⁰ where the court for instance reasoned that the useful environmental management principles set out in section 2, NEMA, ‘applies to activities that will’ significantly affect the environment, rather than

¹¹⁸ Constitution of South Africa *supra* note 13, Section 146(2)(b)(i)

¹¹⁹ Kidd, Michael, ‘Greening the judiciary’ (2006 (3) PER/PELJ 72-118, at 73.

¹²⁰ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC).

those that *may* do so.⁶ This he notes is a critical difference, perhaps because even those activities that may affect the environment possess potential to significantly degrade the environment anyway.

Subsequent decisions have however played a major role in realigning interpretation of the law, and assisting the question of integration a great deal. This is evident in the 1999 decision, *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*.¹²¹ Here, it was held that the Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the *administrative processes* in our country.⁶ (Italics added)

The 2004 decision in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*¹²² is further illustrative. In its judgment, the court began by highlighting that the definition of 'environment' ...meant that the environment was a composite right, which included social, economic and cultural considerations in order to ultimately result in a balanced environment.¹²³ The court also indicated that the environmental right enshrined in the constitution was at par with other such basic rights, like freedom to trade or right to property and none should be considered in priority to the other. This, according to Claassen J, makes it abundantly clear⁶ that the consideration of socio-

¹²¹ *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719C – D.

¹²² *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

¹²³ *Ibid.*

economic factors is an integral part of the respondent's environmental responsibility. The responsibility in this matter was vested in the department of environmental and land affairs. This view reinforces the notion of 'vice-versa' integration by Dire Tladi, whereby environmental authorities should integrate socio-economic considerations, while non-environmental sectoral authorities should integrate environmental considerations into their policies and decisions.

The integration of environmental and socio-economic needs was further reinforced by Ngcobo J. in *Fuel Retailers Association of South Africa v. Director General Environment*.¹²⁴ The judge argued that whenever a development that may significantly impact the environment is planned, there will always be need to weigh considerations of development, with these considerations being underpinned by the right to socio-economic development.¹²⁵ The judge noted that these must be weighed against environmental considerations, which in turn are underpinned by the right to environmental protection. In essence therefore, Ngcobo J. was of the view that sustainable development does not require cessation of socio-economic development but seeks to regulate the manner in which socio-economic development takes place.¹²⁶

The decision in *Fuel retailers* related to integration of environmental and socio-economic considerations in issuing an environmental authorization for construction of a filling station.

¹²⁴ *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) [*Fuel Retailers*]

¹²⁵ *Ibid*, para 59.

¹²⁶ *Ibid*, 58.

Legal scholar Elmene Bray has however construed the dispute as illustrative of more than the environmental impact assessment process, but also shortcomings in the cooperative environmental governance structure.¹²⁷ She argues that the court rightly noted the importance of integrating socio-economic and environmental considerations to ensure a proper environmental assessment. However, Bray argues that this case is illustrative because the environmental authorizations process involves several departments of government. In her view, the concerned departments did not attempt to apply the principles of cooperative environmental governance, to prevent the matter from reaching the courts in the first place.

The judicial decisions and academic perspectives provide useful guidance on execution of legal rules on integration of decision making at institutional level. This integration is imperative because such policies and programmes facilitate giving effect and realization of the socio-economic and environmental rights guaranteed to citizens under the Constitution. However, questions remain about the effectiveness of these legal mechanisms in influencing the behaviour and decision making attitudes of regular land users, especially subsistence farmers. This category of decision makers have to make daily choices, seeking to achieve socio-economic needs, in terms of food and livelihood, and are technically required to adhere to the duty of environmental protection. The 2006 report on the state of the environment¹²⁸ in South Africa underscores the desperate link between environmental

¹²⁷ Bray, Elmene “Uncooperative governance fuelling unsustainable development” 2008 15 SAJELP, 20-21.

¹²⁸ Department of Environmental Affairs and Tourism, *South African Environment Outlook: A Report on the state of the environment – Executive summary and key findings* (Pretoria: Department of Environmental Affairs and Tourism, 2006), online: http://soer.deat.gov.za/dm_documents/Executive_summary_5hHwD.pdf

degradation and poverty, similar to the other African countries illustrated earlier. It states in part -

In general, the condition of the South African environment is deteriorating. Increasing pollution and declining air quality are harming people's health. Natural resources are being exploited in an unsustainable way, threatening the functioning of ecosystems. Water quality and the health of aquatic ecosystems are declining. Land degradation remains a serious problem. Up to 20 species of commercial and recreational marine fish are considered over-exploited and some have collapsed. At the same time, the basic needs of the current generation are not yet being adequately met, and unemployment and inequality are still extremely high. Poverty remains deeply entrenched, and is on the increase in some areas. With the majority of poorer South Africans directly dependent on natural resources to survive, we can ill afford to let the environment deteriorate. Poverty reinforces people's dependence on natural resources and makes them more vulnerable to environmental threats such as polluted water, degraded land, and indoor air pollution. Lack of access to basic needs such as clean water and safe sanitation strips people of their dignity. People living outside the formal sector, many rural dwellers, and the millions of people affected by HIV and AIDS are particularly vulnerable to a deteriorating environment. (Emphasis added)¹²⁹

This situation implies that in spite of existing legal structures to integrate decision making, the impact of implementing these measures at the level of individual people, to change personal attitudes and behaviour is not being felt. This further exacerbates the cyclic relation between unfulfilled socio-economic needs, and environmental degradation. This state of affairs calls for a review of legal and other mechanisms that facilitate integration of policies, and decision making to ensure they are effective at changing the personal and collective behaviours and attitudes of people. This may be helpful in breaking the cyclic relation between poverty and environmental degradation. Reviewing the effectiveness or suggesting any reforms to the South African legal mechanism is beyond the scope of this research. However, the South African system has lent comparative normative support and lessons for the next analysis about the Kenyan legal system.

¹²⁹ *Ibid* at 2.

In the next section, we highlight that the Kenyan constitution was recently enacted in 2010 with fairly comprehensive provisions to facilitate the conceptual human rights-based and institutional integration. However, we express apprehension that a similar outcome as with South Africa where mechanisms facilitating integration at individual level appear ineffective, may follow with Kenya. This may be avoided by enacting statute laws and policies to bring land use decisions by thousands of small scale land users within the scope of integrated decision making for sustainable development. This approach is extensively discussed through chapter 3 and 4, and subsequent recommendations made in chapter 5.

5.3 SUSTAINABILITY AND INTEGRATION IN THE KENYAN LEGAL SYSTEM

Kenya, the country of focus in this research, similar to some of its Sub-Saharan African peers has put in place legal measures relative to environmental management. The framework environmental law, *Environmental Management and Coordination Act (EMCA)* was enacted in 1999. This was a landmark achievement as Kenya's constitution at the time did not address environmental management at all. This was also a period of restrictive application of the common law rules on *locus standi* to prevent public interest suits intended to protect the environment. *EMCA* introduced a statutory right to a healthy environment, and an accompanying statutory *locus standi* for suits brought to enforce this right. A subsequent liberal interpretation of the right to life provisions of the constitution, highlighted earlier in this chapter,¹³⁰ allowed the judiciary to enforce environmental protection by correlating it

¹³⁰ See discussion in section 3.1.1.

with the right to life. This approach may now be eased as the new 2010 Constitution of Kenya has legislated fundamental rights relating to environmental protection, as well as socio-economic rights. The analysis in this section will examine the provisions, and experience with implementation of *EMCA*. We will thereafter highlight the constitutional provisions, flagging the new concept of ecologically sustainable development. This latter legal concept is further examined in the subsequent section.

5.3.1 THE 1999 FRAMEWORK ENVIRONMENTAL LAW

The expected role and intention of *EMCA* to enhance environmental protection was evident during parliamentary debate on the Bill in December 1999.¹³¹ This intention is equally evident in the preamble's objective that *EMCA* is enacted _to provide for the establishment of an appropriate legal and institutional framework for the management of the environment...'. We examine provisions of *EMCA* in two aspects. First we review conceptual integration of the right to development with environmental protection. Second, we examine the approach taken to integrate environment and development considerations with sectoral laws for institutional level policy and decision making purposes.

5.3.1.1 Integrating the right to a healthy environment with development

The enactment of *EMCA* became the first time in Kenyan legal history that a statutory environmental right was provided. It provides that _every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the

¹³¹ Charles Okidi, —Concept, Function and Structure of Environmental Law” in Charles Okidi, Patricia Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008) at 139.

environment.¹³² In order to facilitate judicial enforcement of this right, the *EMCA* also sought to resolve a long lasting controversy over *locus standi*, at common law, which restricted the suits that could be brought in the public interest.

Prior to enactment of *EMCA*, Kenyan courts had generally applied the strict and narrow common law interpretation of *locus standi* established in *Gouriet v. Union of Post Office Workers*, which reserved legal standing only to the Attorney General in public interest matters.¹³³ In Kenya, this view was most notably reinforced in *Wangari Maathai v Kenya Time Media Trust*¹³⁴ in 1989, where the plaintiff sought a temporary injunction restraining the defendant from constructing a proposed 60-story Kenya Times Media Trust complex inside the recreational *Uhuru* Park in downtown Nairobi. The plaintiff was the co-ordinator of the Greenbelt movement but brought the suit on her own behalf. In dismissing the suit, Dugdale J., adopted the reasoning in *Gouriet* and ruled that ‘only the Attorney General can sue on behalf of the public’.¹³⁵ The judge also stated that ‘the personal views of the plaintiff are immaterial...the plaintiff having no right of action against the defendant company and hence no *locus standi*’.¹³⁶

¹³² Section 3(1).

¹³³ *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. Lord Wilberforce ruled that in public interest matters, where ‘there is no interference with a private right and no personal damage’, ‘... only the Attorney-General can apply to the civil courts for injunctive relief against threatened breaches of the law.’

¹³⁴ HCCC No. 5403 of 1989, reprinted in UNEP, *Compendium of Judicial Decisions on Matters Related to Environment, National Decisions* vol. 1, (United Nations Environment Programme) (1998), pp. 15–18. See further discussion in Kibugi, Robert, ‘Enhanced Access to Environmental Justice in Kenya: Assessing the Role of Judicial Institutions’ in Jamie Benidickson, Antonio Herman Benjamin, Ben Boer and Karen Morrow (eds) *A Legal Critique of Ecologically Sustainable Development* (Edward Elgar, 2011).

¹³⁵ *Ibid.*, at 17.

¹³⁶ *Ibid.*

In order to overcome this legal hurdle set by the judiciary, *EMCA* provides that ‘if a person alleges that the entitlement (to a healthy environment) ... has been, is being or is likely to be contravened in relation to him, ... that person may apply to the High Court for redress.’¹³⁷ This right is enforceable notwithstanding a plaintiff’s inability to show ‘that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury.’¹³⁸ (Emphasis added) The High Court, in enforcing this right, ‘may make such orders, issue such writs or give such directions’ to stop the action, offer compensation or give instructions orders to public officers. This last aspect, relating to orders to public officers served a useful role to remove restrictions, imposed by the *Government Proceedings Act*,¹³⁹ which prohibits issuance of injunctive relief against organs of the state. The *EMCA* provisions imply that an injunction may now be issued to the government or its officers to protect the environment.

Since the *EMCA* has been in force from 2000, the Kenyan courts have had occasion to enforce the *locus standi*, and to raise the significance of the environmental right. We analyse two judicial decisions that were briefly highlighted earlier,¹⁴⁰ for purposes of this discussion: *Peter K. Waweru v Republic*,¹⁴¹ and *Charles Lekuyen Nabori & 9 Others vs. Attorney General & 3 Others*.¹⁴²

¹³⁷ Section 3(3).

¹³⁸ Section 3(4).

¹³⁹ *Government Proceedings Act*, Cap 40 of the Laws of Kenya section 16.

¹⁴⁰ See section 3.1.1 of this Chapter.

¹⁴¹ *Peter K. Waweru v Republic* High Court Miscellaneous Civil Application No, 118 of 2000, reported in [2006]eKLR www.kenyalaw.org

¹⁴² *Charles Lekuyen Nabori & 9 Others vs. Attorney General & 3 Others* [2008]eKLR www.kenyalaw.org

Peter K. Waweru came to the High Court as a judicial review petition to quash criminal prosecution for violating public health legislation by disposing raw sewerage into a river. The court quashed the criminal prosecution on procedural faults. The court went further to address the sustainable development challenges posed by the disposal of raw sewerage into a river. The judges argued that the high prevalence of environmental degradation in Kenya gave that case major significance, for the court, to determine how the government addressed waste disposal relative to environmental quality of river systems. While the constitution at the time did not provide for any environmental rights or obligations, the court argued that fully realizing the fundamental right to life required a healthy environment, and these two rights were inseparable.

In reaching this decision, the judges noted that they cannot therefore escape from touching on the law of sustainable development although counsel had chosen not to discuss it.¹⁴³ Evidence was called that the public authorities had not provided the petitioners with means for sewer disposal. In its decision, the court found that the government and concerned public agencies had failed to sufficiently integrate environmental and developmental considerations, which was evident in their failure to provide sewer facilities thereby exposing the river ecosystem, and public health to harmful effects. The court then issued orders of mandamus to several government departments, including the concerned local authority and the water ministry, with instructions to take remedial measures by providing sewer disposal facilities.

¹⁴³ *Ibid*, at 12-13.

The more recent 2008 *Charles Lekuyen* decision was a matter that involved an invasive noxious weed known as *proposis juliflora*. The applicants claimed that the uncontrollable spread of the weed was a violation of their right to a healthy environment. The government of Kenya had introduced the weed in a programme intended to enhance vegetation and biodiversity in the arid parts of Baringo, in Kenya. The *proposis* thereafter became invasive, causing harm to the health of local community and their livestock through dangerous thorns. It also inhibited socio-economic activities like agriculture by extensively growing beyond its intended geographical scope. The applicants secured orders directing the government to put in place measures to remove the harmful weed. Adopting the *Waweru* rationale, the majority bench found the weed violated the fundamental right to life, by denying the applicants a clean and habitable environment.

These two, *Peter K. Waweru* and *Charles Lekuyen* are progressive decisions rendered by the judiciary in a bid to integrate and balance human economic and health interests, with environmental quality. The courts found it necessary, in absence of a constitutional environmental right, to interpret the right to life as being coterminous to a right to a healthy environment. This perhaps can be related to the original dilemma, traceable to the Rio Declaration concept of sustainable development,¹⁴⁴ with development as a right, and no similar treatment of environmental protection. The position taken by the Kenyan judiciary in this respect has helped raise environmental protection to the status of a basic right, at which point policy and decision making ought to consider it at par with other socio-economic rights.

¹⁴⁴ See the analysis in section 2 of this chapter.

It is however notable that the *Waweru* and *Charles Lekuyen* litigations, representative of many others,¹⁴⁵ arise out of environmental degradation occurring while *EMCA* has been in force. The ability of the legal provisions of *EMCA* to integrate human socio-economic activities with environmental protection is therefore brought into question. The earlier analysis of high prevalence of environmental degradation and poverty in Kenya¹⁴⁶ further reinforces this critical view, considering that *EMCA* has been in force for over a decade now.¹⁴⁷ A possible explanation can be derived from the ambiguous provisions of the duty to protect the environment, since, as earlier highlighted, the *EMCA* is silent on how to give effect to the provision. This is a significant shortcoming because the *EMCA* duty manifests some form of horizontal integration, and the silence on how sectoral law or institutional policies can give the duty effect undermines meaningful efforts to vertically integrate with the *EMCA*.

5.3.1.2 Integrating policies, planning and decision making at institutional level

The *EMCA* plays a role in coordination and integration of sectoral institutions for environmental management. The *EMCA* preamble expresses recognition that ‘improved legal and administrative co-ordination of the diverse sectoral initiatives is necessary in order to improve the national capacity for the management of the environment.’ Section 148 further supports this view in its provision that any ‘... written law, in force immediately before the coming into force of [*EMCA*], relating to the management of the environment

¹⁴⁵ A comprehensive list is available on the ‘Environment and Land Law Reports’ database, online: <http://www.kenyalaw.org/environment/content/>

¹⁴⁶ See, section 4.2 of the chapter.

¹⁴⁷ The *EMCA* entered into force on 14 January 2000.

shall have effect subject to modifications as may be necessary to give effect to [EMCA], and where the provisions of any such law conflict with any provisions of [EMCA], the provisions of [EMCA] shall prevail.’ These provisions suggest a specific role whereby the EMCA spells out the legal norms, through its provisions, which in turn facilitate integration of sectoral institutional policy and decision making processes to guide environmental management in Kenya. As explained earlier in the chapter, integration is typically evident both as horizontal, and vertical integration. We examine the role of EMCA in this context, especially whether its provisions concur with the concept of providing the legal norms that facilitate sectoral institutions to undertake integration whether they engage in core environmental management functions or not, for effective ‘vice-versa’ integration.

i). Horizontal integration of policy, planning and decision making

Horizontal integration is evident in two forms, from the EMCA provisions:

a) NEMA and Sectoral Lead agencies

The EMCA establishes the National Environment Management Authority (NEMA) as the overarching agency to implement the provisions of this law.¹⁴⁸ The framework law also introduces the concept of classifying sectoral institutions with environmental functions as ‘lead agencies.’ A lead agency in legal terms refers to ‘any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions

¹⁴⁸ Section 7.

of control or management or any element of the environment or natural resources.¹⁴⁹ This definition of lead agency basically encompasses every sectoral institution that has some legal basis or authority to control or manage any element of the environment or natural resources. Arguably, while the technical definition creates a role for sectoral institutions and policies that manage some element of the environment, a similar role is missing for those sectoral institutions undertaking non-environmental objectives, but which generally have or may impact the environment. Such a distinctive classification is set out by South Africa's NEMA legislation which creates obligations for 'lead agencies' that manage elements of the environment, and those whose core functions may affect or impact the environment.¹⁵⁰

Nonetheless, NEMA is authorized to coordinate the environmental management functions of lead agencies.¹⁵¹ To perform this role, NEMA is therefore empowered by section 9(2) of *EMCA* to 'promote' the 'integration of environmental considerations into development plans, policies and programmes...' for improvement of the quality of human life in Kenya. The use of the term 'promote' rather than the mandatory term 'require' by the framework environmental law further raises questions on the strength, nature and ability of the legal framework to facilitate integration of environmental and development considerations at policy, planning and decision making level by institutions. It appears that NEMA is given rather wide powers to promote integration across a broad diversity of sectoral lead agencies,

¹⁴⁹ See *EMCA* at section 2 – interpretations section.

¹⁵⁰ See section 4.2.2 of this chapter.

¹⁵¹ Section 9(2).

as opposed to conferring an obligation on the lead agencies to integrate environmental management principles and rules from *EMCA* and periodically report on their compliance.

EMCA is further illustrative of the hierarchical structure whereby the law confers superior authority on an institution, rather than setting out superior legal norms to be followed by all institutions. Section 12 of *EMCA* authorizes NEMA to issue instructions to any lead agency to perform a function which that lead agency is required by law to perform, but in NEMA's view, the lead agency has not performed satisfactorily. In that case, if the lead agency does not observe the directive, NEMA can proceed to do the task and demand compensation later. A recent example, in 2010, demonstrates partial application of this power whereby NEMA issued such instructions to the Kenya Forest Service to secure state forests, stop further degradation and illegal human activities.¹⁵² The instructions resulted in a decision by the Kenya Forest Service to abruptly discontinue grazing user rights which local communities had regularly paid for and relied on for livelihood.¹⁵³ The discontinuation was done without notice. We examine this issue further in chapter 4.¹⁵⁴

b) The national environmental action plan (NEAP)

The issue of horizontal integration may also be examined through the lens of National Environmental Action Plan (NEAP).¹⁵⁵ The NEAP is a periodic environmental policy

¹⁵² NEMA advises KFS to conserve government forests, see, online:

http://www.nema.go.ke/index.php?option=com_content&task=view&id=213&Itemid=37

¹⁵³ See decision by National Environment Tribunal in *National Alliance of Community Forest Associations (NACOFA) v. NEMA & Kenya Forest Service* (Tribunal Appeal No. NET 62 of 2010)

¹⁵⁴ See further discussion in Chapter 4, section 5.2.4.2.

¹⁵⁵ *EMCA*, Kenya, *supra* note 44, section 37-38.

statement which, under statutory authority, is binding on all departments of government and lead agencies once it has been adopted by parliament.¹⁵⁶ This environmental policy statement is prepared every five years by a statutory committee. This committee, perhaps in an effort to integrate policy concerns from most sectoral areas, comprises representatives from sectoral lead agencies, ministries, business, and community. The government representatives are in two categories. The first category, listed in the First Schedule to *EMCA*, includes permanent secretaries of key economic ministries or ministries whose activities impact the environment such as agriculture, environment, fisheries, finance, economic planning, energy, education, local government and law enforcement, and water resources.¹⁵⁷ The second category, listed in the Third Schedule, includes representatives from the same ministries. This is perhaps intended to give the committee high level government participation, and also include specialized officers. The Third Schedule also lists several publicly funded universities and research institutions whose representatives are members of this committee.¹⁵⁸

The NEAP is required by law to address several issues; we highlight five that are pertinent to the instant discussion.¹⁵⁹ The policy should contain an analysis of the natural resources of

¹⁵⁶ *Ibid* Section 38(1).

¹⁵⁷ The full first schedule includes Agriculture; Economic Planning and Development; Education; Energy; Environment; Finance; Fisheries; Foreign Affairs; Health; Industry; Law or Law Enforcement; Local Government; Natural Resources; Public Administration; Public Works; Research and Technology; Tourism; Water Resources.

¹⁵⁸ See, “EMCA, Kenya,” *supra* note 44 - Third schedule.

¹⁵⁹ EMCA, Section 38. The NEAP should also contain an analytical profile of the various uses and value of the natural resources incorporating considerations of intragenerational equity; set out operational guidelines for the planning and management of the environment and natural resources; identify actual or likely problems as may affect the natural resources and the broader environment context in which they exist; identify and appraise trends in the development of urban and rural settlements, their impacts on the environment, and

Kenya with an indication as to any pattern of change in their distribution and quantity over time. It should also recommend appropriate legal and fiscal incentives that may be used to encourage the business community to incorporate environmental requirements into their planning and operational processes. The NEAP should also recommend methods for building national awareness through environmental education on the importance of sustainable use of the environment and natural resources for national development. It should also identify and recommend policy and legislative approaches for preventing, controlling or mitigating specific as well as general adverse impacts on the environment. The policy should further propose guidelines for the integration of standards of environmental protection into development planning and management.

The legal provisions setting up the NEAP process and the content certainly envisage the policy statement providing guidelines for a variety of issues pertinent to environmental management. It is noteworthy that these *EMCA* provisions do not refer to the goals of sustainable development directly. It is also notable that the concept of integration, which is central to achieving sustainable development, is not the principal objective, but just one of the intended objects of the NEAP. Section 38(1) stipulates that once adopted by parliament, the NEAP is binding on all government departments. This is a technical requirement that shows the NEAP plays a role in horizontal integration. Beyond this mere provision that the NEAP is binding, there is no further legal requirement or specific instruction for sectoral lead agencies to develop strategies to implement and integrate the national environment

strategies for the amelioration of their negative impacts; and prioritise areas of environmental research and outline methods of using such research findings.

action plan (NEAP) provisions in their sectoral policies, activities or decision making. However the process of preparing the NEAP, since the statutory committee comprises various sectoral representatives, implies there is vertical integration in the sense of inter-departmental consultations.

ii). Vertical integration under the framework environmental law

We examine vertical integration under the *EMCA* law in two parts. The first part concerns an institutional structure of environment committees set by *EMCA* based on the national administrative system. The second part highlights the role of the environmental impact assessment process in integrating *EMCA* provisions into development activities.

a) Environment Committees

Section 29 provides for provincial and district environmental committees. The members of these committees are drawn from representatives of government ministries listed in the first schedule to the *EMCA*.¹⁶⁰ Other members are drawn from the local community, business community, and civil society at provincial and district level respectively. The committees are chaired by the provincial commissioner or district commissioner in case of provincial and district environmental committees respectively.¹⁶¹ The law currently states that these committees are responsible for the proper management of the environment within the province or district in respect of which they are appointed.‘ They may also perform other

¹⁶⁰ See the full list, *supra* note 157.

¹⁶¹ The administrative system of government in Kenya has been altered by the 2010 Constitution, which has replaced the current 8 Provinces with 47 Counties exercising devolved authority.

functions assigned to them by *EMCA* law or periodically by the Minister for environment. In this sense, the provincial and district environment committees are responsible to prepare the provincial and district environmental action plans for their respective areas of jurisdiction.¹⁶² The impact of the roles played by these committees on integration of policy and decisions with respect to agriculture and community forestry is further discussed in chapters 3 and 4 of this research.¹⁶³

b) The environmental impact assessment (EIA) process

Under provisions of the *EMCA*, the NEMA has a statutory mandate¹⁶⁴ to evaluate environmental impact assessment (EIA) study reports and issue licences for development projects that require prior impact assessment.¹⁶⁵ This function manifests the horizontal integration role of *EMCA*, which prescribes the requirements for impact assessment, including those land use or development activities that require mandatory EIA study. NEMA is the executing agency for the EIA process. Under authority from *EMCA*, the NEMA has published the *Environment (Impact assessment) Regulations*,¹⁶⁶ and licences professionals certified to undertake EIA studies for project proponents.¹⁶⁷ NEMA also receives EIA applications and evaluates the substance of the study reports submitted for proposed public

¹⁶² *EMCA*, Kenya, *supra* note 44, section 39-40.

¹⁶³ See: section 6.2.2, chapter 3 & section 6.2.4, chapter 4.

¹⁶⁴ *EMCA*, Kenya, *supra* note 44, section 58-60.

¹⁶⁵ These projects are listed in the Second Schedule to *EMCA*.

¹⁶⁶ The Environmental (impact assessment and audit) Regulations, 2003 [Impact assessment regulations]

¹⁶⁷ *Ibid*, Regulation 14.

and private economic activities.¹⁶⁸ This is a manifestation of vertical integration because the EIA process provides a legally mandated mechanism to ensure that development activities, which fall within the legal scope for mandatory environmental impact assessment, undergo scientific evaluation to ensure they will minimize or mitigate negative impacts on the environment.

In specific terms, the *EMCA* requires mandatory environmental impact assessment before commencement of projects specified in the Second Schedule. The basic procedure requires that a project proponent must submit a project report to NEMA. With the project report, NEMA may approve a project, but if NEMA is convinced the proposed project will likely have significant impact on the environment, the proponent must undertake complete EIA.¹⁶⁹ Projects in the Second Schedule that require mandatory EIA include major land use changes, mining, road construction, or manufacturing. It is however notable that regular small scale land use choices and decisions like subsistence agriculture are outside the scope of an EIA exercise.

Regulation 18 of *Environment (Impact assessment) Regulations*¹⁷⁰ specifies that an EIA study must consider measures to ensure sustainable development. These include available technology; alternatives; potentially affected environment; environmental and socio-cultural effects. The EIA report should frame an environmental management plan to eliminate or

¹⁶⁸ EMCA, Kenya, *supra* note 44, section 58. See also, Impact assessment regulations, *supra* note 166, Part II.

¹⁶⁹ EMCA, Kenya, *supra* note 44, section 58(2).

¹⁷⁰ Impact assessment regulations, *supra* note 166.

mitigate adverse environmental impact, address timeframe, cost and identify who bears overall responsibility to implement the plan.

The EIA process requires vertical collaboration between NEMA and sectoral lead agencies. The *EMCA* indicates that NEMA *may* submit an EIA report to any pertinent sectoral lead agencies for technical comments.¹⁷¹ While the law clearly requires lead agencies to respond to the request within thirty days, the law is not sufficiently clear whether it is mandatory for NEMA to consult with the lead agencies.

This lack of legal clarity has resulted in serious controversy that has dented the legal and scientific integrity of the EIA process in Kenya. This controversy resulted in a government inspectorate and management audit of NEMA. A February 2010 report by Efficiency Monitoring Unit in the Office of Prime Minister¹⁷² resulted in termination of the NEMA Director-General. The report points out increased public outcry and loss of confidence in integrity of the EIA and audit reports.¹⁷³ Several EIA reports are highlighted as illustrative. The *‘Cobra Corner-Mara Triangle’*¹⁷⁴ was an EIA application for a tourism facility in the fragile Maasai Mara national reserve, submitted during an official moratorium on any construction pending a management plan. While the NEMA technical department denied approval, the Director-General overruled them and issued full license in one day. He did not request comments from lead agencies, and bypassed public participation. It was an illegal

¹⁷¹ Impact assessment regulations, *supra* note 166, regulation 20.

¹⁷² Republic of Kenya *Management audit report for the national environment management authority* (Nairobi: Office of the Prime Minister - Efficiency Monitoring Unit, 2010) [Kenya, –NEMA management audit”]

¹⁷³ Kenya, –NEMA management audit,” *supra* note 172 at 41.

¹⁷⁴ Kenya, –NEMA management audit,” *supra* note 172 at 43.

authorization. A similar situation arose regarding “The Silver Crest Limited, Mombasa”¹⁷⁵ a project intended inside a marine national park. Kenya Wildlife Service (KWS), the lead agency was not asked for technical comments. The project caused damage to marine resources, and was stopped by KWS. This was another EIA licence issued in excess of any legal authority envisaged by *EMCA*.

5.3.2 THE 2010 CONSTITUTION OF KENYA

In contrast with the South African legal experience, Kenya’s constitutional integration of environment and development has come into place after the framework environmental law. This constitution came into force on 27 August 2010 after being adopted by 67% of voters at a referendum held on 4 August 2010.¹⁷⁶ In its preamble, the constitution proclaims that the people of Kenya are ‘respectful’ of the environment as ‘our heritage’ and are determined to sustain it (environment) for the benefit of future generations. This constitution employs the human rights approach, by providing guarantees for socio-economic rights, and an enforceable fundamental right to a healthy environment. It specifies two sets of obligations to give effect to the environmental right in order to ensure ecologically sustainable development. The first set spells out obligations that the Kenyan state must implement. The second set spells out a duty for people, cooperating with other people and the state, to protect and conserve the environment and ensure ecologically sustainable development. The second

¹⁷⁵ Kenya, “NEMA management audit,” *supra* note 172 at 43.

¹⁷⁶ The final results of the referendum are published in *Kenya Gazette notice* No. 10019, Vol. CXII-No. 84 of August 23rd, 2010. The Proposed New Constitution was ratified by over 67% of the total valid votes cast and supported by at least 25% of the votes cast in all the eight Provinces in Kenya. See, online: <http://www.iiec.or.ke/final-referendum-results-are-gazetted>

set of obligations is especially important as a potential mechanism of transforming individual behaviour towards integrated decision making for sustainability.

This constitution is relatively new, still being implemented, with no judicial examination yet (at the time of writing) of the environment and land provisions. In this section, we therefore only highlight the provisions and point to their potential role toward facilitating integration of environmental and development considerations in policies and decision making.

5.3.2.1 Constitutional rights to a healthy environment, and to development

Article 42 provides as that:

- Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
 - (b) to have obligations relating to the environment fulfilled under Article 70.

These provisions are contained in the Bill of Rights of the constitution. A reading of this article 42 discloses an express right for every person to a clean and healthy environment. The substance of this right is extended to intragenerational and intergenerational equity. This protection for both present and future generations is to be realized through ‘legislative and other measures’, especially those contemplated in article 69. The contents of these obligations in article 69, which are in two parts, are highlighted shortly. A legal interpretation of the phrase ‘legislative and other measures,’ is also analysed shortly.

These provisions reinforce the previously binding judicial interpretation in *Waweru* and *Charles Lekuyen* whereby the right to life was held to be coterminous with a right to a

healthy environment. Article 70, specified as one of the mechanisms to realize the environmental right, provides that this basic right is actionable and enforceable through a petition for enforcement of fundamental rights to the High Court. The 1999 *EMCA* was hitherto the only legal source for this right and still provides an alternative (and concurrent) legal avenue access to the High Court by ordinary suit. It is noteworthy that currently both *EMCA*, and the 2010 Constitution, now embody a liberalized *locus standi* to enforce the environmental right in court without need to show personal loss or injury.

Article 43 embodies the gist of socio-economic rights in the Constitution, and provides in part:

(1) Every person has the right—

.....

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

We have only highlighted those socio-economic rights that are closely affiliated to land use activities, and therefore are negatively impacted by high prevalence of land degradation.

Another such right includes the right to acquire, own and use property in land.¹⁷⁷

5.3.2.2 The Obligations set out in article 69

The obligations set out in article 69 as the specific ‘_legislative and other measures’ to give effect to the environmental right are in two parts. The first part specifies the obligations on the Kenyan state. The second part specifies the obligations on persons to protect and conserve the environment.

i). Obligations on the Kenyan state

¹⁷⁷ Article 40.

Article 69(1) requires the Kenyan state to effect certain obligations in respect of the environment. These obligations, highlighted here *in extenso*, are to:

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.

These obligations are broad and extensive, and reviewing each of them individually at this point is beyond the scope of this conceptual chapter. Nonetheless, it is helpful to the current analysis to point out several aspects of these obligations. The state is required to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of benefits.⁶ This suggests the constitution is anticipating that while people will continue to exploit, utilize, and manage natural resources, the ordinary standard of conduct for those activities should be sustainable.⁶ Drawn from [ecologically] sustainable development, there is an implied goal therefore that fulfilling this obligation must necessarily involve integration.

Equitable sharing of benefits infers that attention should be paid to intergenerational equity. The state is also required to work to achieve and maintain a tree cover of at least ten per

cent of the land area of Kenya,¹⁷⁸ which is imperative to either agricultural or forest land use as the country's tree cover stands at 1.7 percent.¹⁷⁸

ii). Obligations on the people

In agreeing with the view by Brandl and Bungert that constitutions usually determine a set of values or model character that inspires or influences how citizens behave, article 69(2) of the Constitution provides that:

Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹⁷⁹ (Emphasis added)

A textual reading of this provision highlights several issues. The first is that, in mandatory terms, the constitution has created a duty on every person. A person is defined by the Constitution to include _include a company, association or other body of persons whether incorporated or unincorporated.¹⁷⁹ The second is that under this duty, every person is required to cooperate with organs of state and with other persons. The third issue concerns the intended object of the duty, and the cooperation. The first intended object is to protect and conserve the environment. This object perhaps coincides with the duty spelt out by section 3(1) of the *EMCA* legislation whereby every person has a duty to protect and enhance the environment. The second intended object, mutually reinforcing to the first, is to ensure both ecologically sustainable development, and the use of natural resources.

¹⁷⁸ Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forests Complex* (Nairobi: Office of the Prime Minister, 2009) at 15.

¹⁷⁹ Article 260.

5.3.2.3 Legal interpretations of the phrase ‘legislative and other measures’

According to article 42 of the Constitution, the right to a clean environment is to be given effect through ‘legislative and other measures.’ The substantive content of these measures, reflected through article 69 obligations, has already been highlighted. In this section, we are concerned with the legal interpretation of this phrase and what it contends to Kenyan governmental actions that should be taken to ensure that people behave constitutionally to protect, and conserve the environment while ensuring ecologically sustainable development. Judicial interpretations provide some normative guidance.

In the *Ogoniland case* while the African Commission did not explicitly allude to the law, it referred to ‘reasonable and other measures’ when making a determination over application of the right to a satisfactory environment favourable to human development, under the *African charter*.¹⁸⁰ The Commission ruled that this right ‘requires a state to take reasonable and other measures’ to prevent pollution and ecological degradation, to promote conservation, and secure ecologically sustainable development and use of natural resources.’¹⁸¹ This interpretation by the African Commission manifests an approach similar to that of the *Constitution of South Africa*. We saw earlier¹⁸² that section 24 guarantees the right to have the environment protected for present and future generations through ‘reasonable legislative and other measures...’ The same phrase is applied by the South African basic law with respect to socio-economic rights, but with another variant. Section 26, which guarantees the

¹⁸⁰ ‘Ogoniland case’ *supra* note 35 at 336 para 52.

¹⁸¹ *Ibid.*

¹⁸² See section 5.2.1 of this chapter.

basic right to housing, requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of...‘ the rights.

To the extent that all these variants implicitly refer to ...legislative and other measures...,‘ the question on the legal meaning came up for interpretation by the Constitutional Court of South Africa in *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁸³. This was a landmark decision that involved a question over the pace of measures taken to realize the socio-economic right to housing. In this judgment, the court determined that where such phrase is applied, enacting legislation and establishing a programme to fulfil the rights in question is a necessary, but just a first step. The court directed that after enactment of legislation and putting a required programme in place, what remains is the implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it.‘ The court further stated that such a programme must be implemented with due regard to the urgency of the situations it is intended to address.

The directive that implementation programmes are necessary beyond legislation and plans is instructive because some measures necessary to initiate the individual behaviour or attitude change necessary for integrated decisions making are beyond legal provisions. Equally instructive is the ruling that programmes must be implemented with regard to urgency of situations it is intended to resolve. With regard to the environmental right, the South African and Kenyan Constitutions take a common approach in legal phraseology. With regard to the environmental right, the Kenyan law refers to legislative and other means.‘ The South

¹⁸³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). This matter arose after the respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They brought an action to enforce the constitutional right to housing.

African law refers to ‘reasonable legislative and other means.’ On the other hand, with regard to socio-economic rights, the South African law refers to ‘reasonable legislative means, within its available resources’ or achieving ‘progressive realization’ with regard to the socio-economic right in question. ‘Progressive realization’ is equally restricted to implementation of social and economic rights under the new constitution of Kenya.¹⁸⁴ Even though socio-economic rights and needs are urgent, it is telling that the constitutions do not extend the ‘progressive realization’ philosophy to the environmental rights and measures.

This is perhaps pointing to the urgency required to deal with the significant environmental degradation, but also a possible endorsement that socio-economic activities in societies like Kenyan and South Africa are dominantly land based and require a healthy environment to be sustained. This view finds support in article 72 of the new Constitution of Kenya that ‘parliament shall enact legislation to give effect to the provisions of this part.’ (Emphasis added) This supports the view that the constitution intends the obligations and measures in article 69, for environmental management, to be implemented without delay. It is therefore arguable that the framers of the constitution considered environmental degradation to be a major challenge, and a threat to human survival, and therefore did not intend to restrict implementation of sustainable environmental management within the ‘progressive realization’ philosophy.

There is an additional commonality from the three interpretations set out above. In the *Ogoniland case* the African Commission introduces the idea of ‘ecologically sustainable

¹⁸⁴ See, in particular, the provision of article 20(5).

development.’ The same concept of ecologically sustainable development is one of the objects of environmental protection under the South African constitution, as well as an objective of the obligations set out to fulfil the environmental right under the Kenyan constitution.

5.3.3 ANALYSIS OF THE KENYAN APPROACH TO INTEGRATION

Having the environmental right together with several socio-economic rights in the constitution has some positive implications to integration of environmental and development concerns in policy and decision making. As noted by Claassen J., in the *BP Southern Africa case* and by Brandl and Bungert, this gives environmental protection the same status as other rights and requires that both environmental and development concerns be considered as relevant factors in policy and decision making. While it ensures significant legal attention is given to environmental quality, the urgently needed socio-economic development of people is not ignored, as the two issues are mutually reinforcing. Equally, it firms up the legal status and position of environmental protection in administrative policy-setting and decision making processes that typically do not consider environmental management as a core objective or function.

This constitutional position and the supportive judicial interpretation of similar provisions in the Constitution of South Africa are important to reinforce the statutory environmental right enacted through *EMCA*, and the accompanying *locus standi*. This legal standing, now also available through enforcement of constitutional basic rights embodies an important legal tool enabling judicial protection and enforcement of the right to a clean and healthy environment, to ensure that development activities do not undermine environmental health. It is reiterated

that section 3(1) of *EMCA*, while conferring the environmental right and legal standing, also states that every person also ...has the duty to safeguard and enhance the environment.‘ The concern arises with regard to the duty, as a stand-alone obligation, that every person resident in Kenya owes to the environment. It is significant, as noted previously, that *EMCA* law is silent on the legal or policy measures that should be taken to give effect to this duty to protect and enhance the environment. Conceivably, the process of environmental impact assessment plays a crucial role in enforcing the duty by supervising integration of environmental and development considerations in development projects that undergo the EIA evaluation. The concern however relates to land use choices and decisions made by the predominant number of small-scale land owners/users in Kenya, whose activities fall outside the scope of EIA. It is therefore helpful to read the *EMCA* duty together with the duty specified as an obligation under article 69(2) of the Constitution. The latter duty specifies a responsibility for all people to conserve and enhance the environment, and ensure ecologically sustainable development.

In addition, the Kenyan state has a constitutional obligation to implement an ordinary standard of conduct such that utilization, exploitation or management of natural resources is sustainable‘ This obligation potentially has a significant impact of forming a constitutional basis to require this standard of sustainable utilization, exploitation or management as the basic minimum requirement for sectoral policies or decision making. This is mainly because the *EMCA* does not anticipate cooperative governance in the legal sense evident from the South African or Namibian framework environmental laws. It is important to recall that cooperative environmental governance creates definitive tasks and objectives for sectoral

lead agencies whose activities impact the environment. In that sense, the lead agencies have to prepare environmental management plans demonstrating how they plan to integrate environmental considerations into their core sectoral policies, plans or decisions.

The state is also required by the constitution to provide for environmental impact assessment (EIA), audit and monitoring for the environment. Perhaps as implicit endorsement by the constitution of the view that some land use activities fall outside the threshold of EIA guidance, the state is required to protect and enhance indigenous knowledge in biodiversity and genetic resources of communities. These two obligations demonstrate scientific assessment of environmental practices through EIA given the same legal treatment with indigenous and local knowledge on biodiversity and genetic resources. This is important because the indigenous and local knowledge represents the breadth of values and culture that influence attitudes and behaviour of people in making decisions over use and management of environmental resources. Scientific assessment through EIA and other measures represent the evolving knowledge of ecological systems influenced by climatic and other biological changes, which are necessary to reinforce the indigenous and local knowledge. These obligations and their treatment by the law are significant, because they are to be given effect by the State taking legislative and other measures.

The import of these ‘legislative and other measures’ generally and with respect to EIA, scientific process and traditional knowledge, is that they provide a legal, and a non-legal implementation starting point for mechanisms that can facilitate integration of this knowledge and values into sectoral policies. Through such measures, the mechanisms trickle

down to facilitate integration by individuals who make regular decisions and land use choices.

6 THE LEGAL CONCEPT OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT

Throughout this chapter, we have analysed the evolution of integration as a legal concept pertinent to realization of sustainable development. Some recollection of the foregoing analysis is important to provide perspective to the next steps in this chapter. We have examined the role of human rights, as the basic entitlements of people to development and to a healthy environment as an important catalyst of integration. This is however contingent on environmental protection assuming the status of a basic right, with an express or implied duty to protect and safeguard the environment. We have also examined and highlighted the significant utility of integration of environment and development considerations in policy and decision making by institutions. Both aspects of integration are useful in setting the legal rules, making policies and even decision making by institutions responsible for economic or environmental sectors. We also examined and discussed the role of the legal system, especially the basic or structural laws like constitutions. We highlighted arguments by scholars like Kelsen that a constitution determines the basic norms and values in a legal system. Brandl and Bungert further argued that in addition to offering highest level of environmental protection in a legal system, constitutions also determine the common values and model character which influences how citizens behave.

In the last section, we briefly highlighted that the Constitution of Kenya creates mandatory obligation for people, while cooperating with other people and the state, to protect and conserve the environment and ensure ecologically sustainable development. This obligation

or duty, on a textual reading, appears to show the constitution spelling out a 'model character' for people. This model character further extends to people a clear objective, which is to protect and conserve the environment and ensure ecologically sustainable development. This provision of the constitution is useful to this research because while we have identified conceptual basis for integration from a human rights and institutional perspective, a lacunae still remains over which conceptual approach can enable integration to directly apply to, and influence the personal or collective attitudes or behaviour of people.

In further recollection, section 4 of this chapter highlighted the scale and prevalence of land degradation with its cyclic link to poverty and food insecurity. In this context, we are referring to influencing the attitudes of people such as small-scale land users, in agriculture or forestry, dealing with poverty and who have to make land use choices regularly. By setting out the duty, the constitution is providing the basis for a set of values and a model character requiring people to take actions to protect and conserve the environment, and to ensure ecologically sustainable development. This is the first time in Kenya that there is an express constitutional basis for environmental management. It is also the first time there is a legal and constitutional basis for ecologically sustainable development, as the objective of a duty on people. This makes it necessary to analyse what underlies the idea of ecologically sustainable development, as the legal concept that people should work towards in order to behave constitutionally.

6.1 ECOLOGICALLY SUSTAINABLE DEVELOPMENT AS A LEGAL CONCEPT

In recapitulation, the root of the concept of ecologically sustainable development in the Kenyan legal system can be traced to the fundamental right to a clean and healthy environment. It originates from the article 69(2) obligation on every person to _...to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.‘ The constitution, beyond setting the concept out as an object, does not offer any insights or definitions on its meaning or parameters.

The concept of ecologically sustainable development is however not novel and is applied in various forms in some comparative jurisdictions. As highlighted several times in the foregoing sections, the Constitution of South Africa specifies ecologically sustainable development as one of the objectives of measures taken to attain the environmental right. It lists three objectives. The first is to prevent pollution and degradation. The second is to promote conservation. The third objective is to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

There is a direct relation between ecologically sustainable development and socio-economic development apparent from the South African formulation. The same relation is evident from formulations of the ecologically sustainable development in The *1999 Environment Protection and Biodiversity Conservation Act (EPBCA)* of Australia.¹⁸⁵ One of the objects of this statute is _to promote ecologically sustainable development through the conservation and

¹⁸⁵ *Environment Protection and Biodiversity Conservation Act, 1999.*

Online: http://www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/ [EPBCA Act]

ecologically sustainable use of natural resources.¹⁸⁶ The legislation then defines ecologically sustainable use as ‘use of the natural resources within their capacity to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations.’¹⁸⁷ Looking at the formulations in the Kenyan and South African constitutions, and the Australian biodiversity law, ecologically sustainable development is manifested as the balance resulting from integration of environmental protection with socio-economic considerations into policy making, planning and decision making. Implementation and realization of the concept will depend on how the underlying principles safeguard this ‘integration’ objective of the concept. We now therefore turn to the basic principles of ecologically sustainable development.

6.2 WHAT ARE THE BASIC PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT?

The principles of ecologically sustainable development can be identified from several legal sources. We will examine two legislative instruments from Australia. The 1999 Australian EPBCA Act, in addition to setting out ecologically sustainable development as an object, also sets out the basic guiding principles. Some of these principles are reinforced by the *Protection of Environmental Administration Act*¹⁸⁸ of New South Wales. Several of these principles are pertinent to this analysis:

¹⁸⁶ Section 3(1)(b).

¹⁸⁷ Sec 528.

¹⁸⁸ *Protection of Environmental Administration Act, 1991*.

Online: http://www.austlii.edu.au/au/legis/nsw/consol_act/poteaa1991485/ [Protection of Environment Act]

6.2.1 PRINCIPLE OF INTEGRATION

The EPBCA Act requires that ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.’¹⁸⁹ This principle is reinforced by the New South Wales legislation which specifies that ‘ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes.’ This central role of integration in ecologically sustainable development was affirmed by Preston J., in *Telestra Corporation Limited v Hornsby Shire Council*,¹⁹⁰ when he urged that the principle of integration ensures mutual respect and reciprocity between economic and environmental considerations. Justice Preston further pointed out that integration recognises the need to ensure not only that environmental considerations are integrated into economic and other development plans, programmes and projects but also that development needs are taken into account in applying environmental objectives. This *Telestra* decision not only affirmed that integration is really at the centre of ecologically sustainable development, but also highlighted the ‘vice-versa’ character of integration.

6.2.2 PRECAUTIONARY PRINCIPLE

The precautionary principle is outlined as another basic principle of ecologically sustainable development. The Australian EPBCA Act provides that ‘if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a

¹⁸⁹ Section 3A(a).

¹⁹⁰ *Telestra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10.

Online:

<http://www.lawlink.nsw.gov.au/lecjudgments/2006nswlec.nsf/00000000000000000000000000000000/dfd89ace6e00928bca25713800832056?opendocument>

reason for postponing measures to prevent environmental degradation.¹⁹¹ This formulation echoes the precautionary principle in the Rio Declaration.¹⁹² Preston J., in the *Telestra case* urges that the threat of serious or irreversible environmental damage; and the lack of scientific uncertainty are two necessary conditions to justify application of the precautionary principle. Section 6(2) of the New South Wales legislation further explains that in application of the principle, public and private decisions should be guided by careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and an assessment of the risk-weighted consequences of various options. With respect to land use decisions by private land owners/users that fall outside scope of environmental impact assessment, this reasoning is a helpful conceptual baseline to designing legislative and other measures to facilitate integration to balance socio-economic needs with environmental protection.

6.2.3 PRINCIPLE OF INTERGENERATIONAL EQUITY

The principle of intergenerational equity, relative to ecologically sustainable development, is expressed to mean that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.¹⁹³ The meaning and significance of intergenerational equity, and its import to ensuring development is ecologically sustainable has been variously debated. In *Oposa v.*

¹⁹¹ Section 3A(b).

¹⁹² —Rio Declaration on Environment and Development,” *supra* note 5, principle 15 which provides that In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

¹⁹³ EPBCA Act, *supra* note 185, section 3A(c); Protection of Environment Act, *supra* note 188, section 6(2)(b).

Factoran,¹⁹⁴ the Supreme Court of Philippines stated that every generation has a responsibility to the next and other unborn generations to preserve the ability for the full enjoyment of a balanced and healthful ecology. The same view is echoed by scholar Edith Brown Weiss, who argues that this concept implies an intragenerational aspect that current generations should provide members with equitable access to planetary legacy and, and then conserve the planet and its resources for future generations.¹⁹⁵

6.2.4 CONSERVATION AND ECOLOGICAL INTEGRITY

The EPBCA Act further includes the principle that “the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.”¹⁹⁶ The significance of this principle becomes apparent when it is read together with the principle of integration, and the precautionary principle. The placement of conservation and ecological integrity together implies that the health of the environment should be a fundamental consideration of decision making. This implies that when balancing socio-economic considerations and environmental considerations in decision making, especially where environmental degradation is a major concern, the decision should favour measures that primarily safeguard environmental health.

¹⁹⁴ *Oposa v. Factoran* G.R. No 101083, July 30 1993 (Philippines), reprinted in UNEP, *Compendium of Judicial Decisions in matters related to the environment: National Decisions (Vol 1)* (Nairobi: UNEP/UNDP/Dutch Government-Project on Environmental law and institutions in Africa, 1998) 22-36, at 29.

¹⁹⁵ Edith Brown Weiss, “In Fairness to Future Generations” (1990) 3 *Environment* 7, at 10.

¹⁹⁶ EPBCA Act, *supra* note 185, section 3A(c); Protection of Environment Act, *supra* note 186, section 6(2c).

6.3 ECOLOGICALLY SUSTAINABLE DEVELOPMENT AND INTEGRATION

The legal concept of ecologically sustainable development revolves around integration. The objectives and principles expressed by the Australian statutes reviewed above unequivocally place integration of environmental and development considerations in decision making as an important principle. It is useful to recall that the *EMCA* framework environmental law of Kenya is inadequate in internalizing integration as a key binding legal norm for environmental and other economic or political policy and decision making. This suggests that the Australian principles and especially the strength given to integration are conceptually persuasive to developing an implementation strategy of ecologically sustainable development in the Kenyan legal system.

Integration is imperative because the fulfilment of socio-economic needs is certainly very important for African countries like Kenya, in light of the high prevalence of poverty. Equally, the high level of environmental degradation and the established link between environmental degradation and poverty implies that environmental protection must be enhanced. The concept of ecologically sustainable development allows an emphasis on environmental conservation, and protection in these circumstances. This is notable from one of the principles that biodiversity conservation and ecological integrity should be fundamental considerations in decision making. This is an important distinction to note when framing a legal concept for application in circumstances where environmental degradation is extremely high.

With respect to the dual categorization of integration, ecologically sustainable development offers some important legal reinforcement:

6.3.1 INTEGRATION OF ENVIRONMENTAL AND SOCIO-ECONOMIC CONSIDERATIONS AT THE INSTITUTIONAL OR POLICY LEVEL

Further to the significant emphasis on integration as a basic principle of ecologically sustainable development, the role of sectoral institutions in policy and decision making is important. This is more so in the context of ‘vice-versa’ integration, which facilitates creation of vertical and horizontal integration structures to ensure ecologically sustainable development. It is notable that cooperative environmental governance is a principal feature of integration at the institutional policy or decision making level. These measures are evident as part of the South African NEMA law.¹⁹⁷ Similarly, the EPBCA Act of Australia aims to ‘promote a co-operative approach to the protection and management of the environment’ that involves various levels of government, communities, land-holders and indigenous people.¹⁹⁸

6.3.2 INTEGRATION OF SOCIO-ECONOMIC NEEDS AND ENVIRONMENTAL PROTECTION IN INDIVIDUAL DECISION MAKING

The Constitution of Kenya creates a duty for every person to undertake conservation to ensure ecologically sustainable development. All the principles highlighted above that underpin ecologically sustainable development play a role, but there is a difficulty on how to give them effect. In the context of Kenya, with the constitution mandating people with a duty to conserve the environment and ensure ecologically sustainable development, finding a mechanism to facilitate people in acting constitutionally is important. Small-scale land owners/users in Kenya have to make regular choices in pursuit of their socio-economic needs. The scale of degradation suggests a mechanism is necessary to guide people to tools

¹⁹⁷ See, chapter 3 of the Act.

¹⁹⁸ Section 3(1)(d).

that facilitate integration. The New South Wales legislation implicitly supports this view when it specifically brings ‘public and private decisions’ within the scope of the precautionary principle,¹⁹⁹ further magnifying the fact that private land use decisions require guidance in order to prevent environmental harm.

Typically, land use or other development activities that impact the environment are subjected to an environmental impact assessment (EIA). The EIA mechanism enables a statutory authority to evaluate whether the project proponent has integrated the environmental protection needs with the socio-economic objectives of the project.²⁰⁰ In practice, legislation only brings specific categories of development activities within scope of the EIA mechanism. The *EMCA* for instance lists all the categories of projects that require an EIA in the Second Schedule.²⁰¹ Section 24D of the South African NEMA legislation empowers the Minister to publish a list of activities that must undergo an EIA before commencement.²⁰² It is indicative that land use activities which involve most of the populations in these two countries do not fall within scope of the EIA process. By illustration, while the second schedule to the *EMCA* refers to forestry and agriculture activities, the scope is limited as follows:

¹⁹⁹ Section 6(2)(a).

²⁰⁰ Section 2, *EMCA* defines an environmental impact assessment as a ‘a systematic examination conducted to determine whether or not a program, activity or project will have any adverse impacts on the environment.’

²⁰¹ An indicative list drawn from the second schedule of *EMCA* includes: any activity out of character with its surrounding; any structure of a scale not in keeping with its surrounding; major changes in land use; Urban Development; Transportation; Mining, including quarrying and open-cast extraction; Dams, rivers and water resources; and Aerial spraying.

²⁰² See, Department of Environment Affairs *National Environment Management Act, 1998 (Act No 107 of 1998): Listing Notice 2: List of Activities and Competent Authorities Identified in terms of section 24(2) and 24D* (2010).

- Forestry related activities including: (a) timber harvesting; (b) clearance of forest areas; (c) reforestation and afforestation.
- Agriculture including: large-scale agriculture; use of pesticide; introduction of new crops and animals; use of fertilizers; and irrigation.

Scholar Loretta Feris reinforces this challenge noting that while EIAs may be useful in the practical application of integration, they clearly do not address other forms of decision making, such as those where no EIAs are conducted.²⁰³ These land use activities, which generally impact the environment, include agriculture, or community forestry. Yet, as the Brundtland report reiterates,²⁰⁴ the conservation of agricultural resources is an urgent task.

It is therefore very imperative to reiterate the approach in the 2010 Constitution of Kenya obligations on the Kenyan state. The list of obligations includes a requirement to establish a system of environmental impact, audit and monitoring. The obligations also include a requirement to protect and enhance indigenous knowledge in biodiversity and genetic resources by communities. We earlier argued that these obligations suggest the constitution has placed indigenous and local knowledge at the same legal level as scientific-based knowledge, such as that applied through the EIA process.

The *2003 Revised African Convention* introduces another perspective to this issue. It requires Parties to have regard to ethics and traditional values when designing and taking measures²⁰⁵ to fulfil the objectives of ecologically sound development.²⁰⁶ This role of ethics in

²⁰³ Loretta Feris, —Sustainable Development in practice: Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province” (2008) 1 Constitutional Court Review 235-253, at 249.

²⁰⁴ WCED, —Our Common Future,” *supra* note 1 at 57.

²⁰⁵ Revised African Convention, *supra* note 29, article 4.

²⁰⁶ Article 2 states objectives as: This convention aims to enhance environmental protection and foster the conservation and sustainable use of natural resources. It also aims to harmonize and coordinate policies with a

implementing objectives of environmental law has also been the subject of some academic discourse. Ben Richardson writes that contemporary environmental law provides little space for ethics.²⁰⁷ He notes that instead, environmental laws tend to focus their mechanisms on provisions relating to bureaucratic licences, market incentives, informational standards, and regulatory rules or offences. Perhaps with Richardson's reasoning mind, Ian Hannam stresses the need for ecological ethics in a legal system, in order to facilitate a change in attitude by people, which in turn is necessary to manage or reverse degradation.²⁰⁸ This view is supported by Craig Arnold who argues that effective environmental conservation requires public participation and engagement, and an environmental ethic to offer guidance.²⁰⁹

Implementing constitutional legal rules that aim to ensure ecologically sustainable development involves influencing the practical behaviour of those people that have to make decisions regularly. This is a process associated with implementing the values and principles of ecologically sustainable development. These values and principles, in light of the need to influence the personal or collective behaviour and attitudes of people toward the environment in decision making, relate more closely to a set of ethics or values than to any single legal rule. Some theorists have put forward various theories or 'centrism' that explore and debate the basis of this human interaction with the environment. One of them,

view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.

²⁰⁷ Benjamin Richardson, "Putting ethics into environmental law: Fiduciary duties for ethical investments" (2008) 46 *Osgoode Hall Law Journal* 243-291 at 243.

²⁰⁸ Ian Hannam, "Ecological sustainable soil: The role of environmental policy and legislation" in D.E Stott, R.K Mohtar, and G.C Steinhardt (eds) *Sustaining the Global Farm*, Online: <http://www.tucson.ars.ag.gov/isco/isco10/SustainingTheGlobalFarm/P010-Hannam.pdf>

²⁰⁹ See in particular, Craig, Arnold, "Working out an environmental ethic: anniversary lessons from mono lake" (2004) 4(1) *Wyoming Law Review* 1-54.

Robin Attfield,²¹⁰ gives an overarching justification for these theories of ethics, arguing in part that without some kind of ethic, and some kind of value-theory, humankind lacks guidance and direction for tackling problems that come their way.

We now pursue this argument, and in the next section analyse several theories of ethics with a view to identifying ways in which an ethical theory of the environment may contribute to the advancement of sustainability, within the context of this thesis, on the modification of human attitudes towards integrated decision making.

7 RELATING THEORIES OF ETHICS TO ECOLOGICALLY SUSTAINABLE DEVELOPMENT

In this section, we briefly highlight anthropocentric ethics as favouring socio-economic needs of human beings at the expense of environmental conservation. We also examine alternative non-anthropocentric ethics, and propose the land ethic as a suitable concept of ethics for purposes of implementing the principles ecologically sustainable development to guide and change attitudes of people for land use decision making.

7.1 ANTHROPOCENTRISM

Anthropocentrism is closely linked to the concept of sustainable development, especially the focus on a human right to development. In recollection, the first principle in the Rio Declaration proclaims human beings to be at the centre of concerns for sustainable development with an entitlement to a healthy and productive life in harmony with nature.²¹¹

This principle underpins the human-centred or anthropocentric approach to sustainable development. We argued earlier in the chapter that with the human rights approach that

²¹⁰ Robin Attfield, *The Ethics of the Global Environment* (Edinburgh: Edinburgh University Press, 1999) at 27.

²¹¹ Rio Declaration on Environment and Development, *op cit*, principle 1.

traditionally focused on the right to development, the anthropocentric approach to sustainable development remains at risk of relegating environmental conservation to a legal status inferior to the development right. This is because anthropocentrism confers intrinsic value on human beings and regards all other forms of life, including the environment as being only instrumentally valuable, to the extent that they are or can be useful to serve human beings.²¹² In an anthropocentric ethic, it would be the utility of nature and its instrumental value to human beings that would matter first. It all revolves around the concept of “value”.

Ethics scholar Des Jardins seeks to explain value on two fronts: instrumental and intrinsic.²¹³ Instrumental value is a function of usefulness such that objects will possess that value because of the uses to which those objects can be put. By extension that instrumental value is lost or diminished when the object no longer has use – as this sense of value presupposes the existence of an external valuer or beneficiary.²¹⁴ Intrinsic value on the other hand is possessed by objects without the aid of any external valuer or beneficiary,²¹⁵ and is mostly a value found or recognized rather than externally given.

²¹² J. Baird Callicot, “Non-anthropocentric Value Theory and Environmental Ethics” (1984) 21 *American Philosophical Quarterly* 299. [Callicot, “Non-anthropocentric value theory”]

²¹³ Joseph Des Jardins, *Environmental Ethics: An Introduction to Environmental Philosophy* (California: Wadsworth Publishing, 1997) at 127. The discussion and arguments on instrumental and intrinsic value continues through to page 130. [Des Jardins, “Environmental Ethics”]

²¹⁴ Michael Bowman, “The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law” in Michael Bowman and Catherine Redgwell (eds) *International Law and the Conservation of Biological Diversity* (Hague: Kluwer Law International, 1996) at 14. [Bowman and Redgwell, “International Law and the Conservation of Biological Diversity”]

²¹⁵ *Ibid.*

On the face of it, neither instrumental nor intrinsic value appears to present a problem to use of environmental resources, as long as a value is attached. The problem though arises because of the considerations at play. Scholars Kortenkamp and Moore²¹⁶ sum up these considerations into two: harm or benefit to humans. It translates that nature will receive moral considerations by human beings based on the anticipated harm or benefit. On these considerations, it would be considered wrong to cut down forests because they possess a cure to diseases – but it would also be considered right to cut down forests because they produce charcoal or building materials that are beneficial to humans. With this in mind, Des Jardins points at another challenge. He notes that since in anthropocentric ethics it is only human beings that possess moral value; humans may have responsibilities *regarding* the natural world, but no direct responsibilities *to* the natural world.²¹⁷ This reasoning compounds the challenge of integration because, in practical terms, the line to draw between destruction and preservation, or conservation is rather vague. This is more so in developing countries with extreme poverty, where the search for survival is desperate, and the hope for tomorrow can be a mirage at best. The challenge, for developing countries like Kenya, is how to frame and encourage a value system which will both secure the acute human desire for economic progress, but within limits that safeguard the quality of the environment and sustainability. The analysis of alternative non-anthropocentric ethical concepts in the rest of this section therefore provides useful ideas contrasting anthropocentrism.

²¹⁶ Katherine Kortenkamp and Colleen Moore, “Ecocentrism and Anthropocentrism: Moral Reasoning about Ecological Commons Dilemmas (2001) 21 *Journal of Environmental Psychology* 2. [Kortenkamp et al., “Ecocentrism and Anthropocentrism”]

²¹⁷ Des Jardins, “Environmental Ethics”, *supra* note 213 at 9, the discussion proceeds through to page 11.

7.2 NON-ANTHROPOCENTRIC ETHICS

In contrast to anthropocentrism, any ethic that would confer intrinsic value to non-human beings would thus be termed as non-anthropocentric. The main theories on environmental ethics include biocentrism, animal rights movement, and the land ethic. We will examine the biocentrism and the animal rights movement, to demonstrate the gradual progression of ethics from pure anthropocentrism. Our discussion will then analyse the land ethic, which we suggest manifests a pronounced theory of ethics to balance human socio-economic interests with environmental conservation. This is because the norms expressed by the land ethic relate closely to the critical question of how people can utilize land resources while safeguarding ecological integrity. We therefore suggest the land ethic as consistent with one principle of ecologically sustainable development that, ‘the conservation of biodiversity and the environment should be fundamental to decision making by people in land use.’

7.2.1 CONCEPT OF BIOCENTRISM

Biocentrism revolves around the idea of a certain moral attitude toward nature. Paul Taylor, a key proponent of this theory, calls it ‘respect for nature’ in a ‘life-centred’ system of environmental ethics.²¹⁸ Des Jardins sums biocentrism up as any theory that views all life as possessing intrinsic value, or as life-centred.²¹⁹ Taylor distinguishes biocentrism from anthropocentrism on the basis that in the latter case, human actions affecting the natural environment and its non-human inhabitants are right [or wrong] either because of how they

²¹⁸ Paul Taylor, ‘The Ethics of Respect for Nature’ reprinted in David Schmidtz and Elizabeth Williot (eds) *Environmental Ethics: What Really Matters What Really Works* (New York: Oxford University Press, 2002) at 83. [Taylor, ‘The Ethics of Respect for Nature’]

²¹⁹ Des Jardins, ‘Environmental Ethics’ *supra* note 213 at 130.

matter [positively or negatively] to human well-being, or because they are aligned with the system of norms applied to protect and implement human rights.²²⁰

The core argument of this life-centred theory is that human beings have moral obligations owed to the natural environment because of its intrinsic value for its own sake, not for its utility to the human race.²²¹ Taylor argues all this respect for nature is possible if founded by a belief system, which he calls the biocentric outlook for nature. This biocentric outlook for nature, views humans as living on the earth on similar terms as non-humans, and totally denies any human superiority as a baseless claim. This last claim has attracted criticism from proponents of similar theorem, among them David Schmidtz, who argues that there are grounds for moral standing that human beings do not share with other living things.²²²

Taylor clarifies in his conclusion that for good reason he never advanced a theory of moral rights for plants and animals. He makes a quick argument that he saw no reason why they should not be accorded legal rights, to enable protection and allow public recognition of inherent worth of nature. This argument closely in one sense concurs with Christopher Stone's thesis: Should trees have standing? – Toward legal rights for natural objects.”²²³ Here, Stone argues that conferring legal rights on non-human organisms should be approached as the issue of legally incompetent humans, in which case a guardian is

²²⁰ Taylor, “The Ethics of Respect for Nature”, *supra* note 218 at 83.

²²¹ *Ibid.* The argument goes on through to page 95. I will apply and adapt general ideas from this essay to explain core points throughout this section.

²²² David Schmidtz, “Are all Species Equal?” in David Schmidtz and Elizabeth Williot (eds) *Environmental Ethics: What Really Matters What Really Works* (New York: Oxford University Press, 2002) at 96.

²²³ Christopher Stone, “Should Trees Have Standing? – Toward Legal Rights for Natural Objects” reprinted in Donald VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 183 at 194.

appointed to manage the incompetent's affairs. Similarly, if such rights were accorded to natural organisms, a friend of such an organism could act as guardian and represent their interests in court or elsewhere.

Taylor's overall proposal and his convergence with Stone are not entirely novel as in some jurisdictions the inherent worth of the environment is recognized. As an example, the 1993 Ontario *Environmental Bill of Rights*,²²⁴ Canada asserts in the opening to its preamble that 'The people of Ontario recognize the inherent value of the natural environment.' It is however important to note that consideration here is given for the inherent not intrinsic value and the Ontario law makes no secret that it is the human rights to a clean and healthy environment that it seeks to uphold. Still these legal rights will protect nature but because it matters to human welfare.

7.2.2 THE ANIMAL RIGHTS MOVEMENT

Another non-anthropocentric ethical concept revolves around the animal rights movement that attributes inherent worth to animals based on the concept of sentience or ability to feel pain or pleasure. The main proponents are Peter Singer and Tom Regan. Singer advances the term *speciesism* to describe the belief that we are entitled to treat members of other species in a way that would be wrong to treat members of our own species. On this footing, Singer compares *speciesism* to racism. He also advances the sentience argument that animals do

²²⁴ *Environmental Bill of Rights, 1993* Ontario, Canada.

Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_93e28_e.htm

indeed have capacity to suffer, arguing that in this case, there can be no moral justification for refusing to take into consideration and minimize or eliminate that suffering.²²⁵

Regan's view while still advocating for animal rights takes a different non-utilitarian approach, not concerned with pain, suffering or happiness. He argues that a fundamental problem is the human view of animals as 'our resources.' Within this view, humankind places themselves on a pedestal where they can determine what is right or wrong for the animals, often within the veil of cruelty and kindness. He argues that a kind act is not synonymous to a right act. Regan's view is that animals have inherent value and rights which entitle them to respect without considerations of their value to the human species.²²⁶ Acceptance or criticism for both biocentrism and animal rights is influenced by a diversity of factors not least among them culture, commercial interests, or poverty.

7.2.3 ECOCENTRISM AND THE LAND ETHIC

Ecocentric ethics is based on strength of community. It contrasts with the moral consideration that is extended by other theories of environmental ethics to selected individual entities. Biocentrism for instance extends moral consideration to all living things as having intrinsic value, while animal rights theorists are selective to animals. Ecocentrism

²²⁵Peter Singer, "Animal Liberation" reprinted in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 135-141. See also Peter Wenz *Environmental Ethics Today* (New York: Oxford University Press, 2001) 89-93; and Des Jardins, "Environmental Ethics" *supra* note 234 at 112.

²²⁶ Tom Regan, "The Case for Animal Rights" reprinted in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 143-149. See also Des Jardins, "Environmental Ethics" *supra* note 234 at 112.

and its sense of community have been termed by Des Jardins as moral extensionism on the basis that it extends ethical considerations to all living components of the earth.²²⁷

The main proponent of this theory of ethics is Aldo Leopold, a twentieth century American forester. In his renowned treatise, *A Sand County Almanac with Other Essays on Conservation from Round River*,²²⁸ Leopold embraces moral extensionism as crucial to his theory, noting that from the outset ethics have dealt with the relation between individuals, then evolved to relationships between individuals and society²²⁹ He adds that thereafter, no ethics has been in place dealing with man's relation to land and to the animals and plants which grow upon it. According to Leopold, extension of ethics to this third element in the human environment is an evolutionary possibility and an ecological necessity.²³⁰ He calls this the land ethic.

Leopold defines an ethic as a mode of guidance for meeting ecological circumstances so new or intricate that how to resolve them is not discernible to the average individual. He argues that ethics generally lie on the premise that the individual is a member of a community of interdependent parts. Human instincts make a person compete for a place in the community but his ethics make it desirable to cooperate. Leopold further urges that extension of ethics

²²⁷ Des Jardins, "Environmental Ethics" *supra* note 213 at 175.

²²⁸ Aldo Leopold, *A Sand County Almanac with Other Essays on Conservation from Round River* (New York: Oxford University Press, 1981) and *reprinted* in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 215-224. [Leopold, "A Sand County Almanac"]

²²⁹ Leopold, "A Sand County Almanac" *supra* note 228 at 216. He gives Mosaic Decalogue as an example of the rules governing human relations.

²³⁰ *Ibid.*

through the land ethic also enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land.

Leopold also argues that prior to a land ethic the existing paradigm of human relations to land use urged only enlightened self interest, to extract economic benefit from land.²³¹ The outcome of such a situation is that the existence of obligations over and above self interests is not presupposed, and land use is then dominantly influenced by economics of self interest.²³² The problem with this approach, Leopold points out, is that economics of self-interest is lop-sided. He explains that economics of self interest tacitly allows people to ignore and eliminate many elements in the land community that lack commercial value in the traditional economic utility sense like wetlands, but which are essential to its healthy function. Accordingly Leopold suggests that the land ethic reflects the existence of an ecological conscience, which is a conviction of an individual responsibility to attain and retain the health of the land. He clarifies land health as the capacity of the land for self-renewal. The ecological conscience involves love, respect and admiration for land towards a high regard for its value beyond economic self interest. It includes recognition of the land pyramid in which land is a biotic mechanism comprising more than soil, but rather a fountain of energy flowing through a circuit of soils, plants, and animals.

The land ethic also examines the role of humankind. It seeks to alter the role of humans from conqueror of the land community to a citizen of the biotic community sharing mutual respect

²³¹ Leopold, "A Sand County Almanac" *supra* note 228 at 217.

²³² *Ibid* at 218.

with other members. This however does not imply or prevent the alteration, management or use of land, which Aldo Leopold continues to view as resources.

This view whereby the land ethic recognizes alteration, use or management of land by human beings is the crucial difference between ecocentrism and other environmental ethics theories conferring moral considerability on nonhuman living things. In the latter case, theorists such as Singer on animal rights strongly oppose human view of animals as resources, arguing that human beings have no basis to use animals. Theorist Dale Jamieson notes that a scenario like that suggested by Singer would result in a situation where every living thing has rights against every other living thing, and an endless possibility of actionable rights and wrongs.²³³ In contrast, and perhaps in recognition of this possibility, the land ethic upholds the use of land community as resources, but invokes the ecological conscience.²³⁴ This approach by the land ethic is consistent with the legal systems which confer property rights that allow people to utilize land as a resource, in exercise of those rights. In that context of property rights, the ecological conscience can be perceived as a responsibility or duty contingent on the property rights that requires people to ensure their land use activities support the continuous health of the land and its ability for self renewal. It is such a responsibility on property rights holders that suggests a legal mechanism is viable to facilitate integration of socio-economic activities with environmental protection at the level of individual persons.

²³³ Dale Jamieson, *Ethics and the Environment: An Introduction* (New York: Cambridge University Press, 2008) at 149.

²³⁴ Leopold, "A Sand County Almanac" *supra* note 228 at 216.

7.3 ANALYSING THE IMPLICATIONS OF ENVIRONMENTAL ETHICS FOR LAW AND SUSTAINABILITY

What are the implications of the land ethic to legal implementation of ecologically sustainable development? The land ethic is the non-anthropocentric theory more consistent with the present research because it acknowledges that human beings can and should perceive land as a resource and utilize it to fulfil their socio-economic needs. It is also a theory of ethics that emphasizes that while people can utilize land, they also must apply a human responsibility to uphold the environmental quality of the land. This theory of ethics is therefore consistent with the idea of a right to socio-economic development that legal systems typically confer on people. The requirement that people should exercise ecological conscience to safeguard the environmental quality of land supports the view that the legal right to a healthy environment includes a duty on people to safeguard and protect the same environment. The *African Charter*, which provides an environmental right linked to the developmental needs of people, is clear that the exercise of a right implies the existence and performance of a duty by everyone.²³⁵

The land ethic revolves around the ecological conscience or human responsibility, which is consistent with the legal duty to ensure that where development activities, including by individual land owners, are carried out, measures to safeguard the integrity of the land ecosystem are taken. This ecological conscience or ethical duty is thus consistent with key principles of ecologically sustainable development, including integration, and that environmental conservation should be a fundamental consideration in decision making.

²³⁵ African charter, *supra* note 31 – Preamble.

The ethical duty may be manifested in law through recognition of the ordinary norms or standards of behaviour or conduct that are practiced in a society, community or legal jurisdiction, otherwise referred to as culture. The ethical duty may also be enhanced through legal recognition of scientific research and knowledge as a source of land use practices that are influential in enhancing human attitudes to environmental protection, in the course of regular decision making. The ethical duty may further be manifested through legal recognition that the active participation of people in education or awareness is instrumental to evolution of culture, adoption of scientific knowledge, and firming up the values of the land ethic.

These three approaches broadly identify with the ‘legislative and other measures’ that the 2010 Constitution requires as means to realize the constitutional environmental right. They are potential mutually reinforcing avenues through which integrated land use decision making could be designed for land owners and other people engaged in regular land use decision making. We examine the more specific nature of decision making rights and responsibilities for individuals in agricultural or forestry land use activities, in chapter 3 and 4. We further pursue the possibility of a legal and ethical duty or responsibility in chapter 5 of this research.

8 CONCLUSION

In this conceptual chapter, we have examined the integration of environmental protection with socio-economic activities, as the principal legal challenge to realization of sustainable development. We found that sustainable development embraces the notion of integration but treats development as a right while the legal status of environmental protection is unclear.

This, conceptually, poses the risk that human decisions on the use of natural resources can favour development, at the expense of environmental quality, thereby breaking the sustainability continuum. We pointed to the emerging trend of a statutory or constitutional environmental right, which as a basic right is framed to complete the conceptual balance of competing interests that support integration. It is this conceptual integration that allows for institutional integration whereby an overarching constitutional or statutory provision sets out the environmental or sustainability norms. Thereafter, the sectoral laws, institutional policies and decisions have to be vertically integrated with the overarching norms. In our analysis, the concept of ecologically sustainable development enacted into the 2010 Constitution of Kenya, as the product of an environmental duty more explicitly manifests the requirement for integration, as evident from the fundamental principles.

The analytical framework in this chapter is useful in setting a basis to address the principal concerns of this research, including: significant degradation of agriculture and forest land; and unfulfilled socio-economic and cultural needs (poverty) of significant rural populations that depend on these resources for basic livelihood. This degradation and poverty suggest there is a need to move away from constitutional and framework environmental law level of conceptual integration, and examine whether there is integration of socio-economic rights (such as property), with a legal responsibility to integrate environmental protection in regular land use activities. There is further need to determine why and to what extent sectoral land use laws and institutional policies are fragmented, and not vertically integrated with norms of the framework environmental law.

While we argue that the environmental duty set out by *EMCA* lacks direct instruction on how sectoral laws or individuals should implement it, we nonetheless view that duty as the first step in the Kenyan legal system evidencing some legal human responsibility to the environment. The balance of this research will therefore review agriculture and community forestry, as productive socio-economic sectors, to establish whether there is a legal responsibility on holders of property rights (as socio-economic rights) to integrate environmental protection with their productive activities. This inquiry will equally reflect on whether the sectoral laws and policies are vertically integrated, to reflect the *EMCA* environmental duty. It is an inquiry that is necessary in order to determine the appropriate legal approaches required to create a legal or ethical responsibility to ensure that people and institutions behave constitutionally by exercising the environmental duty and undertaking ecologically sustainable development and use of natural resources. We address this possibility in chapter 5 of this research.²³⁶

In the coming chapters, we use the terms sustainable development, ecologically sustainable development, sustainable land use and sustainable forest management interchangeably to reflect a legal duty for institutions and people to integrate environmental protection with socio-economic activities. It is this integration that will maintain the ability of the environment and resources to regenerate and support further socio-economic and cultural activities for present and future generations. The next chapter examines the legal implication of land tenure and regulation to sustainable land use for agriculture in Kenya.

²³⁶ Chapter 5 explores mechanisms to anchor a legal and ethical responsibility for land owners to integrate sustainable land practices into their decision making. We propose a statutory duty of care to protect the environment, and on land owners to prevent land degradation that adversely affects the sustainability of their land, or the land of another land owner.

**CHAPTER THREE:
REVIEWING SUSTAINABILITY IMPLICATIONS OF TENURE RIGHTS AND LAND USE
REGULATION TO AGRICULTURAL LAND USE**

1 INTRODUCTION

In the last chapter, we established the conceptual basis for framing integration of environmental protection with socio-economic activities in law, as a necessary first step to upholding sustainability. The urgency of this integration is magnified by statistics and literature pointing to significant land degradation and poverty in developing countries like Kenya. This chapter is therefore an inquiry into the legal framework governing agriculture as a land use, and the contribution of law and policy to stewardship in agricultural land use. The pursuit of stewardship and sustainable land use requires that land is able to consistently regenerate its environmental quality to support its own ecosystem and successful human development activities.

We examine agriculture as an economic activity undertaken by a significant proportion of Kenyans inhabiting rural areas, most of whom are experiencing poverty.¹ Agriculture has been identified as one of the productive sectors of the Kenyan economy contributing 51% of the Gross Domestic Product (GDP).² The agriculture sector also provides 62 per cent of overall national employment, and is important to economic recovery and progress.³ The agricultural sector comprises six subsectors: industrial crops; food crops; horticulture;

¹ Republic of Kenya, *Strategy for Revitalizing Agriculture: 2004 – 2014* (Nairobi, Ministry of Agriculture, 2004) at 1-2. [RoK, “Strategy for Revitalizing Agriculture”]

² Republic of Kenya, *Agricultural Sector Development Strategy 2010-2020* (Nairobi: Ministry of Agriculture, July 2010) at 1. [RoK, “Agriculture Strategy 2010”] The Agriculture strategy is the new agriculture policy, and states that agriculture current contributes 26% of the GDP directly and another 25% indirectly.

³ Republic of Kenya, *Economic Recovery Strategy for Wealth Creation and Employment Creation: 2003-2007* (Nairobi: Government of Kenya, June 2003) at 29.

livestock; fisheries; and forestry – all of which rely on land and water as basic factors of production.⁴ Agricultural production is therefore broad, and plays a critical role in the national economic growth and development as an entry point for the country's industrialization by providing food, social security and raw materials.⁵ This implies that the growth of the Kenyan economy is highly correlated to growth and development in agriculture.⁶

It is reported that national agricultural productivity has been on a steady decline that is attributable to many reasons, but that high depletion of soil fertility and land degradation are most prevalent.⁷ This overall decline in environmental quality of land, and the failure or extremely low rainfall,⁸ were exacerbated by the violence which followed the 2007 general elections, and the financial crises of 2008/2009 resulting in a 2.5% agricultural growth contraction in 2008.⁹ It is not surprising therefore that a 2010 Economic Review of Agriculture by the government of Kenya reported that “prices of most agricultural commodities rose on average during the year as a result of supply constraints.”¹⁰ This poor performance in agriculture production has continued despite relatively higher budgetary allocations to the different sector ministries with authority over agricultural aspects.

⁴ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 1.

⁵ Republic of Kenya, *National Development Plan, 2002-2008: Effective Management for Sustainable Economic Growth and Poverty Reduction* (Nairobi: Government Printer, 2002) at 23.

⁶ RoK, —Agriculture Strategy 2010,” *supra* note 2.

⁷ RoK, —Strategy for Revitalizing Agriculture” *supra* note 1 at 17.

⁸ Republic of Kenya, *an Economic Review of Agriculture* (Nairobi: Ministry of Agriculture, 2009) at 2 [RoK, —Economic Review of Agriculture 2009”].

⁹ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 3.

¹⁰ Republic of Kenya, *An Economic Review of Agriculture* (Nairobi: Ministry of Agriculture, 2010) at 2 [RoK, —Economic Review of Agriculture 2010”].

However, the overall budgetary allocation for the 2008/2009 financial year stood at 4.3% of the Gross Domestic Product¹¹ as against the 10% required by the Maputo Declaration on Food Security concluded under the African Union.¹²

Between 2004 -2010, the government has produced two agriculture policies to assist recovery in agricultural productivity. The 2004 *Strategy for Revitalizing Agriculture* reported that about 80% of the population lives in rural areas, relying on agriculture as the principal economic activity, and most of these people live in poverty and food insecurity.¹³ The strategy also pointed out that there was a significant decline in soil fertility, increasing land degradation, and that extension services were ineffective, therefore leaving farmers with limited sources of new skills, knowledge or technology on how to overcome the challenges.¹⁴ The 2010 *Agriculture Sector Development Strategy* (ASDS) claims that most of the targets to enhance agricultural productivity set by the 2004 agriculture strategy were achieved.¹⁵ However, a 2009 Government of Kenya economic review of agriculture does not agree with this assertion, and reports there was overall poor agricultural productivity in Kenya in 2007-2008.¹⁶ The ASDS also contradicts its own assertion, noting in part that challenges still remain in achieving food security, poverty reduction, transformation of

¹¹ RoK, “Economic Review of Agriculture 2009” *supra* note 8 at 7.

¹² The declaration states in part that the Heads of States and Governments “agree to adopt sound policies for agricultural and rural development, and commit ourselves to allocating at least 10% of national budgetary resources for their implementation within five years.” See, African Union, *Declaration on Agriculture and Food Security in Africa* (Second Ordinary Session of Heads of States and Governments, Maputo, MOZAMBIQUE Assembly/AU/Decl.4- 11 (II) / Assembly/AU/Decl.7 (II), 10 - 12 July 2003) at 2.

¹³ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 1-2.

¹⁴ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 15-17.

¹⁵ RoK, “Agriculture Strategy 2010,” *supra* note 2 at xiii.

¹⁶ RoK, “Economic Review of Agriculture 2009” *supra* note 8 at 2.

agriculture to commercial farming and agribusiness, efficient use of inputs and agricultural credit.¹⁷

In light of the above facts concerning the significance of agriculture to the Kenyan economy, and to the livelihoods of many families, the concern over integration of environmental protection with socio-economic activities in land use decision making becomes more pressing. In the context of conceptual integration, advanced in chapter 2 as the first aspect of integration, we suggest that agricultural production should be concerned with facilitating reconciliation and balancing the socio-economic rights (including property rights) that are guaranteed as basic rights by the constitution, with the right to a clean and healthy environment. This is because the undertaking of productive agriculture necessarily involves the exercise of property rights in land, whereby the tenure rights entitle the land owner (or assigned occupier) to make decisions over land use choices.

The utilization of land for agriculture is further regulated by land use law, particularly the 1955 *Agriculture Act*, which should ideally complement the role of land owners by offering practical guidance with positive sustainable land use management responsibilities. This idea of legal responsibilities, either as contingent on the decision making rights of a land owner, or deriving from the authority of agricultural land use legislation resonates with the environmental duty to ‘safeguard and enhance the environment’ that is set out by the framework environmental law, *EMCA*. We argued in chapter 2 that *EMCA* is silent on the mechanisms that could give effect to this environmental duty that is pertinent to realization

¹⁷ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 7.

of the right to a clean environment.¹⁸ However, *EMCA* is the framework environmental law that determines the environmental management norms in the Kenya legal system, apart from the constitution. In this chapter, we therefore examine whether the land tenure legislation, the *Agriculture Act* and agriculture policies are vertically integrated with the legal notion of an environmental duty or responsibility that is set out by *EMCA*.

Section 1 of the chapter is the introduction. Part 1 (sections 2-4) examines the notion of property rights, their interface with land tenure rights and the impact of tenure rights on land use decision making. We examine the process of tenure conversion, from indigenous tenure to statutory law, that has been undertaken by the colonial and independence Kenya governments. We review the tenure conversion objectives of enhancing security of tenure; and increasing agricultural productivity, and suggest that formal tenure now operates in an informal hybrid sense with indigenous tenure. Using two case studies, we find that while the breadth of rights are somewhat sufficient to allow decision making for agricultural productivity, there is no legal imperative requiring land owners or occupiers to integrate environmental protection with their socio-economic land use choices. We contrast the land tenure rights, with comparative provisions from Uganda and Tanzania, two East African countries which share demographic, geographical, colonial and legal similarities with Kenya. In both Uganda and Tanzania the land tenure provisions establish some legal responsibility on land owners to protect the environment, but the legal provisions vary in content and sophistication.

¹⁸ See chapter 2, Section 5.3.1.1.

Part 2 (section 5-6) examines the regulation of agricultural land use through police power of the state. We also review government policy statements on agriculture. The discussion points out that the *Agriculture Act* does not establish positive action responsibilities for regular implementation by land owners as a sustainability guide, when they are making routine land use decisions on agricultural productivity. We further find that the agriculture land use system confers significant discretionary authority on public officers, to prescribe ‘orders’ to farmers, ostensibly after environmental harm has occurred, thereby vitiating the utility to sustainability. We examine agriculture policies, and suggest that while they critically review agriculture performance and reform, the policies do not go far enough to offer legal tools that can provide guidance to land owners or occupiers by influencing behaviour towards integrated land use decisions. Section 7 pursues this need to provide guidance that will enable land owners to undertake integration. We therefore analyse the role of agriculture extension, as a system of education and communication, and the role extension can play/plays in changing the behaviours of land owners by providing knowledge on sustainable land use choices. In various sections of the chapter, we highlight provisions of the 2010 Constitution of Kenya, and review the potential implications of the new Kenyan constitution on legal application of sustainable land use practices.

PART 1 – IMPLICATION OF TENURE RIGHTS ON DECISION MAKING FOR SUSTAINABLE AGRICULTURE

2 PROPERTY RIGHTS AND LAND TENURE

Property rights to resources such as land and water - which contribute to agricultural productivity - play a fundamental role in influencing the patterns of natural resource management especially by determining *who* can do *what* with a particular resource, such as a parcel of land, and sometimes also *when* and *how* they can do it.¹⁹ In the case of ownership and use of land, property rights translate into tenure rights that are fundamental to making decisions on the socio-economic utilization of land, and the measures or steps necessary to sustain its environmental quality. This is because, as suggested by Joseph Sax,²⁰ property rights form part of the basic structural laws in a legal system, which should determine and influence the norm or values of how people use or transform their land. Indeed property rights in Kenya, including the right to own and use land, form part of the fundamental rights guaranteed by the Constitution.²¹ This means that property rights, including the tenure rights in land that are vested in people either individually or collectively, represent the most direct legal entitlement for land owners or occupiers to have control and make decisions over use or management of land, or how to exclude other people. In turn, this implies that tenure

¹⁹ Ruth Meinzen-Dick, Lynn R Brown,; Hilary Sims Feldstein & Agnes R Quisumbing,. "Gender, Property Rights and Natural Resources" 1997 (25) 8 World Development, 1303. See also, Keith D. Weibe Ruth Meinzen-Dick "Property Rights as Policy Tools for Sustainable Development 2005 (15) 3 Land Use Policy, 203 at 205.

²⁰ See Chapter 2, see section 5.1 for a discussion on the role of basic structural laws such as a constitution, framework environmental law or property laws within a legal system. In this chapter, we pursue the implicit role of property rights of basic structural laws since it is property rights that confer basic decision making authority over land use, deriving from the breadth of tenure rights vested on a tenure rights holder.

²¹ Article 40.

rights in land are very essential to the challenge of how to integrate socio-economic and environmental considerations into land use decision making, either by individual land owners or through vertical integration of sectoral law or policy, in the overall pursuit of ecologically sustainable development.

Land tenure systems in Kenya, as in much of Sub-Saharan Africa, vary from community to community and are influenced by the unique historical development of each political grouping; the variation of legal and institutional structures; and the type of land in question.²² An operative tenure system normally defines methods by which individuals or groups acquire, hold, transfer or transmit property rights in land. It has to do with how rights to land and other natural resources are assigned within societies, and just as it determines *who* holds *what* interests in *what* land,²³ tenure tends to reflect the power structure in a society and sets the rules. These rules of tenure can be written or unwritten, for which reason land tenure may derive from either statutory or indigenous law, or both.²⁴

Just as property regimes distinguish between property rights and rules, tenure sets apart access to land and control of land. Control is the command an individual has over a

²² Christopher Leo, *Land and Class in Kenya* (Toronto: University of Toronto Press, 1984) at 29. [Christopher Leo, —Land and Class in Kenya”] See also Patricia Kamari-Mbote, —Land Tenure and Sustainable Environmental Management in Kenya” in Charles Okidi, Patricia Kamari-Mbote & Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008), 260 at 261. [Kamari-Mbote, —Land Tenure and Sustainable Environmental Management”]

²³ Patricia Kamari-Mbote, —The Land has its Owners! Gender Issues in Land Tenure under Customary Law” (Paper presented at the UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action* Nairobi, October 31 – November 3, 2005) at 6. See also, Kamari-Mbote, —Land Tenure and Sustainable Environmental Management,” *supra* note 23 at 262.

²⁴ Daniel Maxwell, & Keith Wiebe, *Land Tenure and Food Security: A Review of Concepts, Evidence and Methods* (Madison: Land Tenure Centre, University of Wisconsin, Research Paper No. 129, 1998) at 4. [Maxwell & Weibe, —Land Tenure and Food Security”]

particular piece of land and the derived benefits²⁵ and it is based on a recognized right, whether indigenous or formal. Access denotes ability to utilize land, but not necessarily ownership, and may include some decision making power over aspects of productivity. In either case, land tenure implies that the holder of the property rights in land would be involved in regular decision making over what land use choices would achieve the desired economic goals, such as agricultural productivity, from the land. The question is whether the breadth of tenure rights in land offer any legal tools that guide rightholders toward any responsibilities to integrate the environmental quality of the land, with the socio-economic choices they make on how to utilize the land.

In the context of Kenya, the realization of ecologically sustainable development and its corollary concept of sustainability in land use require integration both in law and policy, as well as in decision making at the individual level. In order evaluate the legal situation comprehensively it is useful to evaluate the evolution process of land tenure in Kenya. It is our contention that the evolution of this land tenure system since colonial times has significantly impacted the breadth of rights or duties of rightholders, questions of intergenerational equity, the increase or decrease in agricultural productivity and environmental quality of the land.

²⁵ Susan Lastarria-Cornhiel, "Impact of Privatization on Gender and Property Rights in Africa" 1997 (25) 8 World Development 1317 at 1318.

2.1 THE EVOLUTION OF LAND TENURE IN KENYA

Land tenure institutions have long been the subject of agricultural development policy measures, with land tenure reform as the main instrument.²⁶ This is evident in African countries such as Kenya, where land tenure reform typically refers to evolutionary or legal changes in the form of land tenure.²⁷ This has generally entailed attempts by government using the law to nudge indigenous tenure systems in the direction of private property regimes. The policy shift is typically supported by arguments that individual ownership of land will vest more control on tenure holders resulting in higher efficiency in the use and productivity of land. The question is whether care for the environmental quality of the land or land husbandry was identified as an objective of these private tenure rights, since land is uniquely important to the basic livelihoods of Kenyans.

The objects of land tenure conversion in Kenya over the years have traditionally stood out as: security of tenure; and enhancing agricultural productivity. We examine these two objects in this section with respect to tenure, and whether the resulting tenure arrangements facilitate the integration of environmental conservation with socio-economic activities by impacting people's attitude and choices in making land use decisions.

The process of tenure conversion from indigenous to individualized land tenure has been implemented on a massive scale in Kenya starting with British Colonial authorities and carried on by post-independence governments. This tenure reform process has given rise to a

²⁶ Maxwell & Weibe, "Land Tenure and Food Security," *supra* note 24 at 4.

²⁷ *Ibid.*

complex duality in tenure systems in Kenya comprising both indigenous and formal tenure. It is this dual system that now forms the broad basis of property law in land. At the end of this part, we demonstrate how this duality is both parallel and overlapping the ordinary application of tenure rights to control and use land.

The conversion of African indigenous land tenure was mooted by the 1955 Report of the East African Royal Commission.²⁸ This report promoted individualized tenure as possessing great advantages such as giving the individual a sense of security in possession of land, and in enabling the purchase and sale of land.²⁹ The process of formalizing individual registration to land was launched by the 1955 Swynnerton Report,³⁰ which was commissioned by the Colonial government of Kenya.

The Swynnerton report focused on legal and policy methodologies that could be pursued in order to intensify African agricultural productivity. It suggested that realizing sound agricultural development depended upon a system of land tenure which would avail to the African farmer a unit of land and a viable system of production.³¹ The report also proposed registration of individual property rights in land such that the farmer would also be provided with security of tenure through an indefeasible title, to encourage him to invest his labour and profits to develop the farm and apply it as collateral. The process of land tenure conversion was therefore intended to achieve two principal objectives that have a bearing on

²⁸ Secretary of State for the Colonies, *East Africa Royal Commission 1953-1955 Report* (London: Her Majesty's Stationery Office, Cmd 9475), at 323, para 77. [–East Africa Royal Commission Report”].

²⁹ *Ibid* at 323, para 77.

³⁰ Colony and Protectorate of Kenya, *A Plan to Intensify the Development of African Agriculture in Kenya* (Nairobi: Government Printer, 1955). [Kenya Colony, –Swynnerton Plan”]

³¹ *Ibid* at 9.

sustainable land use. The first objective, security of tenure, legally determines the ability of a rightholder to make land use decisions and choices. The second object, enhanced agricultural productivity, should be the logical consequence of secure tenure as the new individual rightholder ostensibly enjoys the freedom to make land use decisions on productive agricultural activities. We now discuss these objectives to demonstrate their normative characteristics, as set out in colonial tenure and agriculture policy of Kenya and by other literature. We later examine both indigenous and statutory land tenure to review how these objectives are reflected, and the impact on the regular decision making by land owners for economic productivity, and sustainability.

2.1.1 THE GOAL OF ENHANCED SECURITY OF TENURE

The first objective of tenure conversion was to enhance security of tenure in the land, which the colonial authorities assumed and believed that the indigenous land tenure systems in place at the time did not confer. In order to understand what security of tenure implies, we refer to analysis of the concept by scholars Bruce and Migot-Adholla.³² They propose security of tenure to exist when an individual perceives that he or she has rights to a piece of land on a continuous basis free from imposition or interference from outside sources. It also includes the ability to reap benefits of labour and capital invested in that land.³³ Literature by the United Nations Food and Agriculture Organization (FAO) suggests that where there is no security of tenure, or it is weak, households are significantly impaired in their ability to

³² John W. Bruce & Shem Migot-Adholla –Introduction: Are Indigenous African Tenure Systems Insecure?” in John W. Bruce & Shem Migot-Adholla (eds) *Searching for Land Tenure Security in Africa* (Iowa: Kendall Hunt Publishing/ World Bank, 1993) at 3. [Bruce & Migot-Adholla —“Are African Indigenous Tenure Systems Insecure?”]

³³ *Ibid.*

secure sufficient food and to enjoy sustainable rural livelihoods.³⁴ This correlation between tenure rights (as entitlement to make land use choices for productive uses like agriculture) and ability of the rightholder to reap benefits of labour, implies that tenure rights could be applied to maintain land in good environmental quality to support food security.

In terms of the breadth of the rights comprising secure tenure, we adopt the FAO proposal that the breadth of tenure rights in land may comprise three elements:³⁵

- i). *Use rights*: rights to use the land for grazing, growing subsistence crops, gathering minor forestry products, etc.
- ii). *Control rights*: rights to make decisions how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops, etc.
- iii). *Transfer rights*: right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights.

According to Place, Roth & Hazell, the completeness of this bundle of rights that defines security of tenure may vary, from complete rights, to preferential rights and limited transfer rights.³⁶ Preferential rights involve ability to use and control land, but the ability to

³⁴ Food and Agriculture Organization (FAO), *Land Tenure and Rural Development* (FAO Land Tenure Studies 3: Rome, 2002) at 18. [FAO, —Land Tenure and Rural Development”]

³⁵ *Ibid* at 9-10.

³⁶ Frank Place, Michael Roth & Peter Hazell, —Land Tenure Security and Agricultural Productivity Performance in Africa: Overview of Research Methodology,” in John W. Bruce and Shem Migot-Adholla

permanently transfer land is restricted to circumstances of intestacy, especially through inheritance. Limited rights exist where use and control rights are given, but no ability to effect permanent transfer of ownership.

The first two principal elements of tenure security, the user and control rights, signify the legal right and ability of a person, holding the tenure rights, to make decisions on how they can use their land to achieve their desired objectives. In the context of a society like Kenya where agriculture is the dominant economic activity, these objectives revolve around enhancing agricultural productivity to fulfil the very essential socio-economic needs of livelihood. The transfer rights element implies that the land owner is able to effect *inter vivos* reallocation of ownership rights through sale or inheritance. Further, as suggested by the Swynnerton Plan, transfer rights vested in an individual imply the owner may use the land as collateral to obtain loan finance.³⁷

The preferential rights have significance in relation to intergenerational equity, evident through land access and use by family members. This is a situation that arises when customary or indigenous tenure practices overlap with statutory tenure rights, such as where parental consent (customary) is given to children to exercise the user and control rights to carry out their socio-economic activities on what is formally the parents' land.³⁸ The strengths or weaknesses of such preferential tenure rights may impact on the ability of the

(eds) *Searching for Land Tenure Security in Africa* (Iowa: Kendall Hunt Publishing/ World Bank, 1993) at 23.

³⁷ Kenya Colony, —“Swynnerton Plan,” *supra* note 30 at 9-10.

³⁸ See section 3.1 of the chapter for further discussion.

holders to make land use decisions, including those affecting the environmental quality of the land.

Just like the breadth of property rights put forward by resource economist Tony Scott,³⁹ security of tenure further interlinks with two other dimensions: the duration; and assurance of the rights over land. However, the character of tenure varies from context to context, and to a large extent, it is what people perceive it to be.⁴⁰ Security of tenure is therefore conferred when a person has, by operation of a system of law that is in force, an assurance over the breadth of rights, for a defined period of time or in perpetuity. Statute law confers security of tenure either through freehold tenure, absolute tenure, or leaseholds.⁴¹ Customary or indigenous law confers security of tenure depending on the context, and substance of law applied by the particular community.

2.1.2 THE GOAL OF ENHANCED AGRICULTURAL PRODUCTIVITY

The second objective of tenure conversion in the Kenyan context of the 1950s was the enhancement of agricultural productivity. As a socio-economic activity, agricultural productivity of land represents the pursuit of socio-economic rights that are guaranteed by

³⁹ Anthony Scott, *The Evolution of Resource Property Rights* (New York: Oxford University Press, 2008) at 5.

⁴⁰ FAO, "Land Tenure and Rural Development," *supra* note 34 at 18-19.

⁴¹ Freehold connotes the largest quantity of land rights which the State can grant to an individual, for instance through the *Registration of Titles Act*, (Cap 300, Laws of Kenya) While it confers unlimited rights of use, abuse and disposition, it is subject to the regulatory powers of the State. Absolute tenure, is essentially similar to a freehold in many respect, except for the contentious argument that the radical title reposes in the registered proprietor. It is conferred by the *Registered Land Act*. Leasehold tenure is given under either statute, and confers right of use and occupation for a defined period and rent. See, Republic of Kenya, *Sessional Paper No.3 of 2009 on National Land Policy* (Nairobi: Ministry of Lands, August 2009) at 18. [RoK, "Sessional Paper on National Land Policy"]

the Constitution, including the right to food.⁴² The increased agricultural productivity of land was projected to be the natural consequence of enhanced security of tenure brought about by the individual registration of land rights. Thus, this registration, as put by the Swynnerton Plan would not only enhance the desire of the individual farmer to work on land, but also facilitate their ability and will to make decisions to use efficient husbandry techniques, that would enhance higher productivity in the longer term.⁴³ It is instructive to note that the Swynnerton Plan refers to “efficient land husbandry techniques,”⁴⁴ as key to enhanced agricultural productivity.

Land husbandry, according to the FAO implies the management of water, biomass and soil fertility by those in direct charge of the land, in order to meet their needs.⁴⁵ The concern with soil fertility and water suggests a concern with sustainability, which the holders of tenure rights should ideally safeguard through management. The reference to efficient land husbandry in the Swynnerton land policy paper conceptually draws a link with sustainability. However, tenure rights imply freedom of land owners to make decisions on productive land use, and therefore the utility of efficient land husbandry in securing the environmental quality of land, depends on whether land husbandry responsibilities are incorporated into the breadth of tenure rights. This implies that, either in indigenous or statutory tenure, some

⁴² See, article 43, *Constitution of the Republic of Kenya, Revised Edition 2010* which guarantees socio-economic rights, including the right to food. [–Constitution of Kenya, 2010”]

⁴³ Kenya Colony, —Swynnerton Plan,” *supra* note 30 at 9-10.

⁴⁴ *Ibid.*

⁴⁵ Eric Roose, *Land Husbandry: Components and strategy* (Rome: FAO, 1996) at 29 online: <http://betuco.be/CA/Land%20husbandry%20-%20Components%20and%20strategy%20erosion%20FAO.pdf> [Roose”Land Husbandry”] See also section 6.3.1 section of the chapter for further discussion on land husbandry.

form of responsibility requiring that land use decision making integrate considerations on the environmental quality of the land is essential. Illustratively, some form of responsibility on land owners to manage soil fertility would be aligned to the principle of ecologically sustainable development, that _conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making.⁴⁶

2.2 THE DUAL SYSTEM OF LAND TENURE

To set the foundation for subsequent discussion of the impact of land tenure on integration of environmental quality of land with socio-economic needs, it is important to review land tenure in Kenya. This discussion will highlight to what extent both indigenous and statutory tenure confer secure rights for land access and use. In terms of statutory tenure, (including the overlap with indigenous tenure), we also review the impact on decision making for agricultural production. We also consider whether land tenure, further to conferring the use, control and transfer rights, establishes a responsibility contingent on the rightholder (or assignees) to integrate considerations respecting environmental quality of the land with their economic production objectives when making regular land use decisions.

The process of tenure conversion, as highlighted, created a new class of registered tenure right holders, legally distinct from tenure rights enjoyed under customary or indigenous tenure. The term _indigenous tenure‘ in this research denotes the form of land tenure that existed amongst diverse Kenyan communities prior to establishment of colonial rule by the

⁴⁶ See the discussion in chapter 2, section 6.2; See also Australian *Environmental Protection and Biodiversity Conservation Act 1999*, section 3A(c).

British,⁴⁷ and as it currently exists in the various forms and variations. The formal system represents the statutory tenure rights mechanism introduced by the colonial government and taken up by subsequent independent Kenya administrations. I will apply the terms formal tenure and statutory tenure interchangeably. We proceed to examine both indigenous tenure, and formal tenure with acknowledgement that to some extent, these two tenure systems operate concurrently, and often overlap.

2.2.1 ILLUSTRATION OF INDIGENOUS LAND TENURE IN KENYA

In this section, we examine African indigenous land tenure in the context of some Kenyan communities. The discussion attempts to demonstrate that indigenous land tenure had internal mechanisms that assured security of tenure. We further demonstrate how this secure tenure impacted decision making and land use choices to safeguard sustainable practices by people, as well as secure intergenerational equity amongst members of families and the community at large.

African indigenous tenure always had a clear distinction between political authority and individual or group access to the use of land.⁴⁸ While most African indigenous laws recognized a measure of individual control over the broad interests represented by land, paramount title was vested above society and all other rights were subordinate to the entire

⁴⁷ This was marked by declaration of a British Protectorate over much of what is now Kenya on 15 June 1895. British rule endured until 12 December 1963 when Kenya gained independence. See in particular Yash Pal Ghai & J.P.W.B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) at 3&50. [Ghai and McAuslan, "Public Law and Political Change in Kenya"]

⁴⁸ H.W.O Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: Acts Press, 1991) at 17. [Okoth-Ogendo, "Tenants of the Crown"]

community's rights.⁴⁹ A relationship has been found to exist between tenure and social status in African societies such that tenure of land arises from and is maintained by fulfillment of obligations to other persons in society.⁵⁰ The obligations, however, derive from membership in a particular community, and it is this fact of membership that confers access to the land.⁵¹ Hence in any given community a number of people could each hold a right or bundle of rights – each of which carried varying degrees of control exercised at different levels depending on social control. Coldham, writing about tenure among the *Luo* community from Western Kenya reports that:⁵²

... among the *Luo* community, each wife in a polygamous household would be given her own plot of land to cultivate with the help of her unmarried children. Any son who reaches age of marriage is allocated some land by his father where he may build his house and establish his farm. The son's section of the land will comprise part of the land hitherto cultivated by his mother. Certain land, often land not suitable for agricultural purposes, would be set aside for grazing cattle. All members of the clan or sub-clan would have the right to graze their cattle there.

This example illustrates that the cultivation rights to specific plots or areas were generally allocated and controlled at the family level, while grazing rights within the broader context were a matter of concern for the larger community.⁵³

⁴⁹ Maxwell & Weibe, —Land Tenure and Food Security, ' *supra* note 24, at 7. See further: (1) Simon Coldham, —The Effect of Registration of Title upon Indigenous Land Rights in Kenya" 1978 (22) 2 Journal of African Law, 91 at 93 [Coldham, —Effects of Registration on Indigenous Land Rights in Kenya"]; and (2) Johan Pottier, 'Customary Land Tenure' in Sub-Saharan Africa Today: Meanings and contexts' in Chris Huggins & Jenny Clover (eds) From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa (Nairobi/Pretoria: Acts Press/ISS, 2005) online: <http://www.iss.co.za/pubs/Books/GroundUp/Contents.htm>

⁵⁰ Maxwell & Weibe, —Land Tenure and Food Security, ' *supra* note 24.

⁵¹ *Ibid.*

⁵² Coldham, —Effects of Registration on Indigenous Land Rights in Kenya," *supra* note 49.

⁵³ *Ibid.* See also the discussion on African commons by HWO Okoth-Ogendo, —The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" 2003 (1) University of Nairobi Law Journal (UNLJ) at 107. [Okoth-Ogendo, —The Tragic African Commons"]

While Kenya is home to numerous indigenous communities, some other useful insights into indigenous land tenure in Kenya can be derived from reviewing *Kikuyu* traditions. The *Kikuyu* are an agricultural community occupying the central Kenyan highlands. In his book, *Facing Mount Kenya*⁵⁴ Jomo Kenyatta delves into the anthropology of land tenure amongst the *Kikuyu*. He notes that the system of land tenure was carefully and ceremonially laid down, so as to ensure peaceful settlement to an individual or family on the land they possessed.⁵⁵ Every family unit thus had a land right of one form or another. However, while the whole tribe or community collectively defended the boundary of their territorial/communal land, every inch of land within it had its owner.⁵⁶ Therefore a polygamous man would refer to his family land as *githaka giakwa* (my land), and the wives would call it *githaka gitu* (our land).⁵⁷ Kenyatta argued that the description of land tenure among the *Kikuyu* gave a clear picture contradicting the colonial view that there was communal ownership of land. These features of land being private to a family, but with some hospitality extended to the community are equally evident from the *Luo* community as illustrated by Coldham above.⁵⁸

With this normative hospitality in mind, Jomo Kenyatta noted that the colonial administration used the multiplicity of land access and land use rights enjoyed by various family members to assume that land *belonged* to every Dick and Harry in the

⁵⁴ Kenyatta, Jomo *Facing Mount Kenya* (London: Martin Specker and Warburg, 1938). [Jomo Kenyatta, *Facing Mount Kenya*]

⁵⁵ *Ibid*, 21.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 29.

⁵⁸ Coldham, *Effects of Registration on Indigenous Land Rights in Kenya*, *supra* note 49.

Community.⁵⁹ The communal part he argued, at least among the *Kikuyu*, came about in two forms. First was the *muhoi* concept whereby another community member, even a stranger, acquired cultivation rights on the land of another man or family unit, on a friendly basis without any payments for the use of the land.⁶⁰ This notion also existed amongst the *Luo* community featuring the *jadak* who would acquire occupation and use rights like the *muhoi*.⁶¹ Second, Kenyatta argues that African kinship ties were so strong that all a man's children, grand and great grandchildren, are considered as one family unit hence they could term the land as community land.⁶² In any event, all the members of the community were collectively sworn to protect their land, from any form of external aggression. It was this sense of responsibility to share with others that returned some general control to the community, as this standard of hospitality was reciprocated over and over again.

The multiplicity of rights enjoyed by various family members, and limited rights to the rest of the community amplify characteristics akin to intra and intergenerational equity. In this sense, the male family heads could control and make decisions on the family land, and their wives and children enjoy access and use of the land, for which reason it was *our land*.⁶ The fact that land would be safeguarded for children implies there was an inherent imperative to the interests of future generations of that family or community.

⁵⁹ Jomo Kenyatta, "Facing Mount Kenya," *supra* note 54 at 30.

⁶⁰ *Ibid* at 22.

⁶¹ Coldham, "Effects of Registration on Indigenous Land Rights in Kenya," *supra* note 49 at 95

⁶² Jomo Kenyatta, "Facing Mount Kenya," *supra* note 54 at 3031.

In his book *Land and Class in Kenya*,⁶³ scholar Christopher Leo concurs that members of most other agricultural communities did acquire rights to a particular plot, just like among the *Kikuyu*, but their rights did not as a rule have the effect of barring any members for access to land.⁶³ The reciprocal balance between individual/family control of land, and the overall community oversight plus hospitality was mistaken by the British colonial administrators in Kenya, who misinterpreted the situation to mean that the land was communal. This in turn offered justification for laws that expropriated the land into government or crown land.

This misinterpretation of indigenous land tenure is also manifested with the colonial treatment of the African commons land in Kenya. African commons generally refers to common property land within arid and semi-arid districts inhabited by pastoralist communities, which is now converted into *group ranches*.⁶⁴ The African commons system involved reservation of land and resources exclusively to specific communities and families operating as corporate entities. African commons also featured a system of authority that made decisions over land use and land stewardship, for instance through the allocation of pasture for wet season grazing, and pastures banking for dry seasons.⁶⁵ This concept meant

⁶³ Christopher Leo, "Land and Class in Kenya," *supra* note 22 at 30.

⁶⁴ See a discussion on rangeland ecology in context of group ranch administration, in Chris Southgate & David Hulme, "Land, Water and Local Governance in a Kenyan Wetland in Dryland: The Kimana Group Ranch and Its Environs" 17 (Inst. for Dev. Policy and Mgmt., Rural Resources Rural/Livelihoods Working Paper Series, Paper No. 4, 1996). The nature of group ranches, and implications of the tenure rights to land use decision making and sustainability are examined in section 3.1.2 of this chapter.

⁶⁵ See a discussion on grassbanking in David Western & Manzoillo Nightingale, *The Future of the Open Rangelands: An exchange of ideas between East Africa and the American Southwest* (Nairobi: ACTS Press, 2007) at 35-37. See also, African Conservation Centre, *Diversifying Rural Livelihoods: Pastoralism and Rangeland Management* (Nairobi: African Conservation Centre, 2007).

that during the rainy season, otherwise called ‘wet season’, the people would graze their livestock up in the mountains far away from home. However, during the ‘dry season’, they would bring them back closer home and utilize the pasture that was set aside during the wet season. The commons was protected by a social hierarchy in the form of an inverted pyramid, the tip representing the family; the middle, the clan and lineage; and the base, the community.⁶⁶ Internal criteria determined allocation of resources such as pasture, allowing specific families control over their livestock but prohibited any *inter vivos* transfer of land with transmission permitted only through intestacy.⁶⁷

Influenced by an understanding consistent with Garrett Hardin’s ‘tragedy of the commons’⁶⁸ thesis, the colonial government viewed these African commons as open access land without any internal controls and exposed to continuous degradation.⁶⁹ Hardin had argued that any rational herdsman sharing a commons will realize that the only sensible course is to add more animals to his herd.⁷⁰ Each man is then locked into a system that compels him to increase his herd without limit, ‘and as a result, a commons is therefore a tragedy because it

⁶⁶ Okoth-Ogendo, ‘The Tragic African Commons,’ *supra* note 53 at 108.

⁶⁷ *Ibid.*

⁶⁸ See, Garrett Hardin, ‘The Tragedy of the Commons’ 162 *Science* 1243, 1244, online: <http://www.sciencemag.org/cgi/content/full/162/3859/1243> [Hardin, ‘Tragedy of the Commons’]

⁶⁹ Okoth-Ogendo, ‘The Tragic African Commons,’ *supra* note 53 at 108.

⁷⁰ See further discussion in Robert Kibugi, ‘Failed Land Use Legal and Policy Framework for the African Commons? Reviewing Rangeland Governance in Kenya 2009’ 24(2) *Journal of Land Use & Environmental Law* 309-336.

will inevitably decay and rot away.⁷¹ Hardin, though, mistakenly assumed that community managed areas equate to areas free from management control.

The ‘tragedy of the commons’ metaphor according to scholar Eleanor Ostrom wrongly presented common property as embodying ‘the expected degradation of the environment whenever many individuals use a scarce resource in common.’⁷² Kameri-Mbote points out that ever since the ‘tragedy of the commons’ thesis was presented, private/individual property rights have been fronted as a panacea to the problem of unsustainable resource use.⁷³ This in spite of the fact that the social criteria which restricted decisions over who had access or could use or utilize the African commons land infers presence of management control, and made the land private to the community.

When they correlated the African commons to the ‘tragedy of the commons,’ the colonial government disregarded the evidence of a social hierarchy that traditionally ensured equity of land access and land use for present and future generations. In particular, the idea of setting aside land for wet and dry season grazing demonstrates that the pastoralist communities were aware how to balance their socio-economic activities (cattle grazing and food crops) with needs to sustain ecological integrity that would further support their economic activities. Whether amongst agricultural communities like *Kikuyu* or African

⁷¹ Hardin, ‘Tragedy of the Commons,’ *supra* note 68.

⁷² Eleanor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, Cambridge University Press, 1990), at 2.

⁷³ Patricia Kameri-Mbote, Patricia ‘Land Tenure, Land use and Sustainable Environmental Management in Kenya: Towards innovative Approaches to Property Rights in Wildlife Management’ in Nathalie J. Chalifour,, Patricia Kameri-Mbote, Lye Lin Heng & John R. Nolon (eds) *Land Use Law for Sustainable Development* (New York: Cambridge University Press, 2007) 132.

commons like amongst the pastoralist Maasai, indigenous tenure rights were therefore quite pronounced, and involved reserving exclusive use of the land either to a family, clan or ethnic grouping. Instead of vesting ownership of land to those in charge of a community, they are vested with control with a primary obligation to guarantee access and equitable distribution⁷⁴ to present members and to preserve the land resources for the benefit of future generations.⁷⁵

It is important to highlight that Jomo Kenyatta went on to become founding President of Kenya, and his government was responsible for taking over and implementing the most widespread land tenure conversion, to individual registration formal tenure.⁷⁶ After the earlier examination of Kenyatta's exposition of indigenous land tenure, and his argument that private rights to land are inherently African, it becomes clearer why the first African government in Kenya readily continued the colonial policies. However, as the next section will show, the process fell far short of the objective, by welcoming the possibility of landlessness, and failing to secure the tenure rights of women, and other family members. We also inquire whether the formal land rights contain a legal responsibility for the tenure rightholders to balance their agricultural and other socio-economic activities with safeguarding environmental integrity, which is critical to sustainable land use in agriculture.

⁷⁴ Okoth-Ogendo, "Tenants of the Crown," *supra* note 48 at 7.

⁷⁵ H.W.O Okoth-Ogendo, "Some Issues of Theory in the Study of Tenure Relations in African Agriculture" 1989 (59) 1 Africa, 6 at 11.

⁷⁶ This earned Kenya a reputation as the country with the most widespread registration and titling of land in Sub-Saharan Africa.

2.2.2 FORMAL LAND TENURE IN KENYA

In this section we review the nature of formal or statutory land tenure in Kenya. The review commences with recounting the process of land tenure conversion that created statutory tenure. Earlier in this chapter, we highlighted that the objective of land tenure conversion was to create the individual registration of land viewed as a natural incentive for farmers to increase agricultural land productivity. The policy statements, such as the Swynnerton Plan, suggested that increased agricultural productivity would be facilitated by eased decision making rights for the sole registered land owner, and the practice of efficient land husbandry techniques. Here we examine whether statutory land tenure realized the intended objective. We also inquire on the legal status of the tenure rights of women and children, previously guaranteed by indigenous tenure, which are essential for protecting intergenerational equity, a key component of sustainability.

2.2.2.1 The historical evolution to formal land tenure

The main legal mark of the evolution to formal land tenure was the introduction of the Torrens system based on statutory registration and ownership of demarcated plots. The Torrens system was introduced to replace existing indigenous land ownership.⁷⁷ The British declaration of a Protectorate and later a Colony over Kenya in 1898 and 1920 respectively fundamentally altered African land relations.⁷⁸ Promulgation of the *Crown Lands Ordinance*

⁷⁷ Kameri-Mbote, "Land Tenure and Sustainable Environmental Management," *supra* note 23 at 262.

⁷⁸ Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Nairobi: Government Printer, June 2004) at 3. [RoK, "Commission of Inquiry into Illegal Allocation of Public Land"]. See also, Ghai and McAuslan, "Public Law and Political Change in Kenya," *supra* note 47 at 3 & 50. The transformation of Kenya into a colony was effected through the Kenya (Annexation) Order-in-Council, 1920.

in 1902, and its 1915⁷⁹ successor conferred enormous powers on the colonial governor to make grants over annexed land in favour of individuals, in the name of the Crown.⁸⁰ Crown land was defined to include all land that was under the control of the colonial government including what the British referred to as native lands. These were lands occupied by the indigenous communities of the protectorate and all lands reserved for the use of the members of any indigenous community.⁸¹ From 1938 however radical title to native lands was vested in the Native Lands Trust Boards, even though the Governor retained powers of eminent domain.

Further land reform was carried out towards the end of the colonial period between 1950 and independence in 1963. This was intended to bring forth an agrarian revolution along pre-industrial European lines.⁸² According to Okoth-Ogendo⁸³ this reform was deemed necessary, at least in Kenya, because the colonial government thought the system of allocation of land rights in African indigenous tenure was defective in several ways: first, it permitted individuals to acquire several parcels of land often at distances from each other; secondly colonial authorities perceived communal nature of the tenure system as conducive

⁷⁹ RoK, —Commission of Inquiry into Illegal Allocation of Public Land,” *supra* note 78 at 6. This 1915 Crownland Ordinance was later renamed the *Government Land Act*, Cap 280 Laws of Kenya.

⁸⁰ Okoth-Ogendo, —Tenants of the Crown,” *supra* note 48 at 41.

⁸¹ *Ibid.* This native lands were areas reserved for indigenous Kenyan communities while highlands comprised the fertile and productive lands expropriated when Kenya was annexed as a colony and set aside for European settlement. They were administered under the Native Lands Trust Ordinance, Kenya (Native) Areas Order in Council, and the Crown Lands Ordinance where no other law was operational. These were administered by the 1939 Crown Lands (Amendment) Ordinance and the 1939 Kenya (Highlands) Order in Council. See also, —East Africa Royal Commission Report,” at 365. See also, —Ghai and McAuslan, —Public Law and Political Change in Kenya,” *supra* note 47 at 85.

⁸² Angelique Haugerud, —Land Tenure and Agrarian Change in Kenya” 1989 (59) 1 *Africa*, 61 at 63. [Angelique Haugerud, —Land Tenure and Agrarian Change in Kenya”]

⁸³ Okoth-Ogendo, —Tenants of the Crown,” *supra* note 48 at 70.

to incessant disputes that created disincentives to capital investments. The colonial government further viewed inheritance procedures in African land tenure as encouraging sub-division, promptly resulting in smaller land units with diminished economic potential. The African commons traditionally occupied by pastoralist communities were perceived as lacking internal management controls, and predisposed to environmental degradation.⁸⁴ With this perception, individualization of tenure was thus seen as the only alternative to these problems.

The main basis of the tenure conversion, as explained earlier in the chapter, was derived from the 1955 Report of the East African Royal Commission which promoted individualized tenure as possessing greater advantages by giving the individual a sense of enhanced security in possession and in enabling the purchase and sale of land.⁸⁵ The Swynnerton Plan, in addition to promoting individualized tenure supported by an indefeasible title to land as the ideal mechanism to enhance agricultural productivity by African farmers, had a further effect. It recommended that a group of ‘progressive energetic or rich’ farmers should be enabled to acquire more land than the ‘bad or poor’ farmers, and effectively created a landed and landless class in Kenyan society. The authors of this policy recommendation anticipated this outcome and termed it ‘anormal step in the evolution of any country.’⁸⁶

One group of people who lost any tenure rights to the use of land at the point of registration were the *muhoi* or *jadak* whose hospitality based occupation was determined as not

⁸⁴ Colony of Kenya, Report of African Land Development in Kenya 1942-1962 (Ministry of Agriculture, Animal Husbandry and water resources, Nairobi, 1962) at 7.

⁸⁵ ‘East Africa Royal Commission Report,’ *supra* note 28 at 323, para 77.

⁸⁶ Kenya: —Swynnerton Plan” *supra* note 30 at 9-10.

amounting to any ownership interests.⁸⁷ In broader terms the outcome of accepting the possibility of landlessness was a class of ‘squatters,’ which implies people without land but who occupied and utilized any available land including marginal or extremely dry land.⁸⁸ Some academic literature now suggests that a lot of poor people live in marginal land, which they desperately cultivate in a bid to fulfil their socio-economic needs for food, with little success, and these lands face increased degradation.⁸⁹ Landlessness is therefore not only an affront to the sustainability principle of intragenerational equity, but together with cultivation of marginal land for socio-economic needs, they are conducive for land use decisions that result in unsustainable practices and land degradation.

Thereafter the Colonial government set up The Working Party on African Land Tenure to examine and make recommendations on measures necessary to introduce a system of land tenure capable of application to all areas of native lands.⁹⁰ The report of this Working Party made far reaching recommendations on native lands. It proposed that title to land registered to natives should be absolute - which was meant to break co-ownership (multiplicity of rights).⁹¹ This was the hallmark of indigenous land tenure, and had always assured equity in land use and access by present and future generations. The report also resulted in enactment of three major statutes governing African land tenure: *Native Lands Registration Ordinance*,

⁸⁷ Republic of Kenya, *Report of the Mission on Land Consolidation and Registration in Kenya 1965-1966* (Nairobi: Government Printer, 1966) at 19. [RoK, ‘Report on land consolidation and registration’]

⁸⁸ For further discussions on the squatter problem in Kenya, see in particular, Philip M. Mbithi, & Carolyn Barnes, *The spontaneous settlement problem in Kenya* (Kampala : East African Literature Bureau, 1975)

⁸⁹ See for instance the extensive discussion by Jane Kabubo-Mararia, in, ‘Rural Poverty, Property Rights, and Environmental Resource Management in Kenya’ (Paper Prepared for the Beijer International Institute of Ecological Economics Research Workshop, Durban, South Africa, May 28-30 2002).

⁹⁰ Okoth-Ogendo, ‘Tenants of the Crown,’ *supra* note 48 at 73.

⁹¹ *Ibid.*

1959; *Native Lands Trust Ordinance*; and the *Land Control (Native Lands) Ordinance*, 1959.⁹² These statutes would later be reviewed and renamed upon independence in 1963. Okoth-Ogendo observed that by conferment of absolute title, the tenure conversion and registration process put African landholding firmly on the principles of European property law.⁹³ The emergence of statutory land tenure resulted in several categories of land ownership:

1. Individual or private land

Individual or private land rights are mainly manifested through two statutes.⁹⁴ These are the *Registration of Titles Act*,⁹⁵ and the *Registered Lands Act*.⁹⁶ Depending on the registration statute, the quantum of rights granted to the registered owner or individual is either freehold or absolute. Freehold tenure connotes the largest quantum of land rights which the sovereign can grant to an individual with unlimited rights of use, abuse and disposition, but subject to the regulatory powers of the State.⁹⁷ In Kenya, such interests are individually held under the *Registration of Titles Act* which provides registration for land alienated as fee simple or freehold estate.⁹⁸ The *Government Lands Act* vests the State with freehold interests over any

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Other statutes include the *Land Titles Act*, Cap 282 Laws of Kenya, which was enacted to ‘make provision for the removal of doubts that have arisen in regard to titles to land and to establish a Land Registration Court.’ The 1882 *Transfer of Property Act* provides for conveyancing of land registered under every land tenure legislation except the *Registered Land Act*, which contains its own conveyancing provisions.

⁹⁵ Cap 281 Laws of Kenya.

⁹⁶ Cap 300 Laws of Kenya.

⁹⁷ RoK, ‘Sessional Paper on National Land Policy,’ *supra* note 41 at 18.

⁹⁸ Section 6; sections 22-23 provide for registration of any grants issued in respect of this land, whether as freehold or leasehold, and indicates that the certificate of title is conclusive proof of indefeasible ownership.

specific land alienated to the government, any unalienated land in Kenya, or any land that escheats to the government upon the demise of any landowner without heirs.⁹⁹

The absolute estate was derived from the enactment of the *Native Lands Registration Ordinance* which was consolidated and renamed the *Registered Land Act (RLA)*,¹⁰⁰ serving as both a registration and a conveyancing statute. It was intended to extinguish all indigenous rights to land, and promote exclusive and individual holdings. The hallmark of the RLA was vesting of radical title of such land to Africans, giving an ‘absolute estate’ that will be ‘indefeasible.’¹⁰¹ The 2009 *Sessional paper on national land policy* of Kenya indicates that there is little other practical difference between the two holdings considering both freehold and absolute holdings, just like leasehold land,¹⁰² are subject to police power and compulsory acquisition. A problem posed by the absolute tenure is perception by tenure holders that they hold absolute rights to maximize immediate utilization of the land. Other challenges arising from the quantum of rights in the absolute estate relating to integration of concerns with environmental quality of land by land owners are further reviewed in section 4.0 of the chapter.

2. Government or public lands

This category of land rights vests a freehold interest in the Government of Kenya and is interchangeably referred to as government or public land. The *Government Land Act (GLA)*

⁹⁹ Cap 280, Laws of Kenya, at sections 2, 4 and 8A.

¹⁰⁰ Section 27.

¹⁰¹ *Ibid.*

¹⁰² RoK, ‘Sessional Paper on National Land Policy,’ *supra* note 41 at 18.

is the principal law governing ownership and exercise of the bundle of rights. Another illustrative category is land vested in statutory agencies, such as forest land. A *prima facie* reading of the statutes suggests that the land is vested in the government as a private owner of land. The GLA defines government land as land for the time being vested in the Government¹⁰³ while the 2005 *Forests Act* provides that all forests in Kenya, other than private and local authority forests⁴ are vested in the State.¹⁰⁴

This perception that government owns this land as private owner has resulted in significant mis-use of the statutory powers of disposition and allocation of such land. The GLA for instance vests extremely wide powers of allocation and disposition in the President of the Republic, which are exercised on his behalf by the Commissioner for Lands.¹⁰⁵ Previously, the now repealed 1942 Forest Act, which was in force from 1942 to 2005 allowed for Ministers to revoke the status for state forests and subsequently allocate them to private use.¹⁰⁶

The argument that land can be vested in the government for its use as a private owner is conceptually weak and should fail, for several reasons. First there is a rich history of illegal and irregular allocations and grabbing⁶ of government held land in Kenya.¹⁰⁷ Secondly,

¹⁰³ Section 2.

¹⁰⁴ Section 21, see further discussion in section 3, of chapter 4.

¹⁰⁵ The office of Commissioner for Lands is established by section 5.

¹⁰⁶ Francis D.P. Situma, "Forestry Law and the Environment" in Charles Okidi, Patricia Kameri-Mbote & Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008), at 236.

¹⁰⁷ This has resulted in investigations by a Presidential Commission of Inquiry, which found evidence of widespread illegal allocation of public lands to the political class. See, RoK, "Commission of Inquiry into Illegal Allocation of Public Land," *supra* note 76.

Kenya practices a system of elective government, in which case any government elected to office is expected to act on behalf of voters and citizen. In this case, any action taken, or property owned or acquired by a government is on behalf of, for, or in trust for the people of Kenya. In fact the full definition of government land indicates this land was vested in the government through the Second Schedule to the Kenya (Independence) Order in Council, 1963.¹⁰⁸ This validly highlights that this land was vested in the government during transfer of sovereignty from colonial rule to independence, actions taken on behalf of the people of Kenya.

Against the backdrop of this debate, the 2010 Constitution of Kenya set a basis to resolve these concerns by reclassifying the categories of land held by the state either directly or through statutory agencies, as public land.¹⁰⁹ The Constitution has also divested the president and commissioner for lands of the extensive authority to allocate public land, and provided for the establishment of an independent National Land Commission to play that role.¹¹⁰ It is expected that relevant land tenure statutes will be reviewed to accord with the constitution as prescribed by article 68.¹¹¹

¹⁰⁸ Government Lands Act, section 2 defines government land to mean land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964.

¹⁰⁹ Article 62(1) for instance states that Public land is, *inter alia*, ‘land which at the effective date was unalienated government.’ (Effective date is when the constitution came into force). Section 62 extensively lists down the lands which qualify as public land.

¹¹⁰ Constitution of Kenya, 2010, article 67. The functions include to ‘manage public land on behalf of the national and county governments.’

¹¹¹ Article 68(a) requires Parliament to ‘revise, consolidate and rationalise existing land laws.’

3. Trust or community lands

The other category of land, relatively generic to Kenya, is trust lands which were created by the former Constitution,¹¹² and administered through the *Trust Land Act*.¹¹³ Trust lands are vested in County councils, the category of local authorities having jurisdiction in rural areas. County councils are required to hold the land in trust for and give effect to rights, interests or other benefits arising under African customary law that may be vested in any tribe, group, family or individual. This land may either be lying fallow or occupied by forest or wildlife, or occupied by the community exercising customary but unregistered rights. Trust lands can be registered to individual or group holders but subject to ascertainment of customary interests. They may also be set apart and allocated for public purposes, mining, or other purposes that the county council deems likely to result in benefit to the local residents. Trust lands are intended to secure access and use rights for members of specific communities, across present and future generations. These lands have now been reclassified as community land by the 2010 Constitution.¹¹⁴

Having reviewed the structure of land tenure in Kenya, and the objectives of the land tenure conversion, we now analyse the impact of individual land tenure attitudes of land owners or occupiers towards integrating environmental protection with their socio-economic activities in land use decision making for sustainable agriculture.

¹¹² Constitution of Kenya [Revised Edition 2008] (now repealed), section 114-120.

¹¹³ Cap 288 Laws of Kenya.

¹¹⁴ Constitution of Kenya, 2010, article 61 & 63.

3 THE IMPACT OF INDIVIDUAL LAND TENURE ON SUSTAINABLE AGRICULTURE

An examination of land tenure conversion and its impact in Kenya could be a very broad and extensive exercise, well beyond the scope of this research. This section will therefore focus on the impact of land tenure rights on sustainable agricultural land use, based on whether there are sectoral law or institutional policy mechanisms to guide landowners to integrate environmental land quality considerations with their socio-economic activities. While individual or private land tenure is manifest either as freehold or absolute estates, we restrict our analysis to the absolute estate created by the *Registered Land Act* (RLA). The RLA framework is widely applied in Kenya as it provides for the registration of customary interests in land, converting them into formal tenure. It was enacted in 1963 to take over the consolidation and registration functions of the 1959 *Native Lands Ordinance*.

Upon registration of land under the RLA, an absolute estate is vested in the registered proprietor.¹¹⁵ Registration under the RLA can occur in two instances. The first instance occurs when tenure rights in land that is held under indigenous or customary tenure is ascertained and registered to a proprietor as the individual owner.¹¹⁶ This process is referred to as first registration, but it is beyond the scope of this research.¹¹⁷ The second instance occurs either when land registered under another legal framework, such as the RTA, is

¹¹⁵ Section 27.

¹¹⁶ See, *Land Consolidation Act*, Cap 283 Laws of Kenya. Section 15 empowered to consolidation committee to record ‘the name and description of every person (hereafter in this Part referred to as a land owner) whose right, in the opinion of the Committee or Arbitration Board, should be recognized as ownership, together with a description or other sufficient identification and the approximate area of every parcel of land to which he is entitled.’ This process was called ‘Recording of Existing Rights.’

¹¹⁷ See generally, Coldham, ‘Effects of Registration on Indigenous Land Rights in Kenya,’ *supra* note 47; See also RoK, ‘Report on land consolidation and registration,’ *supra* note 87.

transferred to RLA, or upon registration of a parcel of land after purchase, gift or inheritance.¹¹⁸

The absolute estate whether obtained by first registration or subsequent registration is indefeasible except on grounds specified by the RLA.¹¹⁹ The tenure rights are to be held and enjoyed by the proprietor, together with all privileges, free from all other interests and claims whatsoever except:

- i). to the leases, charges and other encumbrances and other conditions and restrictions that maybe shown in the register
- ii). Those overriding interests that are specified in section 30, and do not require noting on the register.¹²⁰

These rights show that the registered land owner enjoys the legal right to control and use the land except when restricted by law. The rights also include the legal ability to undertake an *inter vivos* transfer to transmit ownership rights to another person. The quantum of tenure rights conferred with this absolute estate impacts sustainable agricultural land use as they give the registered owner (or assignees) the legal rights to make land use decisions and

¹¹⁸ Section 14.

¹¹⁹ For instance, section 143 of the RLA empowers a court of law to order a rectification of register to cancel a registration where it concludes such registration was obtained through fraud.

¹²⁰ Section 30, the overriding interests include: (1) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (2) natural rights of light, air, water and support; (3) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; (4) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46; (5) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; (6) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; (7) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed; and (8) (electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law.

therefore, ideally, the task of integrating environment considerations with socio-economic activities. In this section, we examine whether rights and decision making amounts to the integrated land use choices that are necessary to safeguard the environmental quality of land. We also review how individual tenure rights impact the rights of dependant family members to access and use land, and therefore possess a legal connection with intergenerational equity.

3.1 THE EXERCISE OF USE AND CONTROL CREATED BY THE RLA

The breadth of rights conferred by the absolute estate in land registered under the RLA confers extensive user rights, control rights and transfer rights. With regard to land use decision making for sustainable agriculture, it is the user rights and the control rights that manifest legal ability and control. Transfer rights to some extent interface with control, especially where customary law based parental control is applied to (informally) reallocate user rights to children, while the land is still technically registered to a parent. This aspect is explored a little later in this section.

It can be argued that in context of tenure rights, the RLA infers some unfettered ability by the registered owner to make land use choices, save for legal restrictions such as encumbrances or overriding interests. There is a further argument that the absolute estate invites a perception of unlimited rights to maximize land utilization for immediate economic benefit. Looking back at the policy motivations to undertake land tenure conversion into individual registered land from indigenous tenure, landholders under the RLA should typically exercise their freedom for decision making to select beneficial land uses. These

land uses were expected to enhance agricultural productivity, planting of long-term economically productive crops and making permanent improvements to the land.¹²¹

In contrast, analysis carried out decades after the tenure conversion programme disagrees with the policy projections. In this respect, research undertaken by Bruce & Migot-Adholla reported two issues. First, that both indigenous and formal tenure do confer secure land tenure rights. Secondly, that even in places like Nyeri County (in central Kenya highlands) with high incidence of land registration, there was no demonstrable evidence that individual registration through formal tenure eased access to loans, or brought any increase in agricultural productivity.¹²² Place and Hazell concur with these findings, noting that formal titles did not necessarily enhance security of tenure (beyond what indigenous tenure had conferred) and that the process did not result in increased agricultural productivity in the areas where land registration occurred.¹²³ A similar conclusion was reached by Pauline Peters who, reviewing broad research from Kenya and other African countries, concluded that registration of titles failed to achieve the expected increase in agricultural investment and productivity.¹²⁴ These findings suggest that the colonial assumption or expectation on the effects of land tenure conversion was incorrect.

¹²¹ Kenya Colony, —Synnerton Plan,” *supra* note 30 at 9-10.

¹²² See, Shem Migot Adholla, Peter Hazell, Benoit Blarel & Frank Place, Frank —Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint for Productivity?” 1991 (5) 1 The World Bank Economic Review, 155-157.

¹²³ Frank Place & Peter Hazell, —Productivity Effects of Indigenous Land Tenure Systems in Sub-Saharan Africa 1993 (75) 1 American Journal of Agricultural Economics, 10-19 at 14&15.

¹²⁴ Peters, Pauline, —Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions” (2009) 38 World Development 1317–1325, at 1318.

Attwood, in reference to decision making in context of land husbandry, concludes that the conventional view that land titling will enhance the adoption of soil conservation measures or new technology for higher agricultural productivity had been inaccurate.¹²⁵ We interpret the question of land husbandry or soil conservation to manifest expected concerns with integration of sustainable land use practices with agricultural productivity. Attwood's conclusion is actually supported by the Kenya government's own land and agriculture policy statements which acknowledge there has been overall poor agricultural productivity in the country, with this outcome having significant negative implications on the economic status of many in the population.¹²⁶ Agriculture policy, for instance, has consistently pointed to declining soil fertility and land degradation as the major contributor to the falling productivity in agriculture.¹²⁷ Interviews and field visits with agricultural and irrigation officers in Kiambu and Embu also indicated that loss of fertility and soil erosion, on farms, continues to be one of the complex challenges.¹²⁸ In order to establish a firm basis for subsequent conclusions, on the interaction between tenure rights, agricultural productivity and environmental quality of land, we examine two brief case studies.

¹²⁵ Attwood, David —“Land registration in Africa: The impact on Agricultural production” (1990) 18(5) World Development 18(5) 659-671, at 668-669.

¹²⁶ RoK, —“Sessional Paper on National Land Policy,” *supra* note 41 at 18.

¹²⁷ RoK, —“Strategy for Revitalizing Agriculture,” *supra* note 1 at 15-17.

¹²⁸ Doctoral research, —“Interviews undertaken by the author, June-August 2009.”

3.1.1 ILLUSTRATION OF LAND USE DECISION MAKING FROM KIAMBU COUNTY

Kiambu County is an administrative unit in the former central province of Kenya,¹²⁹ with a predominant agriculture based economy. Historically, Kiambu is also one of the places the colonial and independence Kenya governments carried out intensive land consolidation and registration.¹³⁰ It is therefore illustrative of a high incidence of individually registered land through statutory tenure. This case study sets out illustrations and conclusions drawn from Kikuyu, Lari and Limuru divisions during the period of research visits and interviews in 2009.

Many land parcels underwent first registration, with ascertainment of customary ownership claims, and subsequent registration of ownership interests to an individual. With time, the subsequent generations of children are relatively content to invest money and labour to build homes, and undertake agriculture with investments even where no further formal land demarcation or subdivision was carried out.¹³¹ This situation occurs where the head of the family gives parental consent to the children and allocates them sections of the family farm to build homes or carry out agricultural investments and production.¹³² This parental authority is a manifestation of the registered land owner using customary authority to informally reallocate the user rights of the land to dependants. Therefore, parental consent

¹²⁹ See, –Constitution of Kenya, 2010,” which in Chapter 11 has reorganized the country into a devolved system of government comprising 47 counties.

¹³⁰ See RoK, “Report on land consolidation and registration,” at 8, a para 27 where the report states that “In Kenya, the Land Adjudication Act was first used in the overcrowded areas of Central Province where there more people than there is land available...” Kiambu County is located in the former Central Province. See also, RoK, “Report on land consolidation and registration,” at 21, para 74, the report notes that “In Kiambu, Nyeri and Embu Districts – admittedly the busiest of the district land registries...”

¹³¹ Doctoral research, “field visits with landowners, June-August 2009.”

¹³² *Ibid.*

supports the feeling of security to a degree that is sufficient to induce investments in the improvement of what is formally someone else's property. Certainly in the event of disputes over land rights, which do occur, formal subdivision of land and obtaining title deeds is preferred to assert legal rights. Equally, family members may mutually agree to undertake subdivisions even without a conflict.

It is evident there is some form of interaction between indigenous tenure values and formal tenure, and both seem to confer secure tenure depending on the circumstances. Therefore the people using the land may enjoy some relative decision making rights especially with regard to land use choices. In the research areas in Kiambu County, it was common to encounter visible and intensive economic investments in productive agriculture such as dairy cattle, food crops such as maize, potatoes, or beans and vegetables grown for the local market, or non-agricultural developments such as housing projects for rent.¹³³

These observations on the scale of economic productivity, even though from one part of Kenya, demonstrate that people, whether they derive their tenure from statute, custom or a hybrid of statute and custom, felt sufficiently tenure secure to justify investments on their land. In contrast, visual observations by this author found evidence of massive siltation of local rivers due to cutting of trees on the sloppy and ridged landscape. There was also evidence of artisanal mining of building stone on the slopes, and along river banks. These small scale but intense mining of building stones is an economic activity perhaps resulting from local unemployment or efforts to improve domestic housing quality. However the

¹³³ Doctoral research, field visits, author observations, June-August 2009.”

tailings from the mines are periodically dumped into the rivers and streams causing siltation.¹³⁴ Further, in the absence of responsibilities to rehabilitate the sloppy area after cutting trees, and stripping biodiversity and topsoil to make way for the stone mine, massive gulley erosion is evident, causing further loss of top soil from farm land higher up on the slope.¹³⁵

It is notable that these levels of environmental degradation occur in a place where the local economy relies on agricultural productivity for food crops, local trade, or livestock feed. These productive land uses in turn require sustainable land use practices that could be adapted into place by changing the personal attitudes of landowners or occupiers so they integrate environmental quality of the land with their economic activities. The state of affairs suggests that the tenure rights available either under the RLA or under customary tenure, when secure, provide the legal ability to make decisions to choose economic land uses. These user and control rights have however not resulted in people assuming responsibility to integrate environmental protection with their socio-economic land use choices.

3.1.2 ILLUSTRATION OF LAND USE DECISION MAKING IN GROUP RANCHES

The term ‘group ranch’ is a generic term referring to lands previously held as African commons through indigenous tenure, and converted to formal tenure by the colonial and independent Kenya governments. The principal law, the *Land (Group Representatives) Act*, uses the term ‘group representatives’ to refer to the people that are elected by a group

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

adjudicated to have communal interests over certain land. The land is registered in the representative's name as trustee, and the group also elects a management committee, which governs the group's daily affairs.¹³⁶ The law also establishes a registrar of group representatives chiefly to supervise group ranch administration.¹³⁷ In practice, this officer is represented in every district where there are group ranches. In order to put the challenges of sustainable land use within group ranches in perspective, a brief account of the process leading to formation of group ranches is essential.

As explained earlier in this chapter, colonial authorities and subsequent governments in Kenya were convinced that the African commons tenure system in the arid rangelands was open access with no internal management controls thereby making it naturally susceptible to the tragedy of the commons.¹³⁸ This resulted in a process, through mechanisms initiated under the *Land Adjudication Act*¹³⁹ to ascertain and record any customary ownership interests claimed by groups of people in the rangelands, and then register particular parcels of land to the particular group, mainly based on clan lineage.¹⁴⁰ It was anticipated the

¹³⁶ For instance, The *Land (Group Representatives) Act*'s preamble provides that it is "[a]n Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as [landowners] under the Land Adjudication Act, and for the purposes connected therewith and purposes incidental thereto." *Land (Group Representatives) Act*, (1968) Cap 287 Laws of Kenya, see preamble. Section 5 of this Act provides for adoption of a constitution, election of group representatives and election of members to act as officers and committee responsible for daily management and decision making in the group.

¹³⁷ *Land (Group Representatives) Act*, section 8.

¹³⁸ See, section 2.2.1 of the chapter.

¹³⁹ The Land Adjudication Act's preamble provides that it is "[a]n Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto." *Land Adjudication Act*, (1968) Cap 284 Laws of Kenya, see preamble.

¹⁴⁰ Section 2 of the *Land Adjudication Act* defines a group to mean _means a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined

structural set up would maintain a communal arrangement that would be favourable to pastoralist livestock keeping and grazing, as the group ranches would ‘contain adequate water supplies’ and ‘make a considerable contribution to development.’¹⁴¹

Through the mechanisms of the *Land Adjudication Act*, adjudication officers were empowered to investigate any claims of customary ownership by a group. After the investigation, if the adjudication officer is satisfied that any group has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, the officer determines that group to be the owner of that land.¹⁴² The officer then advises the group to apply for incorporation of group representatives under the *Land (Group Representatives) Act*. Once the group representatives are incorporated by the registrar of group representatives, the adjudication officer would submit the adjudication register to the Land registrar for the group’s tenure rights to be registered, as a first registration, under the RLA.¹⁴³ Thereafter, the land is subject to two legal regimes with regard to land tenure and with regard to internal administration and decision making.

The RLA, as the applicable land tenure law, determines the overall quantum of user rights, control rights and transfer rights, which are private to the group, and vested on the group representatives as trustees. The *Land (Group Representatives) Act* determines the legal framework for day to day administration and decision making for the collective membership.

to be the owner under the proviso to section 23 (2) (a) of this Act. Section 23(2)(a) allows for registration of these groups.

¹⁴¹ RoK, ‘Report on land consolidation and registration,’ *supra* note 87 at 31, para 104.

¹⁴² Section 23(2)(b).

¹⁴³ Section 27-28 of the *Land Adjudication Act*.

This latter law requires adoption of a constitution before a group is incorporated, which among other things, governs the election of group representatives, meetings of the group, election of a management committee¹⁴⁴ The management committee, which many groups have merged with the group representatives to avoid duplication of roles,¹⁴⁵ should guide day to day decision making and administration regarding development activities and land use. An extensive review of the character and operations of group ranches is however beyond the scope of this research.¹⁴⁶

Earlier in this section we highlighted that the breadth of tenure rights under the RLA are devoid of any legal responsibility over land owners to integrate environmental protection with their socio-economic objectives, in land use decision making. The RLA is the operative land tenure law with respect with group ranches, and therefore it's (RLA) legal sustainability shortcomings have similar effect with respect to basic decision making by any group ranch, as a private land owner. Further the *Land (Group Representatives) Act*, which governs internal group ranch decision making and administration does not set out any

¹⁴⁴ Section 7.

¹⁴⁵ Because the management committee and the group representatives have designated powers and functions, the law has created two centers of power: the group representatives, who may issue instructions to the committee and hear appeals from committee decisions; and the committee, which, while subordinated to the group representatives, is directly in charge of group affairs (Third Schedule to the Act) and is most directly accountable to group members. Even though this governing scheme may have been intended as a check and balance system, it is nonetheless a potential conflict area. Thus, for practical reasons, some group ranches have crafted local solutions that incorporate committee members as group representatives. See, for instance Constitution, Art. 21(c) (2005) (Tiemamut Group Ranch, Kenya) (on file with author); Constitution, Art. 21(c) (2006) (Nkiroriti Group Ranch, Kenya) (on file with author); Constitution, Art. 21(c) (2006) (Kijabe Group Ranch, Kenya) (on file with author).

¹⁴⁶ See discussion in Robert Kibugi, —AFailed Land Use Legal and Policy Framework for the African Commons? Reviewing Rangeland Governance in Kenya 2009 24(2) *Journal of Land Use & Environmental Law* 309-336; see also Esther Mwangi, —Pitfalls for Privatization: Fingers on the Hand are not Equal” 2004 22(2) *Property and Environment Research Centre (PERC) Reports*.

guidelines or requirements for land use activities to factor specific environmental management standards.

The rangelands that group ranches commonly occupy are particularly fragile lands, and therefore integration of sustainable land use practices would be especially valuable.¹⁴⁷ In illustration, most group ranch communities are pastoral livestock keepers. This means that group ranch communities are not only heavily dependent on natural resources, but also upon the proper and sustainable management of these resources. A number of group ranches also act as buffer lands to protected wildlife areas, and tourist lodges, and visits to see the wildlife contribute revenue for the group ranches.¹⁴⁸ In Narok, the group ranches that surround the Maasai Mara National reserve¹⁴⁹ and allow wildlife to occupy their lands equitably receive a combined 19% of the total revenues from the reserve.¹⁵⁰ In light of these collective benefits, and the individual interests of members to find grazing land for their livestock and possibly some suitable land to grow food crops, the group ranch should balance these interests by

¹⁴⁷ See, Republic of Kenya, *National Policy for the Sustainable Development of Arid and Semi Arid Lands of Kenya* (Nairobi: Office of the Prime Minister - Ministry of State for Development of Northern Kenya and Other Arid Lands, November 2009), which at 9-11, reports that ‘The ASAL districts cover about 467,200 square kilometres or about 80% of the country’s total landmass. A total of 39 districts fall under ASALs. Eleven of these districts are classified as arid, 19 as semi-arid and another 9 as those with high annual rainfall but with pockets of arid and semi-arid conditions. Pastoralists and agro pastoralists mainly inhabit the arid districts. Large areas of the arid districts are suitable only for nomadic livestock production. These pastoralists/agro-pastoralists own about 50% of the national cattle and small ruminant herd and 100% of the camel population.’ The policy also notes that in most areas, ‘almost all the farmers grow maize, but the rate of failure is very high. Soil erosion, low fertility and frequent droughts are the major production constraints.’

¹⁴⁸ For instance the Siana Group Ranch lies to eastern boundary of the Masai Mara Reserve.

¹⁴⁹ The Masai Mara National Reserve is located in Kenya, Narok District, having the County Council of Narok as a custodian. It is about 270 kilometres from Nairobi, and takes about 4 to 5 hours by road, online: http://www.narokcountycouncil.org/index.php?option=com_content&view=article&id=76&Itemid=75

¹⁵⁰ Heather Zeppel, *Indigenous ecotourism: sustainable development and management* (Oxford: CaB international, 2006) at 129.

having a system of environmental management entrenched into their land use decision making structures.

The substantive provisions of the *Land (Group Representatives) Act*, which set the basic framework for decision making and rules, do not refer to environmental management. Section 5 provides for the adoption of a constitution. Section 12 authorizes the group members to make rules administering those matters left out by constitution, including the administration of its property and affairs.⁴ These rules therefore become the principal means through which group ranches may regulate and set a basis for integration of natural resource use and development activities with environmental management. However the adoption of such internal rules by a group ranch is optional.

The Third schedule to the *Land (Group Representatives) Act* also requires the management committee to assist and encourage members to manage land or graze their livestock in accordance with sound land use, range management, animal husbandry, and commercial practice principles. The provisions in the third schedule are however not binding and can be expressly excluded from or modified by a group ranch's constitution.¹⁵¹ The mechanisms of the *Land (Group Representatives) Act* that governs internal decision making by the group, including over land use, therefore do not offer sufficient guidance or direction on how the ranch management, or the individual members can integrate sustainability with their economic activities. Since the development of natural resources and economic activities depends on each group ranch's internal rules, many group ranches have collapsed from the

¹⁵¹ These provisions are contained in the third part of the Third Schedule which comprises optional model regulations that each group ranch is free not to adopt for internal use, instead developing its own rules.

inherent inadequacies of this governing structure.¹⁵² Overstocking of livestock and overgrazing has become a common issue. Legal scholar Okoth-Ogendo has suggested that the Kenyan group ranches, set up ostensibly to avoid the ‘tragedy of the commons’ have now become ‘the tragic African commons’ because of the inadequacies of the statutory framework.¹⁵³

A number of group ranches that have not collapsed and sub-divided land amongst members are adopting internal rules and mechanisms to secure good environmental quality of land. Some of the common methods evident include zoning the group land to set apart land for conservation (including use by wildlife), grazing, settlement and food crop cultivation.¹⁵⁴ This approach can be lauded as a step towards adoption of binding minimum, acceptable and clearly set-out responsibilities or rules to guide decision making for natural resource management. However, after years of land use decisions and practices that undermine the environmental quality of land, these internal mechanism may not have significant effect. There is need for policy and legislative measures that will influence the personal attitudes

¹⁵² See, in particular, Esther Mwangi & Shauna BurnSilver, “Beyond Group ranch subdivision: Collective Action for Livestock Mobility, Ecological Viability and Livelihoods” June 2007 CAPRI Working Paper No. 66.

¹⁵³ Okoth-Ogendo, “The Tragic African Commons,” *supra* note 53.

¹⁵⁴ See for instance, Constitution, Article. 17- 19 (2005) (Tiemamut Group Ranch, Kenya) (copy on file with author). This constitution provides for the zoning of the ranch into three sectors, establishes a committee to consult with the general membership in general meetings regarding the nature of zoning and acceptable land uses, and binds all members to act in accordance with zoning arrangements without exception. It also prescribes penalties for the violation of the zoning arrangement.

and behaviours of people in respecting the zoning rules, controlling livestock numbers¹⁵⁵ as well as adoption of soil and water conservation and tree planting practices.

The two case illustrations are to some extent representative of the land tenure and land use situation in Kenya, regardless of whether land is held under formal, indigenous or hybrid interface of the two tenure systems. It is notable that the RLA, the principal operational statute in these instances, confers quite extensive user rights and control rights to registered owners, or those acquiring user rights with customary consent, or under group representatives' legislation. These broad quanta of rights, while conferring sufficient freedom for decision making on the use of land, does not include any responsibilities on the tenure holders (or their assignees) to integrate the environmental quality of land with their socio-economic land use choices.

3.2 TENURE RIGHTS IN THE CONTEXT OF GENERATIONAL EQUITY AND SUSTAINABILITY

While in certain instances as explained earlier, parental consent to the use of land manifests customary security of tenure, the absolute estate vested by the RLA poses another legal problem that has implications on sustainable land use. This legal problem concerns the land access and user rights of family members such as spouses (wives) and children, as dependants of the registered land owner, which is a manifestation of intra and intergenerational equity. The situation especially occurs in patriarchal Kenyan societies if and when the sole registered (mainly male) land owners decides to sell the family land. When it

¹⁵⁵ The stock control issue is enormously difficult to address; this author could not even broach the subject with the Tiemamut, Kijabe, Musul, and Nkitoriti group ranches, as they simply refused to discuss even the idea of rules limiting the amount of livestock they could own.

occurs, this circumstance threatens the important principles and values of intra and intergenerational equity. Intragenerational equity implies that members of the current generation should facilitate access to the use of resources for other people in the same generation. In such ideal circumstances, the present generation owes a crucial intragenerational responsibility to sustain the integrity of the land and environment for the unborn generations.¹⁵⁶ Generational equity, in all its perspectives, is therefore an important principle of ecologically sustainable development. The participation of all people in decision making over the use and management of their land and environmental resources is highlighted as one of the mechanisms to give effect to intergenerational equity.¹⁵⁷

It is therefore important from the perspective of sustainability to promote recognition of the rights of women and children. This is because in rural agricultural societies, women are the primary users of land.¹⁵⁸ Within the scope of intergenerational equity, such women should possess some decision making authority to facilitate integration of environmental management into the land use choices they regularly have to make. Children represent in a concrete manner an element of the intergenerational responsibility that it is hoped to encourage as one further means of ensuring that property in land is used with a view of its long term contribution in addition to the immediate needs of socio-economic fulfilment.

¹⁵⁶ See discussion in chapter 2, section 6.2.

¹⁵⁷ *East African Protocol on Environment and Natural Resources Management, 2006*, Article 34(d).

¹⁵⁸ ‘Rio Declaration on Environment and Development’ in *Report of the United Nations Conference on Environment and Development* (UNGA OR, A/CONF.151/26 (Vol. I), 12 August 1992)., principle 20 states that ‘women have a vital role in environmental management and development’ and ‘their full participation is therefore essential to achieve sustainable development.’

We will again take a brief illustration from Kiambu County because of the high incidence of land registration. Formal registration of land confers a right to exercise the transfer rights to undertake *inter vivos* transmission of ownership. Ideally, the holder of tenure rights should exercise the transfer right aspect, only subject to statutory limitations such as encumbrances or registered charges or mortgages.¹⁵⁹ However in order to undertake the transfer of agricultural land, a land owner must obtain the consent of the Land Control Boards (LCBs) which are established under the *Land Control Act*,¹⁶⁰ to regulate the transfer of agricultural land other than by inheritance.¹⁶¹ The LCBs are established mainly at the district or divisional level, one of the lower levels of governmental authority, and are chaired by District Commissioners or District Officers respectively, as appropriate. By law, these LCBs must give final consent to a land transfer and will generally decline consent if, among other reasons, there will be uneconomical subdivision or conversion of land to non-agricultural use, or possibility of poor land husbandry.¹⁶² The exercise of these specific primary functions and performance by LCBs is not the focus here; rather it is how the LCBs have extended and interpreted these powers and functions in order to safeguard the equitable rights of family members to access and use land.

An interesting finding is that LCBs have interpreted their mandate to include protection of the families and dependants of vendors. This is especially likely where the vendors have been male with families, or the land in question includes a matrimonial home. For this

¹⁵⁹ Section 28 of the *Registered Land Act*, provides for voluntary transfer of land.

¹⁶⁰ Cap 302, Laws of Kenya.

¹⁶¹ Section 6, *Land Control Act*, Cap 302 Laws of Kenya.

¹⁶² Section 9.

reason, although this was not always the case, during the hearing of an application for the sale of land, a vendor maybe required to be accompanied by his wife, and children, who will then satisfy the board whether they have any objections to the proposed sale and transfer.¹⁶³ Where this family approval is withheld, the LCB may decline consent for the registered proprietor to exercise their transfer rights and sell the land. Generally, there appears to be a good measure of respect for the decisions of LCBs notwithstanding that this function is based on an administrative directive, and has no basis in law under the *Land Control Act*. It is conceivable that if subjected to judicial review of administrative action, such a decision would be nullified as having been based on extraneous considerations. Nonetheless, this position appears to receive a lot of local support and concerned public officials concur with a view supported by literature, that the presence of local people as members of the boards has given strength to this approach.¹⁶⁴

To provide the force of law, changes to the law to incorporate family consent as a consideration need to be incorporated into the *Land Control Act*. More important however are changes to the primary legal framework that define and confer the proprietary rights in land, such as the RLA, where a basis and criteria for consideration of family interests should be included. Perhaps as a beginning, the *2009 Sessional Paper on National Land Policy* extensively discusses the establishment of district and community land control boards, comprised mainly of elected local representatives. It also adopts the policy position that as

¹⁶³ Doctoral research, “Interview with public officer” July 2009.

¹⁶⁴ *Ibid.* See also, H.W.O Okoth-Ogendo, “The Perils of Land Tenure Reform: The Case of Kenya” in J.W Arutzen, L.D. Ngcongco, and S.D Turner (eds) *Land Tenure and Agriculture in Easter and Southern Africa* (Tokyo: United Nations University, 1982).

soon as a legal mechanism is in place, it should ensure that the alienation of private rights to land takes into account all other legitimate rights held or claimed by other persons over the affected land, such as the rights of spouses and children.¹⁶⁵ This is an important step in securing decision making ability for women as primary users of land, and empowering them to make land use choices that integrate environmental integrity.

4 EXPERIENCES WITH LAND TENURE CONVERSION AND SUSTAINABILITY IN UGANDA AND TANZANIA

Two neighbouring East African states, Uganda and Tanzania, have undergone significant land tenure reforms. While undertaken separately by the respective governments, the process has largely been influenced by a common colonial heritage, indigenous tenure, and similar legal systems. It offers a greater insight on how land tenure conversion impacted livelihoods of people, and regarding the quantum of rights for secure tenure. We examine if there is any legal responsibility on land owners to integrate sustainable land use or environmental management into the regular land use decisions or choices made in pursuit of socio-economic objectives.

4.1 TENURE CONVERSION AND DECISION MAKING FOR SUSTAINABILITY IN UGANDA

This analysis of conversion of land tenure in Uganda begins with the traditional Kingdom of Buganda, one of several such Kingdoms in modern day Uganda,¹⁶⁶ and eventually considers the national legal framework. In the Kingdom of Buganda, the *Kabaka* (King) nominally

¹⁶⁵ RoK, "Sessional Paper on National Land Policy," *supra* note 41 at 16, paragraph 68(b).

¹⁶⁶ Article 246, *Constitution of Uganda*, 1995 recognizes the institutional of traditional leaders. Under the 1962 Independence constitution, the Kabaka of Buganda was the Head of State of Uganda. This was changed when the Constitution was abrogated in 1966 when then Prime Minister Milton Obote ordered a military invasion of the Royal Palace, deposed the Kabaka, and declared himself President of Uganda.

controlled all the land, while the local chiefs allocated it to peasant farmers. Neither the *Kabaka* nor the chiefs could mortgage or sell this land.¹⁶⁷ Under a 1900 Agreement with the British, the *Kabaka*, his family and the chiefs were allocated freehold estates known as *mailo* (derived from the word mile) covering about half of the total area of Buganda, while the rest of the land was made Crown Land. At the time the British assumed the land to have been property of the *Kabaka* and various chiefs¹⁶⁸ thereby failing to appreciate the trustee nature of role played by the *Kabaka* and the chiefs in land administration.

The overall effect of this British allocation was to convert the ordinary population from beneficiaries under a trust system to tenants at will of the *Kabaka* and other landlords holding the *mailo* freehold estates. They had to pay a variety of rents for their tenancies including land (*busullo*), and commodity (*envujjo*) rents. By 1927, these rents had reached unreasonable levels, and a new law was passed by the Buganda Parliament to control the rent. This 1927 law regulated the rents, but did not actually enhance tenure security for the peasant farmers as they still remained tenants. It however made it harder for landlords to evict tenants, weakening the security of tenure of the landlords instead, and creating a state of confusion.

It was not until 1998, that a new Uganda *Land Act* attempted to resolve the issue by recognizing the landlord and tenancy arrangement of the *mailo* system whereby ownership of land and the developments on it were separated. The rights of the landlord against the

¹⁶⁷ Elliot Green, *Ethnicity and the Politics of Land Tenure in Central Uganda*, (London: Development Studies Institute, London School of Economics Working Paper Series No. 05-58, April 2005) at 6.

¹⁶⁸ –East Africa Royal Commission Report,” *supra* note 28 at 16, para 34.

tenants were also made subject to the indigenous and statutory rights of the tenants and their successors in title.¹⁶⁹ These statutory changes to a certain extent secured the rights of present generations of tenants, as well as future generations thereby highlighting the imperative of both inter and intragenerational equity in land rights.

In terms of integrating environmental management into land use decision making, section 44 of the *Land Act*, which applies to all categories of land tenure in Uganda, attempts to address the question of responsibilities for land owners. In mandatory terms, this law requires any person who owns or occupies land to

manage and utilize the land in accordance with the Forest Act, the Mining Act, the National Environment Statute, the Uganda Wildlife Statute, and any other law.⁶

Two legal issues stand out from interpretation of this provision. First, the land legislation not only binds land owners but also occupiers implying a legal acknowledgement that other people such as *mailo* holders or family members with limited user rights may exercise some decision making authority on the use and utilization of the land. In this case, there is a manifest responsibility deriving from statute for any land owner, or person exercising any form of user rights to integrate the principles or provisions of the listed statutes in their land use choices.

Second, in spite of the spirit inherent through this provision, the nature, and objects are rather broad. The reference to environmental standards from multiple laws means the intended environmental responsibilities are not clearly apparent to land owners or occupiers, and this may undermine utility in securing sustainable land use. Nonetheless, the intended

¹⁶⁹ The *Land Act*, (Uganda) 1998, Acts No. 16, at section 4(a)-(c).

import of reference to the several legislations becomes apparent after reading section 44 of the *Land Act* together with the provisions of the *National Environment Act*.¹⁷⁰

This framework environmental law of Uganda has the objective of providing a legal framework for the _sustainable management of the environment.¹⁷¹ This law also provides a right to a clean environment, and a commensurate duty for every person _to maintain and enhance the environment.¹⁷² When these provisions of the framework environmental law are read together with the land legislation, it is indicative that section 44 infers a duty on any land owner or occupier to protect and enhance the environment when making decisions on land use economic activities. This interpretation however involves a complex reading of the two statutes, and may not be apparent in the same sense to individual land owners such that the statutory intention can influence their personal behaviour, unless some form of extension education is undertaken. We further explore this role of extension later in the chapter.

The other statutes set out in section 44 are all sectoral land tenure and land use legislations. Sectoral statutes tend to have subjective priorities, such as protected areas management, which is not necessarily compatible with the agricultural production that many small-scale farmers may want to pursue. The reference by the *Land Act* to the *National Environment Act*, and the other sectoral legislations is however evidence of some form of vertical integration of sectoral land tenure law with the environmental management provisions, which is critical to sustainability.

¹⁷⁰ Cap 153 Laws of Uganda.

¹⁷¹ Preamble.

¹⁷² Section 3.

4.2 TENURE CONVERSION AND DECISION MAKING FOR SUSTAINABILITY IN TANZANIA

In Tanzania, in contrast to Kenya and Uganda, land tenure conversion was not triggered by colonial administrators but by founding President Julius Nyerere's socialist policies. These policies, popularly known as *ujamaa*, resulted in expansion of the public lands category by abolishing all freeholds and converting government leases into rights of occupancy. This created a lot of confusion and insecurity, especially as the juridical nature of this right of occupancy as a basis of either indigenous or formal tenure was unclear and uncertain.

The basis of this right of occupancy was tested in the 1994 case of *Attorney General v. Lahoy Akonay*¹⁷³ when the government argued that those holding land under indigenous tenure did not own any property. The people in question had been forcibly removed from their land and resettled elsewhere during *operation vijiji*,¹⁷⁴ which involved moving people into collective villages to implement the *Ujamaa* (socialist) policy.¹⁷⁵ Their land was then allocated to others. This argument by the government was meant to deny them compensation for involuntary displacement, but the Court of Appeal disagreed. The court ruled that customary or deemed land rights in Tanzania, even though they may just be rights to occupy

¹⁷³ *Attorney General v Lahoy Akonaay*, reprinted in UNEP, *Compendium of Judicial Decisions in matters related to the environment: National Decisions (Vol II)* (Nairobi: UNEP/UNDP/Dutch Government-Project on Environmental law and institutions in Africa, 2001) 22-36, at 340-347. [*Attorney General v Akonay*]

¹⁷⁴ The 1998 *Village Land Act* defines *Operation vijiji* to mean and include Operation vijiji is defined by the Village Land Act to mean and include the settlement and resettlement of people in villages commenced or carried out during and at any time between the first day of January, 1970 and thirty first day of December, 1977 for or in connection with the purpose of implementing the policy of villagisation, and includes the resettlement of people within the same village, from one part of the village land to another part of that village land or from one part of land claimed by any such person as land which he held by virtue of customary law to another part of the same land, and the expropriation of it in connection with Operation Vijiji.

¹⁷⁵ Patrick McAuslan, "Only the Name of the Country Changes: The Diaspora of "European" Land Law in Commonwealth Africa" in Camilla Toulmin & Julian Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID/IIED/NRI, 2000) at 81.

and use land, were nevertheless real property protected by the constitution.¹⁷⁶ Further the court held that, while radical title in all the land was vested in the President, in this role the President was merely a trustee on behalf of the people.

The 1999 Tanzania *Land Act*, in light of this judgment, clarified that radical title was vested in the President as the holder of all land *in trust* for Tanzanians.¹⁷⁷ This law eventually gave legal recognition to right of occupancy as a title to the use and occupation of land including the titles of those individual or community of Tanzanian citizens occupying land in accordance with indigenous law.¹⁷⁸ By seeking to secure all existing rights in land including longstanding occupation and use, this law commenced the process of returning security of tenure for both indigenous and formal land rights.

In terms of responsibility for land owners to integrate environmental management into decision making, the 1999 land legislation demonstrates some acknowledgement that tenure rights are a useful mechanism to achieve sustainable land use. The aspect of user rights, which are critical to land use decision making, emerges from definition of the right of occupancy as "...a title to the use and occupation of land..."¹⁷⁹ This law also sets out the

¹⁷⁶ *Attorney General v Akonay, supra* note 173, at 344.

¹⁷⁷ The Fundamental Principles of National Land Policy are set out in section 1, it specifies that the land shall be held in trust by the president. Section 2 is more specific on how the trustee functions should be carried out; it specifies that the President and any person he may delegate power and function over land shall at all times exercise those functions powers and discharge duties as a trustee of all the land in Tanzania so as to advance the economic and social welfare of the citizens.

¹⁷⁸ Section 2.

¹⁷⁹ Section 2.

fundamental principles of national land policy, as the ‘objectives’ of the land law ‘to promote...’¹⁸⁰ Two of these principles are pertinent to land use decision making:

- i). To ensure that land is used productively and that any such use complies with the principles of sustainable development.’
- ii). to enable all citizens to participate in decision' making on matters connected with their occupation or use of land

It is however unclear what the ‘principles of sustainable development’ are, and the legal or policy document that should be used as a reference for implementation. Nonetheless, section 34 sets out the conditions for using land under the right of occupancy. The conditions that are set out in the substantive statute relate to obtaining development control permission for buildings, and respecting pre-existing customary rights. They do not address environmental management or sustainability. Pursuant to a rule-making power derived from section 34, the Minister has enacted the *Land (Conditions of rights of occupancy) regulations, 2001*.¹⁸¹ These regulations set out a responsibility for all occupiers regarding environmental management. Rule 11 provides, *in extenso*, that:

‘every occupier shall do everything necessary to preserve the environment, protect soil, preserve soil fertility, plant trees, prevent soil erosion and to use the land so as not to cause soil erosion outside its boundaries and to do all things which may be required by the authorities responsible for the environment.

This provision manifests some specific environmental responsibilities which individuals should integrate with their economic choices when they make land use decisions. It is instructive to point out that there is a requirement on people to ensure their activities do not cause soil erosion outside the boundaries outside their own parcels of land.

¹⁸⁰ Section 3(1).

¹⁸¹ *Land (Conditions of Rights of Occupancy) Regulations* Government Notice No. 77, Published on 4 May 2001.

4.3 LESSONS FOR KENYA

The foregoing discussion on land tenure conversion in Uganda and Tanzania discloses that the two legal jurisdictions have a relatively similar experience as Kenya on evolution of security of tenure. The Uganda *Land Act* requires every occupier or owner of land, regardless of the applicable system of tenure, to comply with several statutes in utilizing and managing land. These statutes include the framework environmental law and several sectoral land statutes. Since the framework *National Environmental Statute* sets out a duty to protect and enhance the environment for everyone, it can be interpreted that a similar duty then exists with regard to tenure rights through section 44 of the *Land Act*. However, it remains unclear what specific environmental requirements of the sectoral land use statutes a land owner (or occupier) should endeavour to incorporate in their (land owner's) regular land use decision making.

This ambiguity poses a challenge especially because the environmental requirements of some sectoral land use laws, such as those governing protected wildlife or forest areas, maybe incompatible with productive agricultural land use. Similarly, unless regulations are made explaining the specific terms of section 44 of the Uganda *Land Act*, it will be difficult for land owners or occupiers to change personal behaviour and undertake the responsibility, as the full import of this section is not apparent through a textual reading. Nonetheless, the Ugandan law echoes the crucial realization that land tenure rights, without more, are insufficient to change the personal behaviours and attitudes of land owners or occupiers to make land use choices that safeguard sustainability.

The land legislation in Tanzania embraces the object of land being used productively in line with principles of sustainable development. It also embraces the idea that participation of people in making decisions over their land contributes to sustainability. The regulations further set out the specific responsibilities of every land occupier to prevent environmental harm, uphold soil fertility, and prevent soil erosion on neighbouring parcels of land. This last aspect anticipates some form of cooperation between people. This cooperation between citizens is useful to public participation in decision making, and is one of the objectives of the environmental duty set out by article 69(2) of the 2010 Constitution of Kenya. The potential of cooperation amongst neighbouring land owners being applied as a legal tool to urge sustainable land use practices across several private lands that constitute an ecosystem is further pursued in sections 4.4 and 4.41 of chapter 5.

The recent legal enactments in Uganda and Tanzania have therefore moved to assure the security of tenure for people, whether obtained under customary law or statute. These land tenure provisions, with varying degrees of sophistication, also incorporate responsibilities on the tenure rightholders, to integrate environment quality of land with their regular land use choices. The Kenyan *Registered Land Act*, in contrast, confers extensive user rights, control rights and transfer rights but does not set out statutory responsibilities for land owners to integrate sustainability in land use. This demonstrates the absence of vertical integration between land tenure legislation in Kenya, with the environmental management norms and provisions of the framework *EMCA*.

It is useful to recall that section 3(1) of *EMCA* while creating the universal right to a clean environment, sets out a corresponding duty on every person to protect and enhance the

environment. We argued in chapter 2 of this research¹⁸² that *EMCA* is unclear on how this duty or responsibility to protect the environment should be given legal effect. It is notable that section 148 of *EMCA* requires any law relative to environmental management to be modified or amended to give effect to *EMCA*, and in the event of a conflict the provisions of *EMCA* would have effect. Land tenure laws in Kenya have not been reviewed, a decade since the 1999 *EMCA* was enacted into law. Even if by interpretation an argument is advanced that the duty in *EMCA* extends to decisions of land uses through section 148, because they impact the environmental quality, such an effect is not clearly apparent to land owners or occupiers or even to public officers in the land or agricultural sector. It is similar to the Ugandan example but at least the Uganda land legislation expressly refers to such a responsibility. In the case of Kenya therefore there would be need for explicit vertical integration of sectoral land tenure and land use policy with environmental or sustainability legislation. There is also need for extension education to bring the sectoral implementation of the responsibility to the attention of land owners, and encourage them to undertake integration in decision making, and therefore safeguard sustainability.

Two legal and policy developments within a two year period however provide a new dimension that will enhance integration of land use policy and decision making in Kenya: The 2009 *Sessional Paper on National Land Policy of Kenya*; and the 2010 Constitution. The land policy acknowledges the challenge of sustainable land use; hence one of its objectives is to provide economically viable, socially equitable and environmentally

¹⁸² See chapter 2, section 5.3.3.

sustainable allocation of land.¹⁸³ To this end, the land policy addresses the question of land use decision making, noting that “sustainable land use practices are key to the provision of food security...”¹⁸⁴ The land policy further suggests that law and policy should address several problems that negatively impact sustainable production. Three of the listed problems are instructive to this research, and we highlight –

- Land deterioration due to population pressure, massive soil erosion and climatic variability, resulting in abandonment of agriculture activities
- Overstocking in the rangelands (the arid and semi-arid districts of Kenya)
- Lack of alternative innovative land uses and planning for diversification of the rural economy

The Sessional paper on land policy also indicates government intention to ensure that all land “is put into productive use on a sustainable basis by facilitating implementation of key land policy principles of conservation of land quality, environmental audit and assessment, productivity targets...and land use planning.”¹⁸⁵ These measures imply that there is concern with sustainability in land use, and points at possible remedial measures to integrate institutional land tenure and land use policies/plans with environmental quality concerns. The reference to environmental audit and impact is notable as the utility of these tools to small-scale land owners would be minimal (if any) because most small-scale agricultural land use is, in any case, outside the legal scope of environmental impact assessment. The land policy however takes note of the decision making role of land owners, broadly suggesting that the government will provide “appropriate incentives and sanctions to ensure

¹⁸³ RoK, “Sessional Paper on National Land Policy,” *supra* note 41 at 1.

¹⁸⁴ *Ibid* at 28.

¹⁸⁵ *Ibid*.

that land owners use their land productively and sustainably¹⁸⁶ The policy further recognizes that the decisions by land owners are crucial to safeguarding sustainability, and states the government will put in place "...research, extension services, marketing... and training for farmers."¹⁸⁷

The 2010 Constitution establishes principles of national land policy, which are identical to the principles set out by the 2009 Sessional paper on national land policy.¹⁸⁸ Several of these principles are pertinent to the foregoing analysis on the potential of land rights resulting in integration of environmental management and economic considerations by land owners in land use decision making –

- i). Equitable access to land
- ii). Security of land rights
- iii). Sustainable and productive management of land resources
- iv). Sound conservation and protection of ecologically sensitive areas

The equitable access to land is closely related to security of land rights. Secure land rights form the basis of the legal right and ability for land use decision making. Equitable access to land broadly infers that there should be access of land by many people in the population. In the context of this research, equitable access to land can be interpreted to include inter and intragenerational equity thereby inferring protection of rights of family members such as spouses or children. In these terms, the constitution requires parliament to enact legislation to protect matrimonial property during and on the termination of marriage.¹⁸⁹ Such

¹⁸⁶ *Ibid.*

¹⁸⁷ RoK, "Sessional Paper on National Land Policy," *supra* note 41 at 29.

¹⁸⁸ *Ibid* at 2.

¹⁸⁹ Constitution of Kenya, 2010, article 68(c) (iii).

legislation will provide protection for tenure rights of spouses, especially women, who as primary users of land in rural Kenya may lose a source of livelihood if land is sold by the husband as the sole registered owner. The principle of sustainable and productive management of land resources integrates a recognition that socio-economic use of land is important, but it must be within limits of sustainability.

These constitutional principles manifest horizontal integration, and should be enacted through land tenure legislation in order to implement vertical integration and give the principles operational effect, such that they can guide changes in attitudes and approaches for integrated policies and decision making. However, article 68(b) requires parliament to revise sectoral land use laws in accordance with the principles...‘ This is a shortcoming because, from the foregoing discussion, it is tenure rights that impact both access to and use of land. This impact derives from the legal decision making capability conferred on land owners by the quantum of user rights, control rights and transfer rights enjoyed as part of secure tenure. It is these tenure rights, in the context of statutory tenure in Kenya, that fail to set out responsibilities for integrating environmental management in socio-economic land use choices. Land use legislation, such as agriculture or physical planning laws are typically regulatory laws that do not define tenure rights. Only a few exceptions of land use legislations, for instance forestry law or protected areas law in Kenya, are both land tenure and land use laws. By prescribing that the land policy principles should be enacted through land use, the constitution is missing the opportunity to directly connect both the vertical institutional/sectoral integration with the decision making ability of individual land owners that would include a responsibility over sustainable land use in Kenya.

This situation has a historical origin from the 1957 Working Party, introduced earlier in the chapter, which was appointed to investigate and recommend a system of nationwide land tenure for the lands occupied by indigenous Kenyans. On the legal control of land use and environmental quality, the Working Party was against imposing any land use conditions in the land title deed, preferring to pursue the same by way of local authority by-laws and the Agriculture Ordinance.¹⁹⁰ This was probably because enforcement was possible through the extensive Native councils and overall colonial administration. In addition, the oppressive political climate of the time, during colonial rule, made it possible to enforce the often harsh and coercive command and control systems.

In the next part, we examine the approach taken through agriculture regulatory law and policies. We review whether this sectoral law/institutional policy approach has mechanisms to guide integration of environmental management into land use choices by individual land owners, in light of the legal lacunae evident from the land tenure laws.

PART 2 - SUSTAINABLE LAND USE UNDER REGULATORY AUTHORITY OF THE STATE

5 NATURE AND OBJECT OF THE REGULATORY AUTHORITY OF THE STATE

The specific administration of agricultural land use is one aspect of the exercise of the police power of the state. This police power constitutes a regulatory authority of the government under which the state exercises control over the individual and property and it (the state)

¹⁹⁰ H.W.O Okoth-Ogendo, —African Land Tenure Reform” in Judith Heyer, J.K. Maitha, and W.M. Senga (eds) *Agricultural Development in Kenya: An Economic Assessment* (Nairobi: Oxford University Press, 1976) at 165.

makes rules for the protection of the health and morals of the people.¹⁹¹ This regulatory power of the state derives from its residual duty to ensure that proprietary land use does not sabotage the public welfare.¹⁹² Across several legal jurisdictions, the regulatory authority of the state over land use, and the objectives of this regulation are manifest through constitutional or statute provisions or both. The regulatory authority may also take different legal formats such as zoning regulations, land use standards, or physical planning legislation.

The 1995 *Constitution of Uganda* is illustrative of land use requirements being prescribed by the supreme law of the country. It empowers the government to apply legislative and other policies to regulate the use of the land. Section 44 of the *Land Act*, explained earlier in the chapter,¹⁹³ which requires land owners or occupiers for instance to comply with environmental or other sectoral land use legislation is indicative of an attempt to give the constitutional requirement effect. In terms of zoning legislation, the *Greenbelt Act* of Ontario Canada,¹⁹⁴ is another illustration of the regulatory authority of the state being applied to determine what socio-economic land use activities can be undertaken within a prescribed area. This 2005 legislation aims to set up a network of countryside and open space areas, the

¹⁹¹ C.I Hendrickson, —*Rural Zoning: Controlling Land Utilization under the Police Power*” 1936 18(3) *Journal of Farm Economics*, 477- 492 at 478. [Hendrickson, —*Rural Zoning: Controlling Land Utilization*”]

¹⁹² See full argument in, Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Nairobi: Government Printer, November 2002) at 42. [RoK —*Report of the Commission of Inquiry into the Land Law system in Kenya*”]

¹⁹³ See section 4.1 of the chapter.

¹⁹⁴ *Greenbelt Act* R.S.O. 2005,

Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_05g01_e.htm. The Ontario government reports that this has enabled the creation of a Greenbelt Plan to protect about 1.8 million acres of environmentally sensitive and agricultural land, online: <http://www.mah.gov.on.ca/Page195.aspx>

Greenbelt, which supports the Oak Ridges Moraine and the Niagara Escarpment.¹⁹⁵ The establishment of a Greenbelt area is intended to achieve certain sustainable land use goals, including:¹⁹⁶

- to sustain the economic viability of rural and small town farming communities;
- to preserve agricultural land as a continuing commercial source of food and employment; recognize the critical importance of the agriculture sector
- to provide protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt Area;
- To control urbanization in the Greenbelt area; manage infrastructure construction and promote sustainable resources use.

In furtherance of the statute objectives, the law requires that the contents of a Greenbelt plan should highlight two issues critical to sustainability in land use. Section 6(2) for instance provides that a Greenbelt plan may set out policies for land and resource protection; as well as the economic and physical development of the land including the management of land and water resources. These provisions manifest, albeit indirectly, a basis to integrate the economic development plans with protection and management of environmental resources within policy and decision making. The plan may also set out policies to guide vertical and horizontal integration of planning and development activities across sectoral ministries and municipalities in Ontario.¹⁹⁷

Legislation from the Australian state of Victoria presents an explicit legal manifestation of environmental sustainability and integration in physical planning legislation. The *Planning and Environment Act*¹⁹⁸ aims to provide a framework to plan _the use, development and

¹⁹⁵ Section 5.

¹⁹⁶ *Ibid.*

¹⁹⁷ Section 6(1).

¹⁹⁸ *Planning and Environment Act, 1987.*

protection of land in Victoria in the present and long-term interests of all Victorians.¹⁹⁹ In addition to ensuring sound and strategic physical planning for Victoria, this law reflects the two aspects of integration, which are crucial to realizing sustainable land use. With regard to vertical and horizontal integration at institutional levels, this law aims to ‘enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies’ at the State, regional and municipal levels.²⁰⁰ This planning law also aims to provide for ‘explicit consideration of socio and economic effects’ on ‘the environment’ when decisions are made about the use and development of land.²⁰¹

The foregoing examination of legal provisions from comparative jurisdictions illustrates the object, and purpose of the regulatory authority of the state irrespective of the legal form. It is notable that the illustrations from Ontario and Victoria place environmental sustainability as a mandatory consideration when the specific legal authority is exercised. This is a perspective that will be instructive when reviewing the nature and exercise of regulatory authority of agriculture land use in Kenya. Indeed, a government commission into the national land system argued in its report that the regulatory authority of the state should ‘limit the use of private property with the aim of protecting the public welfare from potential

Online: http://www.austlii.edu.au/au/legis/vic/consol_act/paea1987254/

¹⁹⁹ Section 1.

²⁰⁰ Section 2(a).

²⁰¹ Section 2(c).

dangers of misuse of land.²⁰² This is the legal power that paves the way for town and city planning through the control of development, physical planning, zoning and setting the standards of land use. As the scope of these actions demonstrates, the police power can only be used to promote a public purpose or to confer a general benefit on all the people and not a special benefit on an individual.²⁰³

5.1 LEGAL FOUNDATIONS OF LAND USE REGULATION IN KENYA

The regulatory power of the state over land use in Kenya has traditionally been established by the Constitution. The now repealed Constitution of Kenya²⁰⁴ empowered the state to regulate land use in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit.²⁰⁵ This former constitution also provided extraordinary powers that allowed the state to take over possession of land, without the protections and compensation accorded to property owners by the process of compulsory acquisition.²⁰⁶ Ideally therefore private land may have been taken over by the State or its agencies for the purposes of carrying out the work of soil conservation or the conservation of agricultural development or improvement works especially where the owner or occupier of the land has

²⁰² RoK, —Report of the Commission of Inquiry into the Land Law system in Kenya,” *supra* 192 at 42.

²⁰³ Hendrickson, —Rural Zoning: Controlling Land Utilization,” *supra* note 191 at 478-479.

²⁰⁴ Constitution of Kenya [Revised Edition 2008] (Now repealed).

²⁰⁵ *Ibid*, section 75(1).

²⁰⁶ *Ibid*, section 75(6)(a)(vii). Generally, the former Constitution of Kenya provided protection and guarantee against compulsory acquisition. It set the criteria that the taking must be for a public purpose, payment of compensation and provides access to the High Court if a person feels aggrieved by the actions of the state over private property.

previously been required to do so, but has consistently failed to. These are powers intended to be used sparingly in extreme situations.

Beyond the constitutional foundation, police power authority has also been exercised through the physical planning law, which has national application.²⁰⁷ With regard to land use for agriculture, there is a principal agriculture law that creates authority over, and power to regulate agricultural land use in Kenya.²⁰⁸ Even though there have been constitutional and statute provisions making provision for land use regulation for years, the government land commission concluded that this regulatory power has not been used extensively to control or otherwise regulate the use of agricultural or urban land, or to enforce sustainable land use practices nationwide.²⁰⁹

The 2010 Constitution of Kenya has introduced new provisions on the regulatory authority of the state over land use. In chapter 2 of this research²¹⁰ we explained that this Constitution, in its Bill of Rights, enacts a justiciable environmental right that is to be implemented through legal and other measures. These measures include the mandatory obligations on the Kenyan state which in broad terms require the state to ensure sustainable use, utilization, exploitation and management of the environment and natural resources, including land.²¹¹ These measures also feature a duty on the people, working in cooperation with others, and

²⁰⁷ *Physical Planning Act*, Cap 286 Laws of Kenya. This law provides for the preparation and implementation of physical development plans but an analysis of its provisions is beyond the scope of this research.

²⁰⁸ *Agriculture Act*, Cap 318 Laws of Kenya.

²⁰⁹ RoK —Report of the Commission of Inquiry into the Land Law system in Kenya” *supra* note 192 at 42.

²¹⁰ See, chapter 2, section 5.3.2.3.

²¹¹ See generally, article 69.

the state to protect and conserve the environment, and to ensure ecologically sustainable development and use of natural resources.²¹² The constitution also makes specific provisions on land use,²¹³ which is a tacit expression of legal concern by the supreme law regarding the declining agricultural productivity, loss of soil fertility and the urgent need to fulfil socio-economic needs for the people of Kenya. As explained in the introduction to this chapter the highest proportion of people in Kenya inhabit rural areas and most engage in agriculture as a main source of livelihood yet many such people live below the poverty line. This is sufficient imperative to review the land regulatory framework, especially informed by our findings earlier in this chapter that the land tenure framework lacks legal tools to guide people in integrating sustainability into their regular land use decision making.

The 2010 Constitution provides, as highlighted earlier in this chapter, that land in Kenya must be used and managed in a manner that is equitable, efficient, productive and sustainable. Article 66 then empowers the state to regulate the use of any land, or interest over land in the interests of defence, public safety, order, morality, healthy or land use planning. The constitution also requires parliament to review sectoral land use laws in accordance with the principles of land policy but this process is expected to take up to five years from 2010.²¹⁴

²¹² Article 69(2).

²¹³ See Chapter 5, Part 1 of the —Constitution of Kenya, 2010.”

²¹⁴ See, “Constitution of Kenya, 2010,” Fifth Schedule which sets out the timetable of legislation to be enacted by Parliament to give effect to constitutional provisions: Legislation regarding environment- four years; and regulation of land use and property – five years. However, in perhaps a positive sign, on 1 November 2010, the Minister for Environment appointed a National Task Force for ‘for drafting Legislation Implementing Land Use, Environment, and Natural Resource Provisions of the Kenya Constitution,’ with a mandate of one year. See, *Kenya Gazette Notice* No. 13880, Vol. CXII – No.120, of 19 November 2010.

The *Agriculture Act*²¹⁵ exercises specific competence over agriculture land use. In this part of the chapter, we examine the legal framework under the agriculture legislation and policy with respect to mechanisms to integrate environmental sustainability and socio-economic activities in agricultural policy and land use decision making.

6 LEGAL FRAMEWORK REGULATING SUSTAINABLE AGRICULTURAL LAND USE

Earlier in the chapter, we pointed out that the colonial government, in 1955, decided not to include land use responsibilities in land tenure legislation. The government preferred to enact agriculture land use legislation and policy for that purpose. In this section, we analyse whether the provisions of this agricultural law and policies integrate environmental conservation with the socio-economic objectives of agriculture land use activities, policy and institutional decision making. We review whether there are mechanisms or legal tools that are available to guide the attitudes and practices by land owners or occupiers and facilitate such integration in their regular land use decisions.

6.1 THE REGULATORY REGIME UNDER THE AGRICULTURE ACT

The *Agriculture Act* defines agriculture²¹⁶ as the cultivation of land and the use of land for any purpose of husbandry including horticulture, fruit growing and seeding; dairy farming, bee keeping and breeding and keeping of livestock; conservation and keeping of game animals, game birds and protected animals; breeding, game ranching, game cropping and other wildlife utilization; and all aquatic animals whether in inland waters or the waters of the maritime zones.⁴ This broad definition appears to bring many land use activities within

²¹⁵ Cap 318, Laws of Kenya.

²¹⁶ Section 2(1).

the jurisdiction of the agriculture law. The definition to a certain extent corresponds with the six agriculture sub-sectors set out in the introduction to this chapter. Presumably, with the broad definition, the agriculture law anticipates a wide application to regulate a vast range of inter-related land use activities. This is amplified by the preamble through which the Act states its objectives as:

- i). To promote and maintain a stable agriculture,
- ii). To provide for the conservation of the soil and its fertility, and
- iii). To stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry.

At their face value, these objectives suggest some regard to soil conservation, soil fertility and practices of good land husbandry which imply legal concern with sustainable land use for agriculture. We shortly examine the statutory mechanisms available under this law, ostensibly for realization of these objectives, in order to establish whether they provide legal tools to guide public officials and land owners/occupiers to adapt and maintain sustainable land use choices.

6.1.1 COMPLEX ADMINISTRATIVE BUREAUCRACY

The *Agriculture Act* set out an extensive system of administration over the diverse aspects of agriculture.²¹⁷ We begin by reviewing this administrative structure because the land use regulatory system involves institutional processes which ideally are important to implementation of sustainability integration from policy content into decision making. The institutional processes and functions are imperative to the objective of offering legal or

²¹⁷ For instance, Part VIII of the Act provides a framework for ‘the ensured production of a sufficiency of food crops for the requirements of Kenya.’ This Part empowers the Minister to declare crops that he considers necessary for the requirements of Kenya, for fulfilling any obligations to supply East African demands, or are necessary for good land agreement, to be essential crops. The Minister may then issue a programme for production of essential crops.

policy guidance to farmers on the responsibility and specific details of integrating their (farmers) socio-economic activities with ensuring environmental integrity of the land.

The agriculture law vests most of the authority with the Minister in charge of agriculture. However due to administrative reorganization of the national government structure, some functions and authority are dispersed to other line Ministries such as Special Programmes which has authority over strategic grain reserve for food security, the Ministry of Livestock, and Ministry of Fisheries.²¹⁸

Subordinate to the Minister there is a Central Agricultural Board²¹⁹ whose functions include advising the Minister on all matters of national agricultural policy; and to co-ordinate agricultural policy on matters affecting more than one province. The Central Agricultural Board exercises authority over Provincial Agricultural Boards, which are established for seven out of the eight current provinces. The eighth province is the mainly urban, residential and capital city region of Nairobi.²²⁰ The Provincial Boards are supported by District Agricultural Committees (DAC) established at the lower district level which just like the

²¹⁸ See generally, Republic of Kenya, *Presidential Circular No. 1/2008: Organization of the Government of the Republic of Kenya* (Nairobi, Government Printer, May 2008).

²¹⁹ This Board is established under section 36, with composition and functions set out by section 37 and 38 respectively.

²²⁰ Interestingly, there is a significant measure of agriculture being carried out in some of the more rural parts of Nairobi such as Dagoretti and Waithaka to the west. The areas are administrative in Nairobi provinces, even though ethnically and geographically linked to the more agricultural and farming Central Province. For these reasons, farming activities are prohibited under diverse City of Nairobi by-laws and there have been incidents of City Inspectorate Officers raiding homesteads and confiscating livestock. See, Mildred Ngesa, —City Residents Have Two Weeks to Get Rids of all Goats and Pigs” *Daily Nation on the Web*, 4 August 2005. Online: <http://allafrica.com/stories/200508040044.html> . See generally, Dick Foeken and Alice Mboganie Mwangi, *Farming in the City of Nairobi* (Leiden: African Studies Centre, 1998). The study of urban agriculture in Kenya is however beyond the scope of this thesis.

provincial boards perform a range of prescribed functions²²¹ at that level but also advise the superior authority. Within this institutional structure, the boards and committees enjoy decision making competence over a wide range of powers and functions that impact sustainability as well as land use choices made by individual land owners. These functions include soil conservation, land development orders or land husbandry rules that are examined later in the section.

In terms of the 2010 Constitution, it is important to highlight that this institutional structure is expected to change because of the division of functions now established between Kenya's 47 counties that have constitutional autonomy and will replace the hitherto centralized structure of administration from 2012.²²²

In the current administrative structure, membership to the central and provincial agriculture boards is restricted to senior public officials. The District Agriculture Committees however draw their membership from farmers appointed by the Minister to represent large scale, small scale and communal land owning groups.²²³ The Central Agricultural Board, which is

²²¹ The specific functions include any specified under the *Agriculture Act* or other written law, advising the Minister, or any duties assigned by the Minister. See sections 25, 32 and 37.

²²² According to the Fourth Schedule to the Constitution, the national government and counties will exercise separate or concurrent authority over a range of issues that impact on sustainable land use and agriculture. A brief illustration: On the one hand, the national government will exercise authority of protection of the environment and natural resources with the object of establishing a durable and sustainable system of development. The national government also has competence to determine the general principles of land use planning and the coordination of planning between counties. The national government is also responsible for developing national agricultural policy. On the other hand, the counties will exercise authority over agriculture, including crop and animal husbandry, plant and disease control, and fisheries. Counties are also responsible for implementing county planning and development, an important aspect of land use regulation. The County governments are also mandated to implement the national policies on environmental conservation, especially with regard to soil and water conservation, and forestry.

²²³ Other members are general members of officers from sectoral line ministries at the particular administrative level including Agriculture, Co-operatives Development, Veterinary Services, Forestry, and Lands.

the highest level organ, does not include a representative from any of the public agencies responsible for closely allied sectoral areas such as forestry.²²⁴ As will be clear at the end of this research, the nature of land use activities usually traverses the boundaries of sectoral law or policy. Initiating basic collaborative mechanisms such as cross-membership of this agriculture sector committees with officials from related sectors, could have served as the first step towards sectoral integration, vertically at the institutional level.

6.1.2 PRESERVATION OF THE SOIL AND ITS FERTILITY²²⁵

One of the express objectives of the *Agriculture Act*, a goal that is fundamental to sustainability, is the conservation of the soil, and its fertility. Section 48 empowers the Minister and the Central Agricultural Board to make rules prohibiting, regulating or controlling clearance of land for cultivation, grazing or watering of livestock or clearing or destruction of vegetation. The Minister is also empowered to make rules for the regulation or control of afforestation or re-afforestation of land and the protection of slopes and catchment areas. Such rules may also require removal or destruction of vegetation planted in contravention of a lawful order; or require the supervision of unoccupied land. They may also prohibit or restrict the use of any land for agricultural purposes.

The *Agriculture (Land Preservation) Rules* have been enacted for the above purposes, pursuant to section 48. These rules empower the Director of Agriculture and the District

²²⁴ Other sectoral areas/agencies that are closely allied to the agriculture include the Kenya Forest Service, the policy-level Ministry of Forestry and Wildlife, Kenya Agriculture Research Institute (KARI), Kenya Forestry Research Institute (KEFRI). The last two are established under the *Science and Technology Act*, Cap 250 Laws of Kenya. See sections 12,13,14, 15 and the Fourth Schedule.

²²⁵ Part IV, section 48-62. Either deliberately or otherwise, the statute applies the terms preservation, and conservation interchangeably.

Agriculture Committee to ‘issue a land preservation order to any owner or occupier of land for any of the purposes’ in the foregoing paragraph. These land preservation orders are to be issued only when deemed necessary, and for a determined period of time. The stated objective of these land preservation rules, which is to provide for imposition of land preservation orders on land owners, discloses a major shortfall of this agriculture law. The *Agriculture Act* expressly sets out soil conservation and fertility as a principal object of the law. It does not create positive responsibilities for regular implementation by land owners/occupiers as a guide when they may be making routine land use choices to balance economic productivity with sustainability. Rather the law confers authority on public officers to impose conditions, when necessary, thereby creating a risk that such land preservation orders may generally be imposed on land owners when unsustainable land use practices have already undermined the environmental quality and productivity of the land. This is in contrast with the case of Tanzania land tenure legislation, analysed earlier in the chapter, whereby regulations create a positive responsibility on any person utilizing land to preserve the environment, protect soil fertility, prevent soil erosion, and ensure their land use activities do not cause soil erosion to neighbouring lands.²²⁶

A fairly recent set of rules enacted under the same section 48, the 2009 *Agriculture (Farm Forestry) Rules*,²²⁷ have attempted to create some relatively positive responsibilities on land owners/occupiers. These rules, applicable to all agricultural land, are intended to ensure all land owners or occupiers maintain a ‘farm forest cover of at least 10 per cent of every

²²⁶ *Supra*, section 4.2. See discussions relating to rule 11.

²²⁷ The *Agriculture (Farm Forestry) Rules* 2009 (Legal Notice No. 166, 20 November 2009).

agricultural land holding and to preserve and sustain the environment in combating climate change and global warming.⁶ One objective of these rules, which is an important sustainable land use practice, is _conserving water, soil and biodiversity.²²⁸ The substantive provisions of these rules are examined in chapter 4²²⁹ which reviews the sustainability of community forestry activities in Kenya. Nonetheless, these farm forestry rules, similar to the land preservation orders place a significant level of authority, discretion and responsibility in the administrative bureaucracy.

With regard to the land preservation orders, the Central Agricultural Board is required to maintain a system of registers in which the details of any land that is subject to an order shall be entered²³⁰ with classification as encumbrances to the land. Section 10 of the *Registered Land Act* (RLA) sets out the contents of the land register, which include encumbrances²³¹ that are entered and that adversely affect the land. The encumbrances, relative to affecting the decision making ability of a land owner or occupier, only have the effect of restricting the transfer rights aspect of tenure rights. This implies that registration of the land preservation order results in minimum or no effect on changing the attitude of land owners toward sustainable land use choices, unless any legal restrictions limit the user and control rights aspect of tenure rights that are exercised in land use decision making.

²²⁸ *Ibid* Rule 4.

²²⁹ See, chapter 4, section 6.2.

²³⁰ *Agriculture Act*, Section 74A.

²³¹ It requires entry of every encumbrance and every right adversely affecting the land or lease.

6.1.3 LAND DEVELOPMENT ORDERS, AND LAND USAGE RULES

Part V of the *Agriculture Act* empowers the Minister to make land development orders.²³²

These orders require owners or occupiers of agricultural land to carry out a prescribed development programme. This programme of development is only prescribed if the Minister or the District Agriculture Committee deems it necessary in the interests of good land management or good husbandry or the proper development of the land for agricultural purposes.²³³ When prescribed, a land development order requires adoption of a system of management or farming practice or other land use system that the agricultural officer considers necessary for proper care of the land for agricultural purposes. The orders, at face value, represent an implicit reference to a system of sustainable agriculture that would involve both proper land husbandry and productive agriculture to meet socio-economic needs of land owners.

There is a legal procedure to regulate the imposition of these orders. The process commences at the incidence of the District Agriculture Committee,²³⁴ if and when it considers such an order necessary for good land management, presumably over a parcel of land that is managed unsustainably or is degraded. The committee is required to serve notice on the land owner before the order is imposed. The imposition of these orders manifests some aspect of positive responsibilities on the land owner to implement the requirements of the land development order to achieve both proper development and good husbandry of the land.

²³² Part V, section 64-74A.

²³³ Section 65(1).

²³⁴ Section 65.

However, such an order would presumably be made, *ex post facto*, when good land management or husbandry is not observed in land use.

Scholar Francis Shaxson defines good land husbandry as the active process of implementing and managing preferred systems of land use in such ways that there will be an increase - or, at worse, no loss - of productivity, stability, and usefulness for the chosen purpose.²³⁵ The FAO defines land husbandry to mean a system of ‘water, soil fertility and biomass management’²³⁶ that is essential to sustainable land use. FAO further suggests that sound land husbandry requires that farmers concentrate on the sound management of good, productive land before it becomes degraded, since there is a faster and larger increase in yields on deep soil than on exhausted stony soil.²³⁷ The concept of land husbandry in relation to sustainable agriculture therefore requires a constant and dynamic process of land stewardship by land owners or occupiers to safeguard the environmental quality of the land. Supporting this view, Shaxson, Tiffen, Wood & Turton, have argued that farmers as the main husbanders‘ of the land are central to successful implementation as it is these farmers who consider‘ then decide to reject‘ or integrate‘ husbandry options into land use decision making.²³⁸ This literature suggests that the approach by the Kenyan agricultural law regarding land husbandry vitiates

²³⁵ T.F. Shaxson. “Conservation-effectiveness of farmers' actions: a criterion of good land husbandry.” in: E. Baum, P. Wolff, and M.A. Zobisch,, (eds) *Acceptance of soil and water conservation: strategies and technologies. Vol.3 in Topics in applied resource management in the tropics*. (Witzenhausen: German Institute for Tropical and Subtropical Agriculture, 1993) at 105

²³⁶ Roose, “Land Husbandry,” *supra* note 45 at 24.

²³⁷ *Ibid.*

²³⁸ Francis Shaxson, Mary Tiffen, Adrian Wood & Cate Turton, *Better land husbandry: rethinking approaches to land improvement and the conservation of water and soil* (Overseas development institute, Natural resource perspectives no. 19 June 1997) at 6, online: <http://www.odi.org.uk/resources/download/2150.pdf>

the utility of the orders to sustainable land since these orders would be imposed after land degradation has occurred. The orders would be prescribed as instructions from public officials to land owners or occupiers rather than some form of collaboration, or clear responsibilities that the land owner can integrate when making land use choices.

6.1.4 RULES FOR BASIC LAND USAGE

Section 184 of the *Agriculture Act* empowers the Minister to make subsidiary rules of application for preservation, utilization and development of all agricultural land. These are rules of general application by every land owner at all times in contrast with the orders previously discussed which appear to be specific in application, and perhaps only authorized where some sort of prior breach has occurred. When enacted these basic land usage rules can have a wide scope of effect such as requiring land management in accordance with rules of good estate management; good husbandry; regulation of cultivation and livestock; regulating the kind of crops, among others.

The *Land (basic usage) Rules* were adopted, pursuant to this section in 1965, and there is no evidence they have been amended since. Section 184 of the *Agriculture Act* clarifies the effect of these rules, providing that a land owner would be in compliance if

‘...having regard to the character and situation of the land, the standard of management..., and other relevant circumstances’, the land owner or occupier ‘...is maintaining a reasonable standard of efficient production (by quality and quantity), while keeping the land in a condition to enable such a standard to be maintained in the future.’

The substantive agriculture statute anticipates that under the rules, the farmer will be guided to fulfil their economic objectives, while maintaining a quality of the agricultural land that will support the same production in future. It is possible to draw parallels with Aldo

Leopold's theory of a land ethic in which the farmer exercises a human responsibility (the ecological conscience) to safeguard the ability of the land to regenerate, even as they utilize the land as a resource.²³⁹ The question is whether the rules enacted pursuant to this section comprise legal tools or mechanisms to facilitate land owners to balance the environmental quality of their land, with their socio-economic activities. We now analyse this possibility.

The *Land (basic usage) Rules* employ a direct command and control tone, and they prescribe some standards of land use in the positive and negative sense.²⁴⁰ It is arguable that the rules set out land use standards for land owners to integrate sustainable practices to preserve soil fertility and prevent soil erosion. However, rather than create proactive and specific individual responsibility for land owners, each of the rules either prescribes an offence or a threat of sanction, and penalties, for instance:

Rule 3 - Any person who cultivates, cuts down or destroys any vegetation, or depastures any livestock on any land of which the slope exceeds 35 per cent shall be guilty of an offence

Rule 4 - An authorized officer may by written order prohibit cultivation or cutting down or destruction of vegetation on any land of which the slope exceeds 20 per cent

Rule 5(1) - Any person who cultivates any land of which the slope exceeds 12 per cent and does not exceed 35 per cent, when the soil is not protected against erosion by conservation works to the satisfaction of an authorized officer, shall be guilty of an offence

The nature of these land husbandry rules requires significant administrative infrastructure for implementation, monitoring and enforcement. The rules also do not anticipate any engagement or collaboration between land owners and agricultural officers. Such

²³⁹ See Chapter 2, section 7.2.3. See also Aldo Leopold, *A Sand County Almanac with Other Essays on Conservation from Round River* (New York: Oxford University Press, 1981) and reprinted in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) at 217.

²⁴⁰ See, Legal Notice No. 26/1965 (which is annexed to the *Agriculture Act*).

engagement, possibly for technical consultations or sharing sustainable land use knowledge, would be useful since land owners hold the legal (tenure) right that gives authority to make primary land use decisions as they seek to utilize the land.

6.1.5 COMPLEX SYSTEM OF ENFORCEMENT SANCTIONS

The general tone of the *Agriculture Act* is coercive in nature as it is intended to procure compliance through prescription of actions to be undertaken by land owners. The key words employed in the Act include ‘Rules’ and ‘Orders’ to describe the standards actions that land owners or occupiers are either required to do, or not to do. The coercive intention of these rules and orders is further evident through the use of mandatory terms such as ‘regulate’, or ‘control’, and ‘require.’²⁴¹ We examine two significant illustrations of the coercive nature of this law. The first one relates to a power vested in the Minister to dispossess a land owner of their tenure rights for failure to observe the rules of good land husbandry. The second is a brief exposition of the system and structure of penalties and monetary fines designed to enforce compliance with the agriculture law.

6.1.5.1 Procedure enabling dispossession of land owner or lawful occupier

The Minister for Agriculture is empowered to dispossess or acquire land if the land owner has persistently been in contravention of rules of general application for preservation,

²⁴¹ See for instance, section 50 which places significant discretion and powers in the Minister as follows: “Notwithstanding anything in this Part, or in any rules made thereunder, the Minister may, whenever it appears to him to be urgently necessary in the public interest so to do, exercise any of the powers of the Director of Agriculture under this Part; and the Minister shall be the sole judge of the necessity for any action taken by him under this section, subject only to such appeal to the Agricultural Appeals Tribunal as is provided for by this Act.” See also section 64. Sub-section (a) empowers the Minister to “~~may~~ make land development orders requiring the execution in respect of any agricultural land by the owners or the occupiers...” subsection (b) provides that “~~A~~ land development order may be made against the owner or occupier of land...”

utilization and development made under section 184. The law confers powers to dispossess that person regardless whether they hold property rights or just user rights.²⁴² If that person is not the owner of the land, the Minister will terminate any tenancy or interest held over the land and then require the registered owner to either farm the land or appoint a tenant to farm the land according to prescribed standards. An order given under this provision must then be delivered to the Registrar of Titles for registration in the register of titles in accordance with the law under which the title to the land is registered and shall not take effect until after it has been so registered.²⁴³

In a situation where the occupier is the owner of the land, the Minister has three legal options. The first option is to order the owner to vacate the land upon which the Minister will appoint a tenant. The second option is, with the consent of everyone with ownership rights, to purchase the land. The third option is to exercise the power of compulsory acquisition over the land in question. Any person whose land is subject to a possible order of dispossession under any of the options above must be afforded an opportunity to make representations to the Minister within one month of receiving notice. Prior to any dispossession, the owner or occupier must be served notice in writing setting out the reasons for the action. Such an owner has recourse to the Agricultural Appeals Tribunal and further right to apply to the High Court which shall hear the matter afresh before reaching a decision.

²⁴² Section 185.

²⁴³ Section 185(7).

This power and procedure to dispossess people of their tenure rights and user interests in land is significant because of the radical nature of its effect. In ideal terms, the very threat of losing land, in Kenya where most people very dearly value their land as the sole source of livelihood and cultural pride, should be imperative for people to change personal behaviours and integrate sustainable practices into land use choices. The legal significance of this provision as an enforcement mechanism is however undermined by three issues. First the basic land usage rules that should guide a balancing between efficient production and caring for the land are inadequate as they prescribe offences rather than offer positive guidance. Second, the other rules of good husbandry only apply *ex post facto* after land degradation has occurred. Third, considering the facts and literature that demonstrate high levels of land degradation and decline in agricultural productivity in Kenya,²⁴⁴ it is plausible to argue that most land should already have been taken over by the government for non-compliance. It is therefore conceivable to conclude that this mechanism has not been applied for the intended purpose.

6.1.5.2 System of penalties and monetary fines

The provisions of the *Agriculture Act* are also enforced by a system of sanctions to be imposed and suffered by those who fail to observe the orders and rules. By way of illustration a person who contravenes or fails to comply with the terms of a land development is liable to a fine not exceeding two thousand shillings or one month imprisonment.²⁴⁵ In the case of a continuing offence, the fine is set at a maximum of one

²⁴⁴ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 15-17.

²⁴⁵ Section 73. (1 US\$ ≈ 75 Kenya shillings)

hundred shillings for every day of which the offence continues. The general penalty for offences under the agriculture law where no specific penalty is given is a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding six months or both.²⁴⁶ The problem is that these penalties, especially the fines, were fixed when the law was enacted in 1955, and since then, there is no evidence to suggest that they have been enhanced. As the monetary value of the fines is now nominal at current inflation rates and cost of living, the benefit for offending the law may be higher than the loss or pain suffered from the sanctions. Kenyan scholar Okoth-Ogendo has argued that even if the provisions were to be enforced completely, the penalties are so low that the cost of enforcing these fines would exceed the pecuniary recoveries, making it uneconomical to enforce the provisions.²⁴⁷

The coercive and sanctions based language and tone of the *Agriculture Act* is probably due to its enactment in 1955 during the period of colonial rule, and especially the state of emergency period of 1952 to 1957 on the eve of independence in 1963. This law makes no provision for incentives or the voluntary participation of land owners and users in decision making, but seeks to prescribe and enforce. Kameri-Mbote notes that the period of worst land degradation, loss of fertility, and decline in agriculture productivity has happened while

²⁴⁶ Section 213.

²⁴⁷ H.W.O Okoth-Ogendo, "Managing the Agrarian Sector for Environmental Sustainability" in Charles Okidi, Patricia Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008) at 232. [Okoth-Ogendo, "Managing the Agrarian Sector"] Another aspect of the sanctions system empowers government officers to give orders to enter the land in question, and carry out the works required for preservation of soil and fertility that the owner or occupier failed to undertake. In such a case the state will require the concerned person to meet any costs and expenses incurred in that exercise will then be recovered from the owner or occupier of the land. *See section 56, Agriculture Act.*

this law and its enforcement mechanisms have been in place.²⁴⁸ She has further argued that the Kenyan state lacks the capacity or predisposition to undertake the policing effort required to enforce the command and control structure. It is therefore conceivable that legal prohibition as a regulatory land use, as the primary technique, has reached its farthest limits and failed in securing sustainable land use in Kenya.

The challenge is finding legal mechanisms that will change the behaviour or attitudes of land owners or occupiers in their land use choices, to ensure they integrate environmental sustainability. Kenyan land tenure legislation, which confers land use decision making authority deriving from tenure rights, does not create a responsibility to integrate environmental sustainability with socio-economic needs. The *Agricultural Act* which was chosen to administer land use in Kenya equally falls short, and particularly assumes a prescriptive tone that excludes proactive responsibilities or incentives for land owners. Therefore for the millions of small scale land owners or occupiers practising subsistence agriculture in Kenya facing a scarcity of, and declining quality of suitable agricultural land (and resulting food insecurity), the balance of interest may well favour maximizing the short-term or immediate benefits of their land. This will be at the expense of caring for the land such that good environmental quality regenerates, and the land supports further socio-economic objectives like agriculture in a sustainable cycle. A viable alternative to the command and control structure must be sought, one that will transfer the responsibility to care for land primarily to land owners, as part of their regular land use decision making

²⁴⁸ Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (Nairobi: Acts Press, 2002) at 75. [Kameri-Mbote, "Property Rights and Biodiversity Management"]

processes. The same integration approach needs to be internalized into sectoral laws and policy for application by institutional decision makers and public officers that work with land owners

6.2 THE NATIONAL POLICIES ON AGRICULTURE

Several policy documents seek to identify the national priorities and approach in addressing the challenges facing agricultural land use. In this respect we will highlight and analyse two policy documents on agriculture in Kenya. One policy, the ‘Strategy for Revitalizing Agriculture,’ was adopted in 2004 and at the time was expected to be operational until 2014. It was however replaced in July 2010 by the ‘Agricultural Sector Development Strategy’ which is scheduled to be operational until 2020. As the overall policy statements on administration of agriculture, these policies are critical to the integration of sustainability with economic activities through land use policies, and decisions.

6.2.1 STRATEGY FOR REVITALIZING AGRICULTURE

The Strategy for Revitalizing Agriculture (SRA)²⁴⁹ was adopted in 2004. This strategy was intended to guide agricultural policy over a period of ten years, from 2004-2014. Its overriding goal was ‘to achieve a progressive reduction in unemployment and poverty, the two major challenges that Kenya continues to face.’²⁵⁰ It also hoped ‘to reduce substantially the number of people suffering from hunger, famine or starvation.’²⁵¹ The strategy was also

²⁴⁹ RoK, ‘Strategy for Revitalizing Agriculture,’ *supra* note 1.

²⁵⁰ *Ibid* at 1.

²⁵¹ *Ibid*.

intended to guide implementation of the main agricultural land use legislation, as well as other sectoral laws that have a bearing on agriculture.²⁵²

As the overarching policy on agriculture, the strategy identified a number of constraints to agricultural growth, key among them –²⁵³

- Frequent droughts and floods, pointing that most agriculture in Kenya is rainfed, and with increasing land degradation, the effects of drought and floods have exacerbated as the land lost the ability to sustain fertility or withstand these increasing frequent events.
- Reduced effectiveness of extension services – the policy noted that extension services, which aim at communicating and educating farmers on new technology and productivity, had declined through the 1990s. Failure in the extension system was also linked to lack of proper handling and storage of agricultural produce, or poor pest control strategies by farmers.
- Lack of coherent land policy – the policy noted that this affected land administration, and tenure security resulting in low investment in the development of land leading to environmental degradation. (On this point, the strategy took the same position taken by the Swynnerton plan decades earlier suggesting that security of tenure was correlated to development in land.)
- Low and declining fertility of the land – the policy attributed this to increasing population, land subdivision, and continuous land cultivation resulting in soil nutrient depletion, declining agricultural productivity and environmental degradation

The strategy then set out a reform agenda on three fronts. The first was reforming the overall legal and policy framework that affects the agriculture sector. The strategy conceded that previously, revision of the various legislation and policy had been sporadic and uncoordinated. This has resulted in new legislation while the old ones have been left intact, resulting in a large list of legal instruments that causes conflict during implementation, especially by dispersing the roles of decision-making.²⁵⁴ While it offered no specific indication of which laws and policies exacerbate sectoral fragmentation, the strategy

²⁵² *Ibid.* In the preamble, the strategy claims it is providing “clearly articulated objective, framework, and structure to stimulate, guide and direct progressive agricultural growth and development.” See preamble, at ix.

²⁵³ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 15-17.

²⁵⁴ *Ibid* at 23.

proposed that the agricultural sector ministries would seek to work with other related sectoral ministries to ensure review and development of policies.

The second was a 9-point institutional reforms guide that highlighted lowering the unit cost of production; improving the extension system; improving the link between research, extension, and the farmer; improving access to financial services and credit; reducing taxation on agriculture; increasing competition in supply of agricultural inputs; market research; encouraging growth of agribusiness; and improving the overall regulatory framework.²⁵⁵ In contrast, while declining soil fertility, which is inimical to sustainable land use, was highlighted in the SRA as a principal constraint to agricultural growth, the suggested reform structure did not discuss any proposals in that regard.

The third is a proposal on the coordination of actors in the agricultural sector through vertical integration.²⁵⁶ The Strategy made an attempt to set up an institutional coordination system, with an inter-ministerial committee at the top and a technical inter-ministerial committee as the implementation secretariat of the objectives.²⁵⁷ This structure was implemented administratively as the Agricultural Sector Coordinating Unit (ASCU).²⁵⁸ Its

²⁵⁵ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 23-25.

²⁵⁶ The policy concedes that lack of sectoral coordination is one of the main constraints to effective development, and implementation of agricultural law and policy.

²⁵⁷ RoK, “Strategy for Revitalizing Agriculture,” *supra* note 1 at 69.

²⁵⁸ ASCU sets out a fairly complex implementations structure. At the top is the National Stakeholders Forum organized regularly by the ministries and stakeholders as the highest decision making organ. It provides a platform for reviewing progress in the implementation of the strategy and the extent to which its objectives are being achieved. There is an inter-ministerial committee (ICC) to give policy direction, approve relevant policies, prepare cabinet papers, mobilize funds, and approve budgetary provision for implementation of agricultural sector activities. The ICC is made up of Permanent Secretaries and Directors of the sector ministries who rotate regularly. The next level is the Technical Committee which comprises sector ministries directors, and representatives of the private sector and development partners. Its principal functions are to

mandate is to facilitate and add value to the reform process and coordinate the sector ministries' and other stakeholders' efforts towards the implementation of the SRA vision. Interviews with some public officers assigned to the districts revealed minimal knowledge that the unit existed, and there was confusion on its role as distinct from that played by the other committees set up by the Act. Some agriculture officers²⁵⁹ reported that they found District Environmental Committees (DEC)²⁶⁰ set up under the framework environmental law, *EMCA*, and chaired by District Commissioners were more efficient in coordinating sectoral functions.

A credible argument to justify this outcome is that the DECs are chaired by District Commissioners. District Commissioners are part of the powerful provincial administration structure that manifests executive authority of the president on matters of general administration and internal security.²⁶¹ The District Commissioners have therefore traditionally have commanded superior administrative status and authority, which implies that other public servants will attend a meeting that is summoned and chaired by the District Commissioner.

decide upon the priority areas of work for ASCU. Below that are Technical Working Groups set up to analyze constraints and opportunities in the implementation of the SRA. The official structure then sets out district coordination units and local community groups as the lowest levels of implementation. See, www.ascu.go.ke

²⁵⁹ Doctoral research, “Interviews undertaken by the author, June-August 2009.”

²⁶⁰ Section 29, *EMCA* establishes District Environment Committees, Section 30 states that the functions include being “responsible for the proper management of the environment” within respective district.

²⁶¹ The provincial administration is organized through Presidential Circular No. 55 of 22 December 1965. See generally, Pal S. Ahluwalia, *Post-colonialism and the politics of Kenya* (Nova Publishers, 1996) In line with chapter 11 of the 2010 Constitution of Kenya, this centralized system will be replaced by 47 counties, with constitutionally devolved authority.

While the 2004 strategy represented a complex and ambitious national policy on agriculture, it focused more on the economic aspect pertaining to agricultural productivity, and dealt insufficiently with the equally important question of undoing land degradation and loss of soil fertility. This suggests a shortcoming in the policy, of mechanisms and tools to integrate environmental quality as a principal counterpart to socio-economic activities, and to require implementation of this integration both by sectoral institutions and land owners or occupiers. These two, integration by sectoral lead agencies in law/policy/decisions and by individual land owners in decisions, are the essential elements that ensure a balancing of interests for realization of ecologically sustainable development. As stated earlier in the section, the policy was intended to be operational until 2014 but was reviewed midterm and replaced in July 2010 by a new 10 year agriculture development strategy.

6.2.2 THE AGRICULTURAL DEVELOPMENT STRATEGY: 2010-2020

In its preface, the Agricultural development strategy (ASDS) states it is the national policy for the sector ministries and all stakeholders in Kenya.²⁶² While no definition is given of the particular sector ministries in order to illustrate the concerned legal and policy sectors, the same can be interpreted in the sense of lead agencies. These lead agencies are defined by the framework *EMCA* law as any government department, ministry, statutory agency or local authority with legal or policy competence on matters relative to the environment.²⁶³ In the context of agriculture lead agencies, an indicative list can be derived from the Ministers who appended signature to the ASDS: Ministers of Agriculture; Lands; Livestock development;

²⁶² RoK, —Agriculture Strategy 2010,” *supra* note 2 at ix.

²⁶³ Section 2.

Environment; Fisheries; Water and Irrigation; and Forestry and Wildlife.²⁶⁴ In terms of application, the ASDS should therefore ideally facilitate some measure of vertical integration for the sectoral lead agencies.

The ASDS acknowledges agriculture as the backbone to the Kenyan economy, and the means of livelihood for most of the rural population, therefore the inevitable key to food security and poverty reduction.²⁶⁵ It sets out its objectives in two thrusts –

- i). Increasing productivity, commercialization and competitiveness of agriculture
- ii). Developing and managing the key factors of production

The policy acknowledges a deep decline in agricultural production in spite of its economic significance to the people of Kenya. However, the ASDS does not specifically acknowledge or categorically set out sustainability, or any overall objective of integrating environmental quality and economic productivity in agricultural land use decision making. It is possible the question of integration and sustainable land use may be discussed by the policy as developing and managing key factors of production. But there is no clear reason why such an overarching multi-sectoral land use policy, which will be a useful guide to public officers working with land owners, fails to explicitly redirect their focus to the important questions of sustainability.

The strategy identifies current challenges to agriculture, key among them –

- Reduced effectiveness of extension services – over the last two decades due to use of inappropriate extension methods. The policy notes that although Kenya has a well developed

²⁶⁴ RoK, —Agriculture Strategy 2010,” *supra* note 2 at x. Other Ministries include Arid Areas Development, and Cooperatives, and Regional Development.

²⁶⁵ RoK, —Agriculture Strategy 2010,” *supra* note 2 at xiii.

agricultural research system, the use of modern science and technology in agriculture production is limited, perhaps due to inadequate research-extension-farmer linkages.

- Inadequate budgetary allocation to the agricultural sector, with a consolidation allocation of 4.5% of the budget
- Lack of coherent land policy – the policy noted that this affected land administration, and tenure security resulting in low investment in the development of land leading to environmental degradation.
- Low and declining fertility of the land – the policy attributed this to increasing population, land subdivision, and continuous land cultivation resulting in soil nutrient depletion, declining agricultural productivity and environmental degradation

This 2010 agriculture policy, in similar terms to the 2004 agriculture strategy it replaced, states that the lack of a coherent land policy is responsible for low investments in land, resulting in higher levels of land degradation. Two critical points arise from this assertion: The first is that the *Sessional Paper on National Land Policy*, which was adopted in August 2009 about a year before the ASDS was adopted in July 2010, makes a more significant attempt to address and connect sustainability principles with productivity of land. Secondly, even in identifying the problems arising from land tenure, the ASDS fails to make the connection that it is the legal rights of tenure that facilitate land use decision making. Under Kenyan law, these tenure rights do not currently create any responsibilities for land owners to observe or exercise responsibility over sustainable land management.

Nonetheless, the 2010 policy indicates that the government will _develop and implement policy, legal and institutional reforms on security of land tenure, land use and development, and on sustainable conservation of the environment.²⁶⁶ This appears to be connection between land use, land tenure, development activities, and environmental conservation, which manifests a conceptual grasp of the aspects of integration. However, the policy does

²⁶⁶ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 59.

not offer further suggestions on how these reforms will be undertaken, or the nature of priorities with regard to securing sustainable land use. Probably, in light of the 2010 Constitution, this suggestion of reform should be read together with article 60, which requires all land to be owned and used in an equitable, productive and sustainable manner.

The ASDS also addresses the challenge of environmental and natural resources management, pointing out that Kenya has lost some of her well known biodiversity resources mainly due to population increase, habitat destruction, desertification, over-exploitation of species and conversion through deforestation and drainage of wetlands for agriculture and settlement.²⁶⁷

The proposed legal and policy interventions to redress these circumstances include improving environmental conservation; improving pollution and waste management; enhancing conservation and management of resources; and implementing the national climate change response strategy.²⁶⁸ These proposed interventions echo the obligations imposed on the Kenyan state by the 2010 Constitution, as part of the legislative and other measures for realization of the right to a clean environment.²⁶⁹

In terms of institutional arrangements, the ASDS will be implemented through established government structures and ministries at district or divisional level.²⁷⁰ The policy requires each sector ministry to work out the activities under its docket and make elaborate financing plans for financing by the treasury.²⁷¹ With regard to vertical integration, the agriculture

²⁶⁷ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 65.

²⁶⁸ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 67.

²⁶⁹ See discussion on the meaning of legislative and other measures‘ in chapter , section 5.3.2.3.

²⁷⁰ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 84.

²⁷¹ *Ibid.*

policy refers to ASCU as having the mandate to facilitate and coordinate the sector ministries and other stakeholders towards implementing the ASDS. The policy anticipates that ASCU will link sector players and provide an enabling environment for sector-wide consultations along the various levels of implementation, from division to district to national level.²⁷² This policy position will face several legal challenges. First ASCU is an administrative body with no statutory authority to coordinate sectoral ministries, which are under no legal obligation to work with ASCU. However, since this is part of government policy, overall administrative directives and common policy to sectoral agencies interests may secure this adherence to work in tandem with ASCU. Second, the policy suggests that ASCU will play a key role at the district or divisional level away from national offices. However, as highlighted earlier, some district-level agriculture respondents reported that the District environment committees were a preferable legal forum for sectoral coordination.

In conclusion the 2010 agriculture policy, just like its 2004 predecessor, is very strong on setting out measures that will increase the economic productivity of land in agriculture. These include increased marketing opportunities, or increased value addition of agricultural produce before marketing. The 2010 policy also suggests measures to enhance participation of farmers through non-statutory voluntary associations like cooperative societies, farmers unions, commodity associations, and community based organizations.²⁷³ The concern with participation of farmers is an important approach because mechanisms to guide farmers on

²⁷² RoK, —Agriculture Strategy 2010,” *supra* note 2 at 85.

²⁷³ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 87.

integration of economic goals with the environmental quality of land in their land use decision making are critical to sustainable land use.

It is clear from the foregoing analysis that land tenure and agriculture land use regulation in Kenya have not been amended to comply with *EMCA* duty to ‘safeguard and protect’ the environment. The direct engagement between sectoral land or agricultural institutions/officers and land owners or occupiers is therefore imperative for two reasons. First, it can be argued that the quantum of land tenure rights conferred by the *Registered Land Act* should be read as if modified by the *EMCA* duty to ‘safeguard and enhance the environment,’ pursuant to section 148 of the *EMCA*. However, there must be a legal or policy avenue to communicate this legal environmental responsibility to land owners or occupiers in practical terms or through environmental values that they can integrate into their land use choices as sustainable practices. Secondly, even the policy effort evident from the *Sessional Paper on National Land Policy* or the 2010 Agriculture strategy (ASDS) regarding sustainable production principles or responses to degradation would not be apparent to land owners without some form of education, communication or consultations with public officials.

Implicitly, any expectations that land owners would adopt the *EMCA*-based or any other new legal responsibility to protect and enhance the environment as a legal responsibility attached to tenure responsibilities, would further require some guidance from scientific know-how combined with any local knowledge or cultural values on sustainability. Some form of participatory engagement between land owners or occupiers and public officials is therefore important to facilitate translation of any legal responsibility to the environment into practical

land use choices and changed behaviour. These arrangements are typically offered through agriculture extension services. It is however notable from both the Strategy for Revitalizing Agriculture and the 2010 ASDS, that diminished effectiveness of agricultural extension services, stands out as a common constraint to agriculture productivity. Arguably, agricultural extension is an important mechanism for pursuing change of attitudes to internalize integration by land owners. Extension also provides a forum for collaboration and engagement between public officers, land use regulators and land owners and is therefore an important avenue to exchange, impart and refine sustainable land use values. In the next part, we examine agriculture extension in Kenya, as an important policy tool for facilitating integrated decision making by land owners.

PART 3 – AGRICULTURE EXTENSION AND SUSTAINABLE LAND USE IN KENYA

7 THE NATURE OF AGRICULTURAL EXTENSION

Agricultural extension is the function of providing need and demand based knowledge and skills to rural populations in a non-formal, participatory manner with the objective of improving their quality of life.²⁷⁴ Considering that land use activities like agriculture are inherently influenced by broad social-cultural, economic and political forces, the role of the extension function is to inculcate behaviour change and to manage these multiple forces.²⁷⁵ This role is therefore well placed to further the goals of sustainable land use by influencing

²⁷⁴ Kalim Qamar, *Modernizing National Agricultural Extension Systems: A Practical Guide for Policy-Makers of Developing Countries*, (Rome: FAO, 2005), 1. [Kalim Qamar, “Modernizing National Agricultural Extension”]

²⁷⁵ Frank Vanclay & Geoffrey Lawrence, “Agriculture Extension in the Context of Environmental Degradation: Agricultural Extension as Social Welfare” (1994) 5(1) *Rural Society*, at 1. [Vanclay, “Agricultural Extension, Environmental Degradation”]. See also, Kalim Qamar, “Modernizing National Agricultural Extension”, *supra* note 46 at 1.

the behaviours of land owners or occupiers to integrate a responsibility to safeguard the environmental quality of land with their socio-economic activities.

The term ‘extension’ has varied applications, such as agricultural extension, or forestry extension. It also has a dual focus. The first is communication, which involves transferring information about new practices and technology from research to potential users and obtaining feedback to the researchers.²⁷⁶ This transfer of knowledge aims to generate behavioural change by land users, seeking major modifications in production systems.²⁷⁷ This communication focus of extension is synergistic with the education focus. The education function of extension involves land owners and users working with researchers and other experts. This mainly involves the exchange of ideas, to guide people in making land use choices that adapt their production systems with the knowledge and skills they acquire.

Extension includes two crucial components: function and organization. Function relates to the role or the relevance of extension services.²⁷⁸ The traditional extension function targets the dissemination of information and advice with the intention of promoting desirable knowledge, attitudes, skills and aspirations.²⁷⁹ Organization relates to how the agency or

See also, World Bank, *Agricultural Research and Extension: An Evaluation of The World Bank's Experience*, (Washington D.C., World Bank, 1985), 71. [World Bank, —Agricultural Research and Extension”]

²⁷⁷ *Ibid.*

²⁷⁸ Madhur Gautam, *Agricultural Extension, The Kenyan Experience: An Impact Evaluation* (Washington D.C., World Bank, 2000), viii. [Madhur Gautam, —Agricultural Experience”]

²⁷⁹ William McLeod Rivera, & Kalim Qamar, *Agricultural Extension, Rural Development and the Food Security Challenge* (Rome, FAO, 2003), at 7.

department responsible for extension organizes itself to execute the extension function,²⁸⁰ or designs a particular extension project.²⁸¹

7.1 AGRICULTURAL EXTENSION IN KENYA

Agricultural extension is intended to help rural families make best use of productive resources at their disposal.²⁸² Agricultural extension provides farmers with important information such as patterns in crop prices, new seeds varieties, management practices on crop cultivation and marketing, and training in new technologies.²⁸³ The farmers, as landowners or occupiers, can thereafter make choices over which advice or information they will adapt to their land use practices. Kenyan farmers have traditionally benefited from two major types of extension organization: publicly funded government extension; and specialized commodity extension.²⁸⁴

Early public extension had limited success in most instances due to many reasons, but was highly successful in the dissemination of hybrid maize technology.²⁸⁵ The focus of extension programmes run by the Ministry of Agriculture has been food crops, and livestock.²⁸⁶ This

²⁸⁰ Kalim Qamar, "Modernizing National Agricultural Extension," *supra* note 274.

²⁸¹ Madhur Gautam, "Agricultural Experience," *supra* note 278.

²⁸² Milu Muyanga & T.S. Jayne, "Agricultural Extension in Kenya: Practice and Policy Lessons" (Nakuru, Kenya: Egerton University/Tegemeo Working Paper 26/2006), 1. Milu Muyanga, "Agricultural Extension in Kenya". See also Milu Muyanga & T.S. Jayne, "Private Agricultural Extension System in Kenya: Practice and Policy Lessons" (2008) 14(2) *Journal of Agricultural Education and Extension*, 111-124, 114.

²⁸³ *Ibid.*

²⁸⁴ Milu Muyanga, "Agricultural Extension in Kenya," *supra* note 282 at 3.

²⁸⁵ Madhur Gautam, "Agricultural Experience," *supra* note 278 at 7.

²⁸⁶ Milu Muyanga, "Agricultural Extension in Kenya," *supra* note 282 at 3.

is, essentially, production extension because it is mainly concerned with how to increase production and yield of food crops, or livestock products.

While the *Agriculture Act* impliedly embraces a sustainability objective through its soil conservation and fertility goals, it is silent on the role of extension. This is probably the reason the Kenyan government has historically pursued a project-based approach to extension organization. Prior to the 1982 National Extension Programme (NEP), there were uncoordinated donor supported efforts.²⁸⁷ These extension arrangements were found to *lack a consistent national strategy, were expensive, inefficient, and largely ineffective*. At the close of NEP, the World Bank commissioned an evaluation which found agriculture extension function and organization up to the end of the project *lacked a strategic vision, had no appreciable improvement in its effectiveness and suffered from weak management*.²⁸⁸ This project approach failed to deliver the kinds of relevant information desired by farmers, instead disseminating simple agronomic and maize related messages.

This failure vitiated the cost-effectiveness of the main *‘face-to-face’* oriented training and visit (T&V) system.²⁸⁹ Most farmers surveyed several years into the T&V system indicated that the availability and quality of information and services declined within a few years.²⁹⁰

²⁸⁷World Bank, *Agricultural Extension Projects in Kenya: An Impact Evaluation* (Washington D.C., World Bank, 1999) (Report No. 19523) at 15.
Online:http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/04/000094946_99092004315349/Rendered/PDF/multi_page.pdf

²⁸⁸ Madhur Gautam, —Agricultural Experience,” *supra* note 278 at 10.

²⁸⁹ *Ibid* at 52.

²⁹⁰ *Ibid* at xv.

World Bank evaluators were quick to highlight that the failure of a *particular* extension project (organization) does not extinguish rationale or utility of extension function *per se*.²⁹¹

Reflecting on this background the government undertook a review, resulting in the 2001 *Agricultural Extension Policy*.²⁹² The policy acknowledges the need to address persistent poor agricultural performance; and to reassess the role of government in extension services.²⁹³ The policy acknowledges that extension is concerned with effecting change through adoption of innovations and changed practices and attitudes.²⁹⁴ The policy extensively focuses on increasing productivity. It also addresses sustainable land use issues, albeit briefly, indicating that farmers should receive training on soil and water conservation especially as it relates to agricultural and livestock production.²⁹⁵

Implementation of the extension policy is undertaken through the National Agriculture and Livestock Extension Programme (NALEP).²⁹⁶ NALEP frames the principal goals of extension function as being to enhance the contribution of agriculture and livestock to social economic development and poverty alleviation in the country. Implementation of these goals also focuses on transfer of knowledge and skills to increase land productivity, and marketing strategies. This suggests that land stewardship may be a subsidiary outcome during extension, through high productivity farming initiatives, but the sustainability link is indirect

²⁹¹ *Ibid* at at.7.

²⁹² Republic of Kenya, *National Agricultural Extension Policy* (Nairobi: Government Printer, 2001), at 1 [RoK –National Agriculture Extension Policy”]

²⁹³ *Ibid* at 1.

Ibid at 9.

²⁹⁵ *Ibid* at 23.

²⁹⁶ The first phase (NALEP I) ended in 2005 after five years, and NALEP II commenced in 2006.

and unclear. NALEP however embraces farmer participation, which is a useful avenue to inculcate the values of sustainable land use. In this sense therefore, the NALEP programmes marks a departure from the predominantly prescriptive provisions of current agriculture land use law.

NALEP implementation revolves around participation of farmers and other stakeholders in the broader agricultural field, including private sector players. It is decentralized to the district level; the highest district organ being the District Stakeholders Forum. This forum comprises farmers, agribusiness representatives, and sectoral ministries such as Agriculture, Livestock, Fisheries, Forestry, Co-operatives, Water and Provincial Administration. In a series of interviews with agricultural extension workers,²⁹⁷ this author established that NALEP is administratively implemented on the basis of focal areas, selected by the District or Divisional Stakeholder forum. In practice, due to budgetary constraints, every district will have one focal area in operation at any single time. Based on the interviews, the following paragraph summarizes the organization of the NALEP project in one district, and is representative of the national arrangement.

The district stakeholder's forum selects a focal area, ideally a new area or a repeat if the entire district was previously covered. Where a district comprises several administrative divisions, the district forum selects one division. A divisional stakeholder forum is selected, reflecting the composition of the district forum. The divisional forum identifies a focal area with a relatively high population density, poor agricultural output, or similar characteristics.

²⁹⁷ Doctoral research, –Interviews undertaken by the author, June-August 2009.”

A survey is undertaken on poverty and farming options. This forms the basis of an action plan for the focal area. An initial meeting for the focal area is usually held in the form of a *baraza* - a meeting convened by the local Chief.²⁹⁸ At this meeting farmers elect suitable groupings, or Common Interest Groups (CIG). The members of these CIG's elect leaders from among their members. At this meeting, and similar subsequent ones, a Common Action Plan is determined for the year-long duration of the project.

This process illustrates some level of engagement and collaboration between public officers, land owners, the local community and other agriculture stakeholders in the locality. The process also avails a useful forum where all these concerned parties gather to identify local issues, and determine agricultural priorities for further action. It is conceivable that if such a locality was facing sustainable land use challenges, such as soil erosion or fertility loss, the local community would prioritize these issues. The extension plan would therefore include the exchange and sharing of local and scientific knowledge on remedial measures to the identified sustainability challenge. The process is reflective of collective decision making.

Some farmers, in focal areas, interviewed for a mid-term assessment of NALEP indicated they have managed to improve their production and food security considerably.²⁹⁹ Nonetheless, the programme faces several challenges: First, NALEP services are restricted to one focal area within an administrative division at any one time. Second NALEP is

²⁹⁸ The *Chiefs Authority Act*, Cap 128, Laws of Kenya, defines the powers and authority of chiefs who, as part of the provincial administration, represent executive power, at the lowest level of administration in Kenya.

²⁹⁹ Melinda Cuellar, Hans Hedlund, Jeremy Mbai, & Jane Mwangi *The National Agriculture and livestock Extension Programme (NALEP) Phase I Impact Assessment* (Nairobi: Swedish International Development Agency (SIDA), Department for Africa, 2006) at 6.

structured as ‘demand-driven.’ This means that outside of an active focal area, training and visits by extension officers to other farms are predicated on a request for service. This may be suboptimal in public policy terms, as those whose actions would most benefit from extension support may not be those who request it. In fact the 2004 Strategy for Revitalizing Agriculture, while paradoxically advocating for ‘demand-driven’ extension services, had also noted that ‘the general feeling by the majority of farmers is that the extension system is virtually dead because they no longer see the extension workers as often as they (farmers) would wish.’³⁰⁰ The poor agriculture performance, attributed to loss of soil fertility suggests that the national extension policy directive that farmers should receive training on soil and water conservation has been ineffective, especially since extension is implemented on such a limited scale nationally. The 2004 agriculture strategy also admitted this fact, noting that the agriculture extension system in Kenya is ‘ineffective and inadequate, and is considered as one of the main causes of poor performance in the agricultural sector.’³⁰¹

Nonetheless some agriculture, social and home economics specialization officers attached to the extension units, in an active focal area, provided positive reviews of the programmes to this author.³⁰² They pointed out that the NALEP programme had offered opportunities for men, women and youth in agriculture, and had generated some attitude change with farmers beginning to view farming as a business rather as subsistence, especially supporting on-farm value addition to products. This positive effect of agricultural extension, especially

³⁰⁰ RoK, ‘Strategy for Revitalizing Agriculture,’ *supra* note 1 at 11.

³⁰¹ RoK, ‘Strategy for Revitalizing Agriculture,’ *supra* note 1 at 10.

³⁰² Doctoral research, ‘interviews undertaken by the author, June-August 2009.’

supporting increased agricultural productivity and quality of land stewardship was visible to this author during field trips when accompanying extension staff to private farms in a focal area.³⁰³ However, extension advice is offered actively in only a limited number of focal areas at any one time, or only on demand, and this significantly limits the overall impact on a nationwide scale.

The 2010 agriculture policy (ASDS) concurs and states that agriculture extension “plays a key role in disseminating knowledge, technologies and agricultural information and in linking farmers with other actors in the economy.”³⁰⁴ In this context, the ASDS perceives the objectives of agriculture extension as a “critical change agent required in transforming subsistence farming into a modern and commercial agriculture to promote household food security, improve income and reduce poverty.”³⁰⁵ This objective internalizes important issues especially the aim to bring about change, and transform productions systems. However, it appears deficient in focusing on key issues such as declining land fertility and the necessary role of extension in influencing behaviours and attitudes of farmers in making land use choices that safeguard environmental quality of land.

In terms of the link between agricultural researchers, extension agents and farmers, the 2010 policy notes that this is useful because the country’s agricultural base will only be increased and improved through diversified, demand-driven crop varieties, appropriate technologies,

³⁰³ *Ibid.*

³⁰⁴ RoK, —Agriculture Strategy 2010,” *supra* note 2 at 19.

³⁰⁵ *Ibid.*

and expanding use of irrigation in agricultural production.³⁰⁶ The policy therefore indicates that research-extension links will be strengthened to ensure demand-driven research and effective application of research technologies on the farm.³⁰⁷ This reveals that the 2010 agriculture policy also concentrates on ‘demand-driven’ approaches to agriculture extension. In addition, it is non-specific on the legal or policy mechanisms that will be applied to enhance and strengthen the links between researchers, extension workers and farmers.

In conclusion, the literature, and research information suggest that agriculture extension, even while focused on production has some positive impact on public participation. Even though agriculture extension in Kenya is narrowly focused on only some parts of the country (or is demand-driven), where the services are available there is some evidence that extension still achieves some attitude change. This is evident from farmers’ willing uptake of farming, value-addition and marketing advice. If the extension policy boldly integrated sustainable land use practices, this evident attitude change can be tapped as a means to communicate, educate, and exchange knowledge on the urgently needed sustainable land use practices. This, in turn, provides an implementation tool for the sustainability objectives of agricultural and environmental law. We pursue this possibility further in chapter 5, arguing that successful implementation of these sustainability objectives is crucial due to the importance of agriculture as a productive economic sector in Kenya.

³⁰⁶ *Ibid* at 33.

³⁰⁷ *Ibid*.

8 CONCLUSION

In this chapter, we have analysed the legal implications of land tenure rights and land use regulation on sustainable agricultural land use. We inquired into the system of land tenure, arguing that property or tenure rights are a category of socio-economic rights that confer the legal right on the holder to make decisions on land use choices. We therefore argued that tenure rights are the primary tool that can be used to reconcile socio-economic activities with protecting the environmental quality of land, thereby fostering integrated decision making by land owners or occupiers. The chapter has reviewed the dual nature of tenure rights in Kenya, revealing that indigenous and formal tenure often function in a hybrid sense, conferring sufficient legal decision making to permit agricultural activities but lacking a legal responsibilities to require integration. This is contrasted with the land tenure laws of Uganda and Tanzania, which however also fail to specify how the environmental responsibility should be implemented by small-scale land owners. The 2009 *Sessional Paper on National Land Policy* and the 2010 Constitution support our contention that land rights should be exercised in a manner that is consistent with _sustainable and productive management of land resource.⁶ We however noted that the constitution prefers enactment of sustainability principles through land use legislation. In our analysis, we respectfully disagreed, noting that it is property rights that establish the primary interaction between land, and land owners. The land use legislation and policy should provide clear and practical guidance to a responsibility that is already incorporated into tenure rights.

Our analysis noted that the preference for land use legislation can be traced to colonial history whereby it was preferred to use the vast colonial security machinery to enforce land

husbandry standards using the 1955 *Agriculture Act*, instead of land tenure. The agriculture legislation however applies a system of command and control mechanisms that over the last five decades have proven to be ineffective. Illustratively, the rules for preservation of soil fertility, which is crucial to land sustainability, do not create positive action responsibilities for regular implementation by land owners as a guide for integrating environmental protection into their regular land use activities. Instead the agriculture law confers extensive discretion on public officers to prescribe orders to land owners, after the fact, when environmental degradation has already afflicted the land. We have suggested that having affirmative responsibilities for land owners or occupiers is important because they can clearly know the specific measures they need to undertake and safeguard sustainability in their land use decisions. We pursue this further in chapter 5, arguing that it is a crucial step in modifying human behaviour, such that land owners can embrace a human responsibility that is consistent with Aldo Leopold's land ethic. Similarly, we suggested that such a responsibility will facilitate proactive engagement and collaboration between land owners and public officers, as the land owners seek guidance on how fulfil their legal responsibility.

Agriculture extension is a policy mechanism that can play a key role in fostering this engagement between land owners and public officials, as extension facilitates some form of education, communication and exchange of knowledge. In the analysis we established that agriculture extension in Kenya is insufficient, mainly given on demand or to a few selected focal areas around the country at any given time. However available evidence suggests that, even in the limited form, extension has achieved some attitude change amongst farmers. In essence therefore the system of land tenure, land use regulation and extension service

provides a mutually reinforcing legal and policy system that could be structured to foster sustainable agriculture land use in Kenya.

Sustainable land use will require statutory reconciliation between tenure rights and a legal responsibility to integrate environmental protection in decision making by land owners. Agriculture land use legislation should thereafter set out minimum sustainable land use standards clearly showing the conduct of sustainability expected from land owners, as a practical implementation of integration. The agriculture extension programme should embrace integrated sustainable land use practices, and tap attitude change by land owners. In this sense, extension moves from productivity focused to sustainability focused extension that facilitates exchange of ideas, as well as transfer between local and scientific knowledge on land use sustainability, thereby providing an implementation tool for the law. As highlighted earlier in this section, we pursue these proposals further in chapter 5 of this research. In the next chapter, we analyse the legal arrangements and challenges for sustainable community forestry in Kenya.

**CHAPTER FOUR:
EXAMINING IMPACT OF FOREST LAW AND POLICY TO THE SUSTAINABILITY OF
COMMUNITY FORESTRY**

1 INTRODUCTION

Forests, including trees that grow outside formal forests, play a variety of ecological, socio-economic and cultural functions. The protective role of forests includes affecting the climate by reflecting less heat in the atmosphere, than other types of land use that have more bare soil and less green cover.¹ Forests also reduce wind velocity thereby moderating soil temperature and increasing relative humidity, which is beneficial in agroforestry systems.² Forests also protect land from wind erosion. Forests further protect water by reducing surface erosion and sedimentation, filtering water pollutants, regulating water yield and flow, moderating floods, enhancing precipitation, and mitigating salinity.³

The productive roles of forests include provision of wood products such as timber, and non-wood forest products. Non-wood forest products consist of goods of a biological origin other than wood, derived from forests, other wooded land and trees outside forests.⁴ They perform a crucial role in meeting the subsistence needs of a large part of the world's population living in or near forests and in providing them with supplementary income-generating opportunities.⁵

¹ Food and Agriculture Organization, *Global Forest Resources Assessment* (Rome: FAO, 2005), at 95.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid* at 91.

⁵ *Ibid.*

The Kenya forest law, the 2005 *Forest Act*, recognizes the vital role played by forests in protecting water catchments and the stabilization of soils and ground water that are crucial for reliable agricultural activity.⁶ The forest law also aims to provide for the conservation and rational utilization of forest resources for the socio-economic development of the country.⁷ These provisions, and the analysis in the foregoing paragraphs, suggest that sustainable forestry activities are concerned with balancing the productive and protective functions. This requirement to balance between productive (socio-economic) and protective (ecological) provokes thoughts about the legal concept of integration, which is pertinent to realization of ecologically sustainable development, or in this case, sustainable forestry management.

In chapter 2, we reviewed the nature of conceptual integration whereby the right to development is reconciled with an environmental right and duty. This conceptual reconciliation gives rise to a legal responsibility to integrate environmental protection with socio-economic activities. Further to this, sectoral forest law, institutional policies and decision making should be vertically integrated with the environmental duty set out by section 3 of the framework *Environmental Management and Coordination Act (EMCA)*,⁸ such that forest vitality becomes the primary concern of forest activities.

The *Forest Act* has been enacted with the overt objective of pursuing sustainable forest management. The conceptual definition of sustainable forest management reviewed in this

⁶ *Forest Act*, 2005, see the Preamble.

⁷ *Ibid.*

⁸ *Environmental Management and Coordination Act*, Laws of Kenya, Act No. of 1999. [EMCA]

chapter subsumes some form of integration between concerns for forest conservation, and the socio-economic and cultural activities of those people holding forest management and user rights. The fact that the 2005 forest legislation (enacted after *EMCA*) provides for sustainable forest management, *prima facie*, demonstrates implicit vertical integration with 1999 *EMCA*. The challenge, which this chapter examines, is whether the forest law has put in place legal and institutional tools and mechanisms to guide people involved in forestry management, especially local communities, towards integrated decision making.

Available literature, highlighted in the chapter, reports that about 3-4 million people inhabit agricultural lands that are adjacent to protected state forests in Kenya. A 2009 government task force report noted that forest adjacent communities, legally or illegally, utilize forest resources for grazing, food, water or firewood. This manifests some form of indirect community roles in forestry. Section 46 of the *Forest Act* provides for the participation of forest adjacent communities in the sustainable management of state forests. This is an attempt to use the law and reintroduce the *shamba* system, a mechanism by which individuals have previously been allocated gardens in state plantation forests. In the *shamba* system, the individuals would be required to plant seedlings, and were allowed to grow food crops as they looked after the trees. However, because of political expediency, and the fact that the *shamba* system was not founded on sound sustainability policy, the system resulted in significant deforestation and degradation.

Outside of areas where the *shamba* system was permitted, other Kenyan communities have historically been excluded from state forests, which are managed as protected areas. The introduction of community forestry by the forest law is an acknowledgement that

communities have a role to play in sustaining healthy forests. However, because communities have historically been excluded from state forests, there is a significant task ahead to change the behaviours and attitudes of people to ensure that forest conservation is a primary consideration in decision making. This approach is important, not least because increasing population, and the diminishing quality and availability of agricultural land will increase the pressure on erstwhile protected state forests. In this chapter, we therefore examine the legal approach taken by the forest legislation in developing mechanisms to build the capacity of communities such that when they engage in forestry activities, they can make decisions that reconcile forest vitality with productive uses. We investigate whether there are unequivocal statutory responsibilities on forest communities to integrate environmental quality with their socio-economic activities.

Section 2 of the chapter investigates the implications of forest tenure rights to sustainable forest management. Section 3 analyses forest law in Kenya and the interface with sustainable forest practices. Section 4 examines the sustainability of community forestry, reviewing academic literature, and exploring the history of community forestry in Kenya. In particular, we analyse the ancestral forest claims by the *Ogiek* and *Endorois* communities in Kenya, and contrast the judicial attitudes of municipal Kenyan courts with the African Commission on Human and Peoples Rights which held that cultural practices are not necessarily inconsistent with conservation. Section 5 examines the *shamba* system, as community forestry that is practised by forest-adjacent communities. Section 6 investigates farm forestry as a manifestation of community forestry on private farm land. Section 7 of the chapter reviews the role of forestry extension in securing attitude and behaviour change by communities

involved in the *shamba* system and in farm forestry. In general, the chapter pursues the collective argument that sustainability in forest management should be set as an overriding legal objective in order to satisfy the competing needs on the sustainable use, conservation and management of forest resources by communities.

2 TENURE RIGHTS IMPLICATIONS TO SUSTAINABLE FOREST MANAGEMENT

The integration of environmental conservation with socio-economic activities is a major legal and policy challenge facing management of forests. In Kenya, calculations reveal that about 94.5% of all forest land is owned and managed by the state as protected areas.⁹ In these circumstances, any forestry land use activities by local communities living adjacent to the forests have traditionally either been strictly prohibited, or regulated with conditional permits or agreements.¹⁰ Official government statistics suggest that the planning, control and decision making over forests exclusively by the state has not been effective, as the country has a tree cover of 1.7%,¹¹ making Kenya a very low forest cover country. The 2007 *Sessional Paper on Forest Policy* and the 2010 Constitution indicate that national forest

⁹ Public forests represent 3,438,500 ha while private forests represent 199,000 ha out of an approximate 3,637,500 ha of forests nationally, such that an average of 94.5% of all forests fall under the public forests tenure vesting them in some agency of the state. See, Forest tenure detailed data Kenya. Resource person: Ndambiri Kathendu, Forest Conservation Officer. Conservation of Forests (Government of Kenya) The information is sourced from FAO, online: <http://www.fao.org/forestry/39661/en/ken/> . In this context ownership of the land = ownership of the forest.

¹⁰ See, for instance sections 9-13, 1942 *Forest Act* (now repealed). See further, section 5 of the chapter for analysis on the *shamba* system, which was the only conditional permission through which individuals were allowed to undertake farming in state forests, before the 2005 *Forest Act* was enacted. This latter statute allows for community forestry activities in state forests (section 46).

¹¹ Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forests Complex* (Nairobi: Office of the Prime Minister, 2009) at 15. [RoK, –Mau Task Force Report”]

cover should be a minimum of 10% of the national land mass.¹² As highlighted in the introduction, literature suggests that about 3-4 million people inhabit lands adjacent to protected forests, within a five kilometre radius.¹³ These people use forests for socio-economic activities like charcoal burning, water, grazing, fruits, vegetables and medicinal plants.¹⁴ This finding supports the argument that forest management, in order to be sustainable, should incorporate the roles played or that could be played by local communities.

Where the law anticipates and provides for community involvement in forest management, such as in Kenya,¹⁵ these communities become primary decision makers on forest and land use choices, based on the tenure rights they hold. Therefore, an analysis on the participation of local communities in sustainable management of state forests should first explore the legal concept of forests, and forest tenure.

A legal concept of forest allows examination of the various definitions, content, function and uses of forests, as well as administrative classification. These administrative classifications are often indicative about who holds tenure rights and decision making authority over the management of forest resources. Forest tenure reflects the individual or entity which holds ownership rights, and the decision making competence. A clarification of these legal rights is

¹² See, Republic of Kenya, *Sessional Paper No. 1 of 2007 on Forest Policy* (Nairobi: Government Printer, 2007) at iv; [RoK, “Sessional paper on forest policy”] See also *Constitution of the Republic of Kenya, Revised Edition 2010*, section 69(1) (b). [“Constitution of Kenya, 2010”]

¹³ RoK, “Mau Task Force Report,” *supra* note 11 at 64; See also The World Bank, *Strategic Environmental Assessment of the Kenya Forest Act 2005* (Washington D.C., The World Bank, 2007) at xii. [The World Bank, “SEA of the Forest Act”]

¹⁴ RoK, “Mau Task Force Report,” *supra* note 11 at 64.

¹⁵ *Forest Act*, 2005, section 46.

therefore important when examining any responsibilities on tenure holders to integrate environmental quality of forests with socio-economic activities or uses.

2.1 LEGAL CONCEPT OF FOREST

The legal conception of forests(s) involves discussions on forest ownership and classification. It involves questions such as: what is a forest? whose forest? what is in a forest? Understanding a forest, in legal terms, also involves examining the concepts of content, uses, sizes, or biodiversity content. Such an exercise also involves reviewing an administrative aspect, as to whom the forest is vested, whether as public property, private property, or local community property. These aspects are important because just like most other land use activities, forests revolve around property or tenure rights that define the legal ability over decision making and use. It is therefore necessary to define who has legal control over a forest, the purpose of the forest and its uses, in order to pursue accountability and monitor the sustainability objectives that may inform decision making by public officials and communities.

A single and unified definition of forests has been elusive due to varying climatic, social, economic, and historical conditions, and a preference by many governments for defining ‘forest’ as a legal classification of areas that may or may not actually have tree cover.¹⁶ Non-legal definitions of forest therefore assist in establishing a technical baseline for the legal classification of a land mass as a forest area. The 2001 Global Biodiversity Outlook defined

¹⁶ *Millennium Ecosystem Assessment, Forests and Woodlands* (Washington D.C: Island Press, 2005) at 590. [Millennium Ecosystem Assessment, “Forests and Woodlands”]

forests as ecosystems in which trees are the predominant life forms.¹⁷ The Outlook concurred that most definitions refer to canopy or crown cover, which is essentially the percentage of ground area shaded by the crowns of the trees when they are in full leaf.¹⁸ The United Nations Food and Agriculture Organization (FAO) defines a forest to include natural forests and forest plantations and refers to land with a tree canopy cover of more than 10 percent and area of more than 0.5 ha.¹⁹ In the FAO definition, forests are determined both by the presence of trees and the absence of other predominant land uses. The term ‘forest’ is therefore interpreted to include forests used for purposes of production, protection, multiple-use or conservation (i.e. forest in national parks, nature reserves and other protected areas), as well as forest stands on agricultural lands such as windbreaks and shelterbelts.²⁰ In natural manifestation, forests are usually composed of many individual stands in different stages of development and with different characteristics,²¹ reflecting the diversity of biogeophysical conditions, social structures, and economies.

The intergovernmental Panel on Climate Change, in a special report on land use change and forestry advances three types of forestry definitions,²² which are often reflected in forest legislation. The first are administrative definitions, which bear no relationship to the

¹⁷ Convention on Biological Diversity, *Global Biodiversity Outlook* (Montreal: Secretariat of the Convention on Biological Diversity, 2001) at 91.

¹⁸ *Ibid.*

¹⁹ FAO, *Global Forestry Resources Assessment 2000: Main Report* (FAO, Forestry Paper 140, 2001) Appendix 2: Terms and Definitions, at 363.

²⁰ *Ibid.*

²¹ *IPCC Special Report on Land Use, Land-Use Change and Forestry*, online: - [Chapter 2: Implications of Different Definitions and Generic Issues.](http://www.ipcc.ch/ipccreports/sres/land_use/045.htm) http://www.ipcc.ch/ipccreports/sres/land_use/045.htm

²² *IPCC Special Report on Land Use, Land-Use Change and Forestry* online: - [Chapter 2: Implications of Different Definitions and Generic Issues.](http://www.ipcc.ch/ipccreports/sres/land_use/046.htm) http://www.ipcc.ch/ipccreports/sres/land_use/046.htm

vegetation characteristics on the land but relate to which agency of government has jurisdiction over the forest land,²³ and the extent of the land mass classified as a forest. The second definition is based on current, potential or even desirable land use.²⁴ A third approach defines a forest in terms of vegetative land cover, for instance as an ecosystem characterized by more or less dense and extensive tree cover.²⁵ The tree cover is assessed as a percentage of the crown cover with possible distinctions made between open- and closed-canopy forests.²⁶ The administrative definition is closely affiliated to the entity that holds the tenure rights and essentially controls decision making. The land use and land cover classifications advanced by the IPCC point to the objectives of forestry activities, including choices made by tenure right holders on the biodiversity conservation and socio-economic uses of the forest.

The 2005 *Forest Act* of Kenya blends several of the conceptual approaches in defining a forest. Section 2 defines forests to mean any land containing a vegetation association dominated by trees of any size, whether exploitable or not, capable of producing wood or other products, potentially capable of influencing climate, exercising an influence on the

²³ *Ibid.*

²⁴ See for instance, the Swedish *Forest Act of 1994* which carries the following land use-based definition: For the purposes of this Act, forest land is defined as: (i) land which is suitable for wood production, and not used to a significant extent for other purposes; and (ii) land where tree cover is desirable in order to protect against sand or soil erosion, or to prevent a lowering of the tree line. Land that is wholly or partially unused shall not be regarded as forest land if, due to special conditions, it is not desirable that this land be used for wood production.

²⁵ *Supra* note 16.

²⁶ Antonio Di Gregorio & Louisa Jansen, *Land Cover classification system (LCSS): Classification Concepts and user manual* (Rome: FAO Land and Water Development Division, 2000) Appendix A: A Glossary of Classifiers and Attributes. Online: http://www.fao.org/docrep/003/X0596E/X0596e01n.htm#P9_32

soil, water regime, and providing habitat for wildlife, and includes woodlands.²⁷ This definition seems to subscribe to the classification provided by the IPCC report by incorporating a combination of a land use classification and a land cover classification. The Kenyan definition does not include the requirement that a classified forest should have a minimum tree canopy of at least 10%, even though Kenya has a low forest canopy cover area of about 1.7%.²⁸ The 2010 Constitution has provided legal remedy by placing a mandatory obligation on the Kenyan state to increase and maintain a tree canopy cover of at least 10% of the total land area of the country.²⁹

Another dimension of legal conception of forests in Kenya relates to administrative classification of forests as: state, local authority, or private forests. This legal classification can be interpreted to subsume the foregoing statutory definition of a forest, and generally infers which entity or person has ownership or user rights, and therefore the competence to make decisions over forest use and conservation. We now examine these ownership and tenure rights over forests, while the classification of forests is analysed in section 3.2.1 of this chapter.

2.2 PROPERTY RIGHTS AND FOREST TENURE

A definition of forest tenure draws from the technical definitions and examination of the general concepts of property rights, and tenure. The general nature and role of property

²⁷ Section 2. This definition is contained a version of the *Forest Act* downloadable from: <http://www.fankenya.org/downloads/ForestsAct2005.pdf> 19 January 2011. However, the official version of the *Forest Act* does not reflect this definition, online: www.kenyalaw.org

²⁸ RoK, “Mau Task Force Report,” *supra* note 11 at 15.

²⁹ Constitution of Kenya, 2010, article 69(1)(b).

rights in conferring decision making authority to the holder of the rights is analysed in chapter 3 of this research.³⁰ In that analysis, we argue that property rights form part of the basic structural laws in a legal system, which should determine and influence the norms or values of how people make choices to use or transform their land.³¹ Scholars Meinzein-Dick, Brown *et al.*, highlight the utility of property and tenure rights in the care and productivity of resources such as land and water.³² These roles include influencing the patterns of natural resource management especially determining *who* can do *what* with a particular resource, such as land, generally and sometimes also *when* and *how* they can do it.³³ Thus concerns over property rights in forests just as in land become questions of tenure rights – bringing the same tripartite question³⁴ as in general land tenure - as to *who* holds *what interest* in *what* forest land, hence concerns with forest tenure.

Similar to land tenure rights the breadth of rights over a forest includes user rights, control rights, and transfer rights.³⁵ These rights are pertinent to decision making over the use of the

³⁰ Chapter 3, section 2-4.

³¹ *Ibid.* See also Joseph Sax, —“Environmental Law Forty Years Later: Looking Back and Looking Ahead”, in Michael Jeffrey, Jeremy Firestone and Karen Bubna-Litic (eds) *Biodiversity, Conservation, Law + Livelihoods: Bridging the North-South Divide* (New York: Cambridge University Press, 2008) at 10. See further, a discussion on the role of constitutions, framework environmental laws, and property rights as basic structural laws in chapter, section 5.

³² Ruth Meinzen-Dick., Lynn R. Brown, Hilary Sims Feldstein, & Agnes R. Quisumbing, —“Gender, Property Rights and Natural Resources 1997 (25) 8 World Development, 1303.

³³ *Ibid.*

³⁴ Patricia Kameri-Mbote —“Land Tenure and Sustainable Environmental Management in Kenya” in Charles Okidi, Charles, Patricia Kameri-Mbote & Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008), 260 at 261. [Kameri-Mbote, —“Land Tenure and Sustainable Environmental Management”]

³⁵ See discussion on breadth of land tenure rights: Chapter 3, section 2.1.1; See also, Food and Agriculture Organization (FAO), *Land Tenure and Rural Development* (FAO Land Tenure Studies 3: Rome, 2002) at 18.

land or forest resources, as well as allocation or transfer of some of the user and control rights to third parties. In this sense, scholars Reeb and Romano suggest that forest tenure is a broad concept that includes ownership, tenancy, and other arrangements for the use of forests.³⁶ Their conception, endorsed by a 2008 FAO study,³⁷ presents forest tenure as a combination of legally and customarily defined forest ownership rights and arrangements for the management and use of forests, including a determination of who can use what resources, for what duration and under what conditions.³⁸ The reference to ‘management’ and ‘use’ of forests echoes the sustainability concerns that validate arguments for integration of environmental conservation with socio-economic uses of forests. This integration is a process that should commence with statutory provisions, or policy on the responsibilities of forest tenure rights holders (or their legal assignees) during decision making, to ensure they safeguard the environmental quality of forests.

In Sub-Saharan Africa, statistics by the FAO record that about 83% of overall forest lands is owned by the state as public forests with the remaining 17% split almost evenly between forests owned by local government authorities; villages; private holders, among other groups. Community or group forest ownership has been reported at a continental average of

See also, Anthony Scott, *The Evolution of Resource Property Rights* (New York, Oxford University Press, 2008) at 6.

³⁶ Dominique Reeb, & Francesca Romano, “Forest Tenure in African and South and Southeast Asia: Implications for Sustainable Forest Management and Poverty Alleviation” (Paper presented at the International Conference on Poverty Reduction and Forests, Bangkok, September 2007) at 1. See also Francesca Romano, “Forest Based Tenure in Africa: Making Locally Based Forest Management Work” 2007 (228) 15 *Unasylva* 11-17 at 11.

³⁷ Food and Agriculture Organization, *Tenure Security for Better Forestry: Understanding Forest Tenure in Africa* (Rome: FAO, 2008).

³⁸ *Ibid* at 2.

about 3%.³⁹ In Kenya, the focus country of this research, public forests represent 3,438,500 ha while private forests represent 199,000 ha out of an approximate 3,637,500 ha of forests nationally⁴⁰ such that an average of 94.5% of all forests fall under the public tenure vesting them in the state or an agency of the state. This distribution of forest tenure denotes the Kenyan state as the dominant holder of forest tenure with statutory authority to determine land use, and a notable approach of managing state forests as protected areas with restricted access by people.⁴¹ It is important to recall that about 3-4 million people inhabit lands adjacent to protected forests within a five kilometre radius,⁴² and they use forests for socio-economic activities like charcoal burning, water, grazing, fruits, vegetables and medicinal plants.⁴³ These facts suggest that, especially with population increase, the pressure on protected state forests by local communities will increase, especially as agriculture land reduces in quantity and quality.⁴⁴ It is therefore imperative to anticipate and consider the legal options that will facilitate community roles in forestry, but equally safeguard forest sustainability.

³⁹ *Ibid* at 4.

⁴⁰ See, Forest tenure detailed data Kenya, *supra* note 9.

⁴¹ See, section 3.2.1.1 of the chapter for a detailed analysis of state forests.

⁴² See section 2 of this chapter. See also RoK, –Mau Task Force Report,” *supra* note 11 at 64; The World Bank, –SEA of the Forest Act,” *supra* note 13 at xii.

⁴³ RoK, –Mau Task Force Report,” at 64.

⁴⁴ See Republic of Kenya, *Strategy for Revitalizing Agriculture: 2004 – 2014* (Nairobi, Ministry of Agriculture, 2004) at 15-17.

Unlike previous forest legislation in Kenya,⁴⁵ the 2005 *Forest Act* makes provision for participation of local communities in the sustainable management of state forests through a revised variant of the *shamba* system,⁴⁶ which is analysed in section 5 of this chapter. This expected role of local communities in sustainable forest management points to a need to review the conceptual paradigm that should determine the legal responsibilities for implementation of the *shamba* system or in farm forestry. The legal responsibilities relate to the state, as the principal institutional holder of forest tenure rights, and communities as the legal assignees, to integrate environmental quality of forests with their socio-economic activities and ensure forest management is sustainable.

2.3 SUSTAINABLE FOREST MANAGEMENT

The early definitions of sustainable forestry concentrated on timber resources, with forest management aimed at the ‘sustained yield’ of a limited number of products.⁴⁷ Sustained yield was based on the concept of equilibrium between growth and timber harvest that can be sustained in perpetuity.⁴⁸ The 2003 Millennium Ecosystem Assessment⁴⁹ distinguished between ‘sustained yield management’, which is the management and yield of an individual resource or ecosystem service, and ‘sustainable management’, which refers to the goal of

⁴⁵ The *Forest Act*, 1942.

⁴⁶ Section 46.

⁴⁷ Sophie Higman, James Mayers, Stephen Bass, Neil Judd & Ruth Nussbaum, *The Sustainable Forestry Handbook: A Practical Guide for Tropical Forest Managers on Implementing New Standards* (London: Earthscan, 2005) at 4.

⁴⁸ Millennium Ecosystem Assessment, ‘Forests and Woodlands,’ *supra* note 16 at 589.

⁴⁹ Millennium Ecosystem Assessment, *Ecosystems and Human Wellbeing: A Framework for Assessment*. (Washington DC: Island Press, 2003) [Millennium Ecosystem Assessment, ‘Ecosystems and Human Wellbeing’]

ensuring that a wide range of services from a particular ecosystem is sustained.⁵⁰ The Center for International Forestry Research (CIFOR) then defined sustainable forest management to mean maintaining or enhancing the contribution of forests to human wellbeing, both of present and future generations, without compromising their ecosystem integrity, i.e., their resilience, function and biological diversity.⁵¹

The meaning, object and scope of sustainable forest management is further addressed by a 2008 *United Nations General Assembly (UNGA) Ordinary Resolution adopting a non-legally binding instrument on all types of forests*.⁵² The UNGA resolution was adopted to enhance the contribution of forests to the achievement of the internationally agreed development goals. These include the Millennium Development Goals, in particular with respect to poverty eradication and environmental sustainability.⁵³ The UNGA resolution identifies sustainable forest management as a mechanism to achieve its objectives. Sustainable forest management is then defined as a dynamic and evolving concept, which aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations.”⁵⁴

⁵⁰ *Ibid* at 63.

⁵¹ J.A. Sayer, J.K. Vanclay & N. Byron, “Technologies for Sustainable Forest Management: Challenges for the 21st Century” (Jakarta: Centre for International Forest Research (CIFOR) Occasional Paper No. 12, April 2007) at 2.

⁵² United Nations, *General Assembly Resolution on a Non-legally binding instrument on all types of forests* (Sixty Second session, A/62/419 (Part I), 31 January 2008). <http://www.fao.org/forestry/14717-03d86aa8c1a7426cf69bf9e2f5023bb12.pdf> [UN, “Non-legally binding instrument on all types of forests”]

⁵³ *Ibid*, see article 1, setting out the purpose of the UNGA Resolution. See also the chapeau to the resolution which explains the background of purpose leading up to the MDGs.

⁵⁴ UN, “Non-legally binding instrument on all types of forests,” *supra* note 52, article 3.

The aims of sustainable forest management, expressed in this definition, imply the existence of an underlying principle or policy whereby forestry land use activities integrate the socio-economic values and activities, with environmental values and functions of forests. The utility of sustainable forest management to integration was earlier echoed by the 1992 *United Nations Statement on Non-Legally Binding Forest Principles*.⁵⁵ Article 2(b) of these principles noted that “forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations.” According to the 2008 *UNGA Resolution on a non-legally binding instrument*, the pursuit of sustainable forest management is intended to achieve four objectives, three which reveal a conceptual attempt to balance the competing interests of forest conservation and economic utilization.⁵⁶

- i). To reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation;
- ii). To enhance forest-based economic, social and environmental benefits, including by improving the livelihoods of forest-dependent people; and
- iii). To increase significantly the area of protected forests worldwide and other areas of sustainably managed forests, as well as the proportion of forest products from sustainably managed forests.

The UNGA resolution also addresses national level implementation of sustainable forest management and calls on member states to develop policies and strategies suitable to their circumstances, but in line with the general principles. Specifically, the instrument advises

⁵⁵ United Nations, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests* (UNGA, A/Conf.151/26(Vol.III), 14 August 1992). <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm> [UN, “Forest principles”]

⁵⁶ UN, “Non-legally binding instrument on all types of forests,” *supra* note 52, article 5.

that such legal and policy frameworks should consider, as a reference point to sustainable forest management, several thematic areas. These thematic areas include:⁵⁷

- the extent of forest resources;
- forest biological diversity;
- forest health and vitality;
- productive functions of forest resources;
- protective functions of forest resources; and
- the socio-economic functions of forests.

The diversity of these thematic areas reflects the objectives of sustainable forest management, and offers policy level guidance on the direction that forestry planning and decision making should follow. This approach has, to a certain extent, been incorporated by national forestry legislation in some jurisdictions. By way of illustration, the *1999 Law on Forestry* of Indonesia⁵⁸ requires forest administration to be based on benefit and sustainability, democracy, equity, togetherness, transparency and integration.⁵⁹ This Indonesian law further requires forest management to optimize the variety of forest functions which cover conservation, protection and production functions in order to gain balance and sustainable benefits of environment, social, culture and economy.⁶⁰ Further illustration of sustainable forest management is evident from the objectives of the *Crown Forest Sustainability Act* of Ontario Canada,⁶¹ which are to -⁶²

⁵⁷ *Ibid*, article 6(b).

⁵⁸ *The Law of the Republic of Indonesia, Number 41 Year 1999 on Forestry*
Online: http://www.dephut.go.id/INFORMASI/UNDANG2/uu/Law_4199.htm

⁵⁹ *Ibid*, article 2.

⁶⁰ *Ibid*, article 3.

⁶¹ *Crown Forest Sustainability Act*, R.S.O. 1994, Chapter 25.
Online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_94c25_e.htm#BK1

⁶² *Ibid* section 1.

provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations.’

The Ontario forest legislation points to sustainability as the principal object, which then supports the socio-economic and environmental needs of people. Sustainability is defined as the long term crown forest health.⁶³ Forest health is thereafter interpreted to mean ‘the condition of a forest ecosystem that sustains the ecosystem’s complexity while providing for the needs of the people.’⁶⁴ These provisions imply an underlying intention to safeguard Crown forest health, and pursue those management practices that integrate that primary objective of forest sustainability, with the socio-economic needs of people in present and future generations. The reference to ‘manage’ in the objective points to a human responsibility to integrate forest health into the values, attitudes and practices of forestry socio-economic activities.

The same approach is evident from the objectives of the *2005 Forest Act* of Kenya, which are to ‘provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country.’⁶⁵ This, *prima facie*, illustrates some vertical integration of the *Forest Act* with the values of the statutory duty to protect and enhance the environment, as set out by the framework environmental law, *EMCA*. These objectives and the normative character of sustainable forest management imply an underlying responsibility on those involved in

⁶³ *Ibid* section 2.

⁶⁴ *Ibid* section 3.

⁶⁵ *Forest Act*, 2005, see the preamble.

forestry planning and decision making to safeguard environmental quality of those forests. In ideal terms therefore, forest law and policy should be concerned with how to sustain the health and vitality of forests, and serve the socio-economic needs of people, especially those whose livelihoods are linked to forest resources.⁶⁶ Forest legislation thus serves to orient and control the behaviour of individuals and groups in accordance with policy, by defining both responsibilities and incentives (or penalties) to encourage fulfilment of policy objectives of sustainable forest management.⁶⁷ The challenge is whether, in addition to this normative basis for sustainable forest management as the basic premise for integration, the Kenyan forest law has tools and mechanisms setting out a legal responsibility to integrate forest conservation with socio-economic or cultural activities. In subsequent sections of this chapter, we examine whether such an explicit legal responsibility has been put in place.

3 FOREST LAW AND SUSTAINABILITY

In this section, we analyse forest legislation, in context of Kenya as the country of research. We have already established in the foregoing section that the 2005 *Forest Act*, in principle, ascribes to the principle of sustainable forest management. We now review the provisions which manifest the legal tools and mechanisms available for implementation of sustainable forest management. In particular, we review forest classification, tenure and administration in order to definitively set out who has policy, planning and decision making authority over different types of forests. This approach is important to highlight whether the Kenyan

⁶⁶ R.M de Montalembert & F Schmithüsen, “Editorial: Forest policy and legislation” 1993 44(3) *Unasylva*,
Online:
<http://www.fao.org/docrep/v1500E/v1500e02.htm#editorial:%20forest%20policy%20and%20legislation>

⁶⁷ *Ibid.*

forestry law has mechanisms to guide implementation of sustainable forest management, by institutions involved, and by individuals, including local communities. This is instrumental because the state not only holds the largest proportion of forest tenure and user rights, but the state simultaneously exercises institutional policy making, planning and decision making roles over the forestry sector. The 2005 *Forest Act* has also enacted provisions allowing community participation in the sustainable management of state forests. In section 4, we review these provisions to analyse the legal mechanisms available to guide the attitudes and choices of local communities towards sustainable forestry.

Prior to the 2005 forestry legislation, Kenyan forestry tenure and rules had evolved from pre-colonial days⁶⁸ when land, including forests, was owned and used under indigenous land tenure. Colonial land and forest tenure and use policies resulted in expropriation of land, and the creation of protected forests that excluded local communities. This state of affairs has, over time, resulted in a complex and challenging legal relationship between the state and local communities because of exclusion from forestry management. In recent years, as highlighted earlier, it is recorded that about 3-4 million people inhabit lands within 5 kilometres of protected forests. Therefore forest conservation efforts may be undermined by short-term economic objectives of local people, including search for water, firewood, charcoal, and illegal cultivation.⁶⁹ It is therefore important to first examine the pre-2005

⁶⁸ The transformation of Kenya into a colony was effected through the Kenya (Annexation) Order-in-Council, 1920. See Yash Pal Ghai & J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) at 3 & 50.

⁶⁹ See RoK, "Mau Task Force Report," *supra* note 11 at 64; See also The World Bank, *Strategic Environmental Assessment of the Kenya Forest Act 2005* (Washington D.C., The World Bank, 2007), *supra* note 13 at xii.

evolution of forest legislation, to establish the context within which current forest law has been operating.

3.1 FOREST LAW AND POLICY UNTIL 2005

Conservation strategies pursued by the colonial government and post-independence Kenya governments have been dominated by measures to fence off or reserve areas for nature preservation and exclude people from the reserved areas.⁷⁰ Colonial forest administration dates back to the 1897 declaration of Kenya as a British Protectorate, subsequent expropriation of land by the British as crown lands, and the first forest ordinances enacted in 1902 and 1911. These ordinances adopted and crystallized a centralized forest administration, with a Chief Conservator of forests managing a powerful forest department.⁷¹ The department's main task was the expansion and management of crown forests, which were the government forest estate. The 1902 and 1911 ordinances severely restricted local use of state forest lands, which was community land prior to expropriation, by prohibiting building of dwellings, cutting trees, farming or herding without official authorization from the administrators.⁷² Violators of forest regulations faced jails or fines, with prosecution for serious offences.⁷³

⁷⁰ Paul Guthiga & John Mburu "Local Communities Incentives for Forest Conservation: A Case of Kakamega Forest in Kenya" (A Paper Presented at the 11th Biannual Conference of International Association for the Study of Common Property (IASCP), Bali, 2006) at 10. [Guthiga & Mburu, "Local Communities Incentives for Forest Conservation"]. See also Katrina Brown, "Innovations for Conservation and Development" 2002 168(1) *The Geographic Journal*, 6-17.

⁷¹ Alfonso Peter Castro, *Facing Kirinyaga: A social History of Forest Commons in Southeaster Mount Kenya* (London: Intermediate Technology Publications, 1995) at 66-67. [Castro, "Facing Kirinyaga"]

⁷² *Ibid.*

⁷³ *Ibid.*

The first most comprehensive forest legislation was enacted in 1942 by the colonial government, and remained the main legislation until a new law was enacted in 2005. This law, just like its predecessors conferred extensive forest tenure rights on the state, conferring the legal ability to make decisions on the management and use of forests. While the 1942 forest law was in force, Kenya experienced high level deforestation, forest degradation, illegal forest encroachment for pasture and farming, and the irregular excision of forests with allocation to the political elite.⁷⁴ This factual outcome notwithstanding, the 1942 forest law had set up a legal regime for the establishment, control and regulation of Central government forests, forests and forest areas in the Nairobi Area and on unalienated Government Land.⁷⁵ It granted the Minister the power to determine which areas of the country would be subject to the provisions of the Act. Therefore the Minister was empowered to declare any unalienated Government land⁷⁶ to be a forest area; to declare the boundaries of a forest and from time to time alter those boundaries; and to withdraw the forest status of an area.⁷⁷

⁷⁴ The World Bank, “SEA of the Forest Act,” *supra* note 13 at 2; RoK, “Mau Task Force Report,” *supra* note 11 at 10. See also NEMA, *National Environmental Action Plan 2009-2013* (Nairobi : National Environment Management Authority[NEMA], 2009) at 9.

⁷⁵ The objectives of that statute were captured in its short title. Central forests were vested in the central/national government, and have now been renamed state forests under the 2005 forest law. .

⁷⁶ This is land held under the *Government Lands Act*, Cap 280 Laws of Kenya. It defines government land section 2 defines government land to mean land for the time being vested in the Government. The 2010 Constitution, a Article 62(1) for instance states that Public land is, *inter alia*, _land which at the effective date was unalienated government.‘ (Effective date is 27 August 2010, when the constitution came into force). Section 62 extensively lists down the lands which qualify as public land.

⁷⁷ Section 4.

The forest law at the time did not require the Minister to give any reasons for such declaration, or consult with any interested member of the public or other stakeholders.⁷⁸ This provision was inimical to sustainable forest management because this decision making, such as altering forest boundaries or withdrawing the forest status of an area, carried potentially negative environmental, socio-economic and cultural consequences. The only basic form of public communication was for the Minister to publish a notice of intention to vary forest boundaries, or cease a forest area in the official Kenya Gazette about four weeks prior to that decision.⁷⁹ The law was quiet on the expected impact of this Notice, for instance, - were public representations entertained or - would the Minister listen? In fact these Gazette Notices were routinely issued quietly perhaps with the expectation that not many members of the public would read the official gazette, or take notice.

Problems with these provisions were evident for instance in 1998 when it became public that between 1996 and 1998 the government had allocated half of the 1063ha Karura forest, an urban forest just outside of the capital city Nairobi, to private developers.⁸⁰ The forest provides a vital refuge from urban life. The residents were thus concerned about the clearance of a forest important for water catchment functions and of great potential value for the relaxation, recreation and education of the people of Nairobi.⁸¹ The excision and

⁷⁸ Francis D.P. Situma, "Forestry Law and the Environment" in Charles Okidi, Patricia Kameri-Mbote & Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008) at 236. [Francis Situma, "Forestry Law and the Environment"]

⁷⁹ Section 4(2).

⁸⁰ Michael Gachanja, "Public Perception of Forests as a Motor for Change: The Case of Kenya" 2003 213 (55) *Unasylva* 59-62 at 60.

⁸¹ *Ibid.*

allocation to private individuals was undertaken without public consultation, and was only revealed to the general public by residents of neighbouring areas who noticed construction crews and equipment moving into and clearing vast forest areas. The revelation resulted in public demonstrations, public prayer meetings and violent encounters with developers, as the public demanded revocation of allocations. The demonstrations, at times bloody and destructive, finally succeeded in halting the developments in 1999, and the government reviewed and rescinded its decision.⁸² These events demonstrate that the decision making authority of the Minister was wrongly exercised to convert forest land, and allocate it to private individuals with political connections, for other economic uses⁸³ without considering the non-fiscal environmental benefits, such as recreational facilities, accruing to the public.

In contrast to these events, the 1942 statute contained a very extensive system of sanctions and offences that criminalized any unauthorized conduct that would compromise the nature of the forest or its produce.⁸⁴ These provisions would therefore be enforced against ordinary citizens, who may have wanted to enter the forests in search of basic items like food or

⁸² *Ibid.*

⁸³ As a case in point, the Kenya government has, since 2008, been involved in a complicated legal and political process of repossession a huge proportion of the Mau Forests Complex, one of five important water towers of Kenya. They were allocated to farming communities, and the political class. The political class, include the President at that time, and senior Ministers, and other administrators have been found to own huge tracts of land. For more information, see www.maurestoration.go.ke

⁸⁴ Section 9 made it an offence for any person without lawful authority to:(a) mark any forest produce or affixes upon any forest produce a mark used by any forest officer to indicate that the forest produce is the property of the Government or that it may be lawfully cut or removed; (b) alter, obliterate, remove or defaces any stamp, mark, sign, licence or other document lawfully issued under the authority of this Act, or removes or destroys any part of a tree bearing the stamp or other mark used by any forest officer;(c) cover any tree stump in any Central Forest or forest area or on any unalienated Government land with brushwood or earth or by any other means whatsoever conceals, destroys or removes or attempts to conceal, destroy or remove such tree stump or any part thereof; or(d) wear any uniform or part of a uniform or any badge, or other mark issued by the Forest Department to be worn by forest officers or other employees of the Forest Department.

firewood. The hallmark of the overall forestry law and policy strategy therefore involved the creation of state forests as protected areas with exclusion of local people from decision making on management, consumptive use or conservation.⁸⁵ These methods, termed as ‘_exclusionary’, ‘_fence and fine’, ‘_coercive conservation’ or even ‘_fortress conservation’ have not been effective in attainment of objectives,⁸⁶ as Kenya now records a low 1.7% forest canopy cover.⁸⁷ The 1942 forest law was therefore not conducive for integration of conservation with socio-economic or cultural uses either by forest institutions, or by local communities who were legally excluded, except under the *shamba* system.⁸⁸

3.2 FOREST LAW AND POLICY SINCE 2005

The current forest legislation in Kenya was enacted in 2005 to govern establishment, development and sustainable management of forests for the socio-economic development of Kenya. It was, as mentioned in the introduction, enacted after the framework environmental law. This law, *EMCA*, was the first legal instrument in Kenya to set a basis for integration of environmental protection with socio-economic activities by creating a statutory environmental right, and a corresponding duty to ‘_protect and enhance the environment.’ Even though *EMCA* is silent on mechanisms available for implementation, the duty stands out as a statutory responsibility on every person to protect and enhance the environment in their regular activities. In the realm of forestry law, with the 2005 *Forest Act* clearly

⁸⁵ *Ibid*, see, also Guthiga & Mburu, ‘Local Communities Incentives for Forest Conservation,’ *supra* note 70.

⁸⁶ Michael Wells, ‘Biodiversity Conservation, Affluence and Poverty: Mismatched Costs and Benefits and Efforts to Remedy them 1992 (21(3) *Ambio*, 237-243 at 238-239.

⁸⁷ RoK, ‘Mau Task Force Report,’ *supra* note 11 at 15.

⁸⁸ The *shamba* system is discussed in section 5 of this chapter.

endorsing the objectives of sustainable forest management, there is a *prima facie* indication of vertical integration with the basic principles and values of *EMCA*.

The implementation of the *Forest Act* is facilitated by the 2007 *Sessional Paper on Forest Policy*,⁸⁹ which was adopted two years after the law in 2007. Prior to that, the first forest policy for Kenya had been written in 1957 to regulate the preservation, protection of the forest estate and sustainable exploitation of forests.⁹⁰ It was reviewed after independence resulting in the 1968 Policy whose principal focus was on catchments management and timber production, with strong government control of the sector.⁹¹ The 2007 forest policy aims to enhance the contribution of the forest sector in the provision of economic, social and environmental goods and services.⁹² While it highlights several objectives, two most pertinent to this research are: (1) the enhancement of forests' contribution to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees; and (2) promoting participation of communities and other stakeholders in forest management and decision making.⁹³

⁸⁹ See, RoK, "Sessional paper on forest policy," *supra* note 12.

⁹⁰ This policy called for afforestation and conservation of forests in areas reserved for the African population and the proper management of privately owned forests. It also recognized the value of forests for public amenity and wildlife was also recognized. See, Jael Ludeki, George Wamukoya & Dominic Walubengo, *Environmental Management in Kenya: A Framework for Sustainable Forest Management in Kenya - Understanding the New Forest Policy and Forests Act, 2005* (Nairobi: Centre for Environmental Legal Research and Education (CREEL), Forest Action Network (FAN), WWF and Ministry of Environment and Natural Resources, 2006) at 2.

⁹¹ *Ibid.*

⁹² *Ibid* at 3.

⁹³ RoK, "Sessional paper on forest policy," *supra* note 12 at 3.

In terms of forest administration for the sustainable forest management objective, the *Forest Act* establishes an administrative classification of forest tenure rights, and this classification determines who has forest access rights, user rights, and control rights for decision making. The law also sets out the overall regulatory oversight vested in several statutory forest institutions, and enforcement mechanisms.

3.2.1 FOREST TENURE AND ADMINISTRATIVE CLASSIFICATION

In this section we examine the forest tenure rights in state forests, local authority forests and private forests. We highlight the nature of policy, planning and decision making authority over the sustainable forest management, and the impact on maintaining the environmental quality of forests.

3.2.1.1 State forests

All forests in Kenya other than private and local authority forests are vested in the State subject to any lawfully granted user rights.⁹⁴ State forests, are a single category of protected forests, which fall under the management jurisdiction of the Kenya Forest Service.⁹⁵ The Minister in charge of Forestry has authority to declare any area of unalienated government land, or other land purchased by the government to be a state forest.⁹⁶ This aspect of definition or classification follows the administrative category of definition, based on the protection status as a state forest, and the control by the Kenya Forest Service.⁹⁷ This

⁹⁴ Section 23.

⁹⁵ Section 5(2) and 21.

⁹⁶ Section 23.

⁹⁷ This Service is established as an autonomous state agency by section 4. Further discussion on its functions and power will be in section 3.2.2 of the chapter.

administrative nature of forest alienation means that large areas may be classified as state forests but fail to meet the technical requirements that are set out in the definition, based on canopy cover and biodiversity content. The very low national forest cover in Kenya suggests that a significant proportion of the public forests fit into this category.

Some of the protected state forests have been at the centre of irregular excisions for allocation to individuals for farming, or to the political class. They have also been under scrutiny due to widespread degradation including massive soil erosion due to deforestation, and burning of vegetation to expand the areas available for agriculture. One such area is the Karura forest highlighted earlier in this section. Another example is the Mau forests complex, a series of closed canopy indigenous forests that cover a combined 400,000 hectares of land.⁹⁸ In areas like Nessuit location, in the Nakuru County, human land use activities such as farming and degradation were evident to this author on a rather wide scale both in the neighbouring agricultural land, and within forest boundaries.⁹⁹ Some of the visible human activities included subtle but incremental burning of the bamboo growth on the forest edge to open up more forest area for farming. There was also the burning of regenerating tree stumps to prevent new growth of cut-down trees, riverbank cultivation which was widespread along the privately owned farmland adjacent to the forest, and large-scale gulley erosion due to loss of soil covering vegetation.¹⁰⁰

⁹⁸ Department of Remote Sensing and Resource Survey (DRSRS) & Kenya Forest Working Group (KFWG), *Changes in Forest Cover in Kenya's Five "Water Towers" 2003-2005* (Nairobi: DRSRS/KFWG, 2006) at 7. [DRSRS/KFWG, —Changes in Forest Cover in Kenya"]

⁹⁹ Doctoral research, —Author observation during site visits, June - August 2009.”

¹⁰⁰ *Ibid.*

This Mau forest complex has been at the centre of land use competition between forestry, and, the farming and other economic needs of local communities. It is illustrative of the intricate challenge of attaining sustainable forest management especially where the local community is excluded from protected forests. The Mau forest complex is part of a broader network of indigenous forests that are very important to the future of Kenya, commonly termed as the *five water towers*. This term *five water towers* is a generic term referring to the main montane forest ranges of the country: Mount Kenya, Aberdare Ranges, Cherangany Hills, Mau Forest Complex; and Mt Elgon. In total these water towers cover over 1 million hectares and form the upper catchments of all the main rivers of Kenya except the Tsavo River, which is further away in the Coast Province.¹⁰¹ They also provide vital ecological services to the country and forest adjacent communities such as water storage, river flow regulation, flood mitigation, recharge of groundwater, reduced soil erosion and siltation, water purification, conservation of biodiversity and micro-climate regulation.¹⁰²

Therefore while there are many protected state forests in Kenya, the five water towers are a good example, due to their unmatched importance to the Kenyan nation. They have been termed the lifeline of the nation¹⁰³ since they serve as the upper catchments of the main rivers that support the country's key economic sectors, including energy¹⁰⁴, water, agriculture, livestock and tourism. These forests are also important in terms of carbon

¹⁰¹ DRSRS/KFWG, —Changes in Forest Cover in Kenya,” *supra* note 98 at 5.

¹⁰² RoK, —Mau Task Force Report,” *supra* note 11 at 15.

¹⁰³ DRSRS/KFWG, —Changes in Forest Cover in Kenya,” *supra* note 98 at 3.

¹⁰⁴ The contribution of these forests to energy is particularly important as hydropower generation covers 70% of national electricity needs. See, DRSRS/KFWG, —Changes in Forest Cover in Kenya,” *Supra* note 99.

sequestration, soil conservation, provision of timber and non-timber products, as well as for their social, cultural and spiritual values.¹⁰⁵ Some parts of these towers are managed by the Kenya Wildlife Service (KWS)¹⁰⁶ which has concluded memoranda of understanding with the forest service.¹⁰⁷

Their ecological importance notwithstanding, there has been a high level of illegal encroachment into the *five water towers*, and other state forests especially in search of agricultural and settlement land. The Mau Complex represents the most high profile example of massive encroachment and irregular or illegal allocations of forest land by the government. The government of Kenya appointed a National Task Force to study the degradation, biodiversity loss, forest excisions, and role of local communities in the Mau complex.¹⁰⁸ The task force, in 2009, reported that excisions of the Mau complex forest reserves through ministerial authorizations in the official gazette have resulted in destruction of approximately 25% of the complex over a 25 year period.¹⁰⁹

¹⁰⁵ DRSRS/KFWG, “Changes in Forest Cover in Kenya,” *supra* note 98 at 3.

¹⁰⁶ Kenya Wildlife Service is established by section 3A of the *Wildlife (Conservation and Management) Act* as amended 1989 with authority to hold all wild *flora* and *fauna* in trust for the people of Kenya.

¹⁰⁷ In the aftermath of the report of the degradation of the Mau forests complex, the National Taskforce recommended that compliance and enforcement authority be temporarily vested in the KWS while the Kenya Forest Service, accused of gross incompetence, undergoes reform. See, RoK, “Mau Task Force Report,” *supra* note 11 at 23.

¹⁰⁸ See RoK, “Mau Task Force Report,” *supra* note 11.

¹⁰⁹ RoK, “Mau Task Force Report,” *supra* note 11 at 16. In a parliamentary debate on the adoption of conservation measures for this forest complex, the Prime Minister of Kenya stressed that conservation of the Mau forests complex is a matter of life and death and pointed that similar attention should be focused on the other four towers as they were facing degradation at varying degrees. For a record of the proceedings see, Kenya National Assembly, *Official Report* (Nairobi, Hansard Reports, Tuesday, 15th September, 2009 at 2.30pm) at 50.

An Interim government secretariat was established on the recommendation of the National Task force report.¹¹⁰ This Interim secretariat is responsible for rehabilitation of the Mau complex forests. In a December 2010 brief, the Interim secretariat reported significant progress in repossessing irregularly allocated forest land and removal of illegal human settlements.¹¹¹ It is notable that, among other actions, the forest repossession and rehabilitation process has involved eviction of people from erstwhile illegal settlements.¹¹² However, both the Task Force, and the Interim Coordinating Secretariat have recommended fast-tracking the involvement of local communities in management of state forests in order ensure forests meet local socio-economic needs. This, it is anticipated, will influence the attitudes of the local people to ensure they adopt a responsibility to conserve forests, even as they undertake their socio-economic or cultural activities. We examine this issue, in section 4.0 of the chapter viewing it as an implicit policy endorsement of implementation of sustainable community forestry.

¹¹⁰ RoK, "Mau Task Force Report," *supra* note 11 at 8.

¹¹¹ See, Interim Coordinating Secretariat: Mau Forests Complex, *Brief on the rehabilitation of the Mau Forest Complex* (Nairobi: Office of the Prime Minister, Government of Kenya, 7 December 2010) p2-3: [Interim Secretariat, "Brief on Mau Forest Rehabilitation"] In this brief, the Interim Coordinating Secretariat reports that, "in consultation with the relevant Ministries, it has developed a five phases plan of action for the repossession of forestland. Phases I and II are near completed, enabling so far the repossession of over 20,000 hectares of forestland. Phases I concerned forestland excised in 2001, but unparceled or unoccupied. Over 1,500 hectares of forestland have already been repossessed under Phase I. Phase II concerned the repossession of approx. 19,000 hectares in South Western Mau Forest Reserve of largely bamboo forest that have been encroached by illegal squatters. These squatters have no documentation to support their occupation of the forest. In addition, the area encroached has never been set aside by the Government for settlement. It is still and remains a protected forest reserve. The repossession of the 19,000 hectares was completed on 4 December 2010. The removal of the squatters took place peacefully, with the squatters leaving voluntarily the forest and the forest guards providing assistance. The Government mobilized several Ministries to assist the squatters in rebuilding their life once back to their divisions of origin. However, the squatters have been incited not to return to their divisions. It must be noted that the compensation / resettlement of illegal squatters is not provided for in the Task Force report as it would create a precedent that would encourage people to invade government land and provide a basis for squatters that have been relocated from forests, road reserves and national reserves in the past to make a claim for compensation."

¹¹² *Ibid.*

3.2.1.2 Local authority forests

Local authority forests are vested in municipal level governments officially referred to as county councils and municipalities.¹¹³ These local authority forests are a generic version of state forests as they are exclusively vested in a municipal level government. They include any forest situated on trust land which has been set aside as a forest by a county council;¹¹⁴ any arboretum, recreational park or mini-forest or forests established, and vested in a local authority. Section 24 of the *Forest Act* empowers the Minister to declare any area of land within the jurisdiction of a local authority to be a forest if the land is an important catchment area, a source of water springs, or is a fragile environment; the land is rich in biodiversity or contains rare, threatened or endangered species; the forest is of cultural or scientific significance; or the forest supports an important industry and is a major source of livelihood for the local community.

Some level of confusion arises because the National Museums of Kenya is granted power by law to declare any trust land held by a County council as a protected area for heritage purposes.¹¹⁵ The law however makes no provision for consultations between the National Museums and the relevant local authority, or for any consultations with the local community

¹¹³ Section 24. Local Authorities are established and governed by the provisions of the *Local Government Act*, Cap 265 Laws of Kenya. Sections 6, 8, 9, 12 and 28 are instructive on the different categories of local authorities, their establishment, powers and functions.

¹¹⁴ The *Trust Land Act*, Cap 289 of the Laws of Kenya regulates the exercise of authority of these lands.

¹¹⁵ This power is conferred by section 33 of the *National Museums and Heritage Act*, Cap 6 Laws of Kenya. The National Museums of Kenya already has exclusive jurisdiction in a number of forests around the country including Kaya Chistanze a sacred grove for the Mijikenda community in Matuga, Kwale District in the Coast; Oluchiri Sacred Grove in Lwanda, Vihiga district in Western Kenya, among others. See generally, Republic of Kenya, *National Museums of Kenya (Confirmation of Heritage Sites)*, Legal Notice No. 128, Legislative Supplement No. 45 (Kenya Gazette Supplement No. 69, 9 October 2008).

who may be affected. In addition this power puts the National Museums in direct conflict with Minister exercising powers under section 24 of the *Forest Act* to declare any local authority land as a protected area due to its ‘cultural significance,’ which is part of the heritage the museums work to protect.

Although it varies with the land and type of local authority, human access may be restricted and allowed only for aesthetic value as happens for parks and arboreta. The management of this forests category has been fraught in controversy in recent years, as exemplified by the Maasai Mau forest reserve. This forest, one of indigenous forest units comprising the Mau forest complex, is on trust land that is vested in the Narok County Council by the Constitution to hold in trust for local communities, and manage the forest reserve.¹¹⁶ The Mau Forests National Taskforce found a high level of encroachment into the forest reserve, with large tracts of forest land cut down under the guise of settling landless members of the local community.¹¹⁷ It emerged that the majority of the beneficiaries were in fact local leaders, government officials, and members of parliament, chiefs, councillors and employees of the custodian, Narok County Council. The Mau Forests Interim secretariat, as highlighted in the last section, reports it has repossessed previously allocated forest land, including surrender of title deeds. Their December 2010 brief records that ‘it must be noted that two title deeds received were surrendered by the Chairman, Narok Town Council, covering a total area of 250 acres.’¹¹⁸ This irregular excision by politicians happened even though the

¹¹⁶ Francis M. Nkako, Christian Lambrechts, Michael Gachanja & Woodley Bongo, *Maasai Mau Forest Status Report 2005* (Nairobi: Ewaso Ngiro South Development Authority, 2005) at 5.

¹¹⁷ RoK, ‘Mau Task Force Report,’ *supra* note 11 at 11.

¹¹⁸ Interim Secretariat, ‘Brief on Mau Forest Rehabilitation,’ *supra* note 111 at 3.

2005 *Forest Act* empowers the Forest Service, through forest officers, to carry out inspections to evaluate compliance with the forest law and policy¹¹⁹ including in local authority forests.

3.2.1.3 Private forests

The forest law provides for the establishment of private forests in Kenya. The provisions enable any person who owns a forest on private land to apply for its registration.¹²⁰ This registration with the Kenya Forest Service entitles a farmer to receive financial assistance including grants, loans, and incentives from the government.¹²¹ In a bid to facilitate sustainable forest management, private forest owners are also entitled to receive technical advice regarding appropriate forestry practices and conservation.¹²²

Private forests are recognized to include farm forests established alongside agricultural crops on private farmland. The farm forestry rules,¹²³ published under section 48 of the *Agriculture Act*,¹²⁴ adopt a more specific technical requirement. Under these rules, every land owner or occupier of agricultural land is required to plant, and maintain a minimum 10% tree cover on

¹¹⁹ This inspection visits should be undertaken at least twice a year, and the forest officer should submit their evaluation to the Director of the Kenya Forest Service. The Director is required to submit a report to the Board, which, if it is satisfied that it is in the public interest for a local authority forest to be managed by the Service, may make appropriate recommendations to the Minister for the local authority forest to be declared a provisional forest. Section 26 empowers the Minister to declare any local authority or private forest that has been mismanaged, to become a provisional state forest.

¹²⁰ Section 25(1), *Forests Act* 2005.

¹²¹ *Ibid*, Section 25(2).

¹²² *Ibid*, Section 25(3).

¹²³ *The Agriculture (Farm Forestry) Rules*, 2009 (Legal Notice No. 166, 20 November 2009).

¹²⁴ Cap 318, Laws of Kenya.

the land.¹²⁵ This is close to the FAO definition, which however not only requires a more than 10% tree canopy cover but also specifies the land area should be more than 0.5 hectares, which is not the case under the rules.

That notwithstanding, there are glaring differences between the two sectoral laws that apply to farm forestry. The forest law applies a broad and liberal definition of farm forests, and leaves the initiative to land owners to apply for registration. The agriculture law-based rules are mandatory, apply widely to all agriculture land, and have penal and financial sanctions for non-compliance. These latter rules, brought to operation on 20 November 2009, are the more recent ones and have made no mention of, or visible attempt to reconcile with the forest law. Private forests, in the narrow context of farm forestry, are analysed further in section 6.0 of this chapter as part of the review into legal mechanisms available for implementing sustainable community forestry.

3.2.2 ADMINISTRATIVE STRUCTURE FOR FORESTRY MANAGEMENT

The *Forest Act* establishes the Kenya Forest Service¹²⁶ as the successor to the former Forest Department, which served as the administrative agency under the 1942 forest law. The Forest Service is the principal public agency responsible for sustainable management of all categories of forests. To this end, the Forest Service is responsible to formulate policies and guidelines regarding the management, conservation and utilization of all types of forest areas.¹²⁷ The Forest Service is also vested with tenure rights and management responsibility

¹²⁵ Rule 6.

¹²⁶ Section 4 & 5.

¹²⁷ Section 5(a).

over state forests.¹²⁸ Section 5 sets out an extensive list of functions that the Forest Service should perform. We highlight some of the functions to demonstrate how through the role of the Forest Service, the *Forest Act* has attempted to balance socio-economic utilization of forests with conservation, enforcement or roles and support for communities -

- i). promote forestry education and training.
- ii). collaborate with individuals and private and public research institutions in identify research needs and applying research findings;
- iii). draw or assist in drawing up management plans for all indigenous and plantation state, local authority, provisional and private forests in collaboration with the owners or lessees, as the case may be;
- iv). provide forest extension services by assisting forest owners, farmers and Associations in the sustainable management of forests;
- v). enforce the conditions and regulations pertaining to logging, charcoal making and other forest utilisation activities;
- vi). collect all revenue and charges due to the Government in regard to forest resources, produce and services;
- vii). develop programmes and facilities in collaboration with other interested parties for tourism, and for the recreational and ceremonial use of forests;
- viii). collaborate with other organisations and communities in the management and conservation of forests and for the utilisation of the biodiversity therein;
- ix). promote the empowerment of associations and communities in the control and management of forests;
- x). manage forests on water catchment areas primarily for purposes of water and soil conservation, carbon sequestration and other environmental services;
- xi). enforce the provisions of this Act and any forestry or land use rules and regulations made pursuant to any other written law;
- xii). in consultation with the Attorney-General, train prosecutors from among the forest officers for purposes of prosecuting court cases

These functions demonstrate vertical integration as the forest legislation has internalized environmental protection and socio-economic roles in forests management. The Forest Service is further required to facilitate issues that will enhance responsibility of communities to make decisions that enhance forest conservation. Some of the pertinent services to benefit local communities include forestry training and education; extension services; and empowerment of communities in the control and management of forests. Some of these functions reflect legal tools and mechanisms that can facilitate change in personal behaviour

¹²⁸ Section 21; section 5(b).

and attitudes of entities and local communities when they are involved in sustainable forest management.

The forest service implementation system includes a system of forest officers deployed to the districts and divisions around the country.¹²⁹ Transition of the forest service from the former Forest Department, with repeal of the 1942 law, has been slow and tedious with staff morale and performance often criticised.¹³⁰ The former Forest Department, during its existence, was adversely affected by cut-backs and layoffs in the civil service due to the economic structural adjustment programme of the 1990's which resulting in loss of high calibre staff, as well as higher job insecurity due to fear of further lay-offs.¹³¹ Even as the forest department has been restructured into an autonomous Forest Service, lack of sufficient funding still afflicts the recruitment process and other operational aspects.¹³²

These challenges highlight two crucial issues. It will be a long while before the Forest Service can build capacity and acquire sustainable funding to meet all its operational targets. In the short and long term periods this could be mitigated by joint implementation of certain common responsibilities between agriculture and forest sectors such as extension, or law enforcement. This also provides the opportunity to critically examine how to widen the scope of community forestry that is based on devolved or transferred ownership or use rights. These partial tenure rights would ideally empower local communities to make

¹²⁹ Doctoral research, –interviews undertaken by the author, June-August 2009.”

¹³⁰ RoK, –Mau Task Force Report,” *supra* note 11 at 7.

¹³¹ The World Bank, –SEA of the Forest Act” *supra* note 13 at xii.

¹³² *Ibid.*

decisions on forestry socio-economic activities, responsibilities over forest conservation and enforcement. This could achieve two elusive results: engage forest communities in constructive forest management and utilization, and reduce the policing burden that is currently undertaken by the forest service.

Nonetheless the *Forest Act* creates a Forest Board to provide policy directive to the Forest Service. This Board is also empowered to establish forest conservancy areas for the proper and efficient management of forests and to divide such conservancy areas into forest divisions and stations.¹³³ It also requires, in mandatory terms, the establishment of forest conservation committees for each forest conservancy area. These committees, based on forest divisions and stations, have a responsibility to advise the Forest Service on local needs, monitor implementation of law and policy, assist local communities achieve equitable benefit sharing, and recommend potential forest areas. Membership to the committees is spread between public officers in the provincial administration, forest officer, agriculture officer, environment officer, industry representatives, and local community members. In order to be members of the forest conservation committees, community members must be nominated by a community forest association operating in the conservancy area. These community forest associations are analysed in more detail in section 5.0 of this chapter. They currently provide the only legal mechanism whereby communities participate in sustainable management of state forests.

¹³³ Section 13.

3.2.3 ENFORCEMENT MECHANISMS

The enforcement mechanisms under the *Forest Act* are dominantly coercive even though this law introduces some participatory and incentive based measures. Significant enforcement powers are vested in forest officers including powers to search and arrest anyone entering a state and local authority forest without permission. Officers also have powers to execute warrants of arrest. The wording of the *Forest Act* generally refers to forest officers, who are defined to include ‘‘Director, a forester, a disciplined officer of the Service, or an honorary forester.’’¹³⁴

The term ‘‘disciplined officer’’ refers to forest officers who have undergone paramilitary training, and are subject to a uniformed officers’ code of conduct.¹³⁵ These officers are granted enforcement powers over state and local authority forests. It is important to recall however, that unless competence has been transferred, the administration over local authority forests is vested in local authorities.¹³⁶ This suggests that these local authorities would ordinarily recruit and train their own forest guards, to undertake policing and enforcement duties. The statutory definition of forest officers is not broad enough to include local authority forest guards. Therefore, unless they have otherwise been designated ‘‘disciplined officers’’ by the forest service, they may lack the authority to enforce this law.

¹³⁴ Section 3.

¹³⁵ The First Schedule, to the 2005 *Forest Act*, Part I, makes Provisions relating to the officers of the Service. It lists out the ‘‘Disciplined Officers Cadre’’ to include: Commandant; Deputy Commandant; Assistant Commandant; Senior Superintendent Forest; Superintendent Forest Guard; Chief Inspector Forest Guard; Inspector Forest Guard; Sergeant Forest Guard; Corporal Forest Guard; Constable Forest Guard; and Forest Guard Recruit. The Schedule also sets out a ‘‘Disciplinary Code of Regulations’’ that regulates (1) the investigation of disciplinary offences and the hearing and determination of disciplinary proceedings; (2) disciplinary penalties; and (3) any other related matters.

¹³⁶ Section 24.

Alternatively, it could be argued that the law is to be read *mutatis mutandis* such that since local authorities are empowered to apply and enforce the law, then by extension they possess power to organize how this power is executed.

Further to the designation of competent officers, the forest law sets out a list of activities that are prohibited within the confines of protected forests except where a person has a licence or permit.¹³⁷ It also sets out vast sanctions and penalties to be imposed upon conviction, including imprisonment, fines and forfeiture of property used in the commission of offences.¹³⁸ Any person convicted for causing damage to forest resources may be required to pay compensation upon conviction, forfeit property used in commission of offence, and in the case of illegal cultivation of crops, forfeit the crops to the state.¹³⁹

Unlike its predecessor, the current forest law provides a system of incentives in addition to the vast sanctions. Any person who registers and operates a private forest, for instance, is eligible for tax rebates and government grants. The functions of the Forest Service, set out in section 3.2.2 of this chapter, reveal the Forest Service is required to provide training and extension services to communities and individuals, and to collaborate and engage with communities in furtherance of sustainable forest management objectives. This engagement with local communities is a significant incentive because the *Forest Act* has authorized the

¹³⁷ See, Section 52 for instance prohibits any person from actions that would: fell, cut, take, burn, injure or remove any forest produce; be or remain therein between the hours of 7 p.m. and 6 a.m. unless he is using a recognised road or footpath, or is in occupation of a building authorised by the Director, or is taking part in cultural, scientific or recreational activities; erect any building or livestock enclosure, except where the same is allowed for a prescribed fee; smoke, where smoking is by notice prohibited, or kindle, carry or throw down any fire, match or other lighted material; and de-pasture or allow any livestock to be therein.

¹³⁸ Section 53.

¹³⁹ Section 55.

granting of forest access and user rights to communities. These access and user rights permit local communities to engage either in forest management, or regulated cultivation of food crops or both through community forest associations. Section 47 sets out one of the functions of community forests associations as assisting the Forest Service in enforcement of the provisions of provisions of the Act or any applicable rules. It however falls short of providing detailed guidance on how this enforcement function of community associations maybe structured in practical terms.

4 THE SUSTAINABILITY OF COMMUNITY FORESTRY

There are two terms, social forestry and community forestry that are applied quite often in reference to the involvement of local communities in forestry activities. Social forestry is identified when there is an institution or mechanism in which communities or community members are organized to manage forest resources.¹⁴⁰ Social forestry integrates synonymous terms such as communities, communities, or local people and their participation in forestry activities. Community forestry too, directs its focus on the role played by the communities, and local people in forestry activities.

4.1 NATURE AND FUNCTION OF COMMUNITY FORESTRY

The Food and Agriculture Organization of the United Nations (FAO) adopts a broader conception of community forestry, as any situation which intimately involves local people

¹⁴⁰ Tri Djahmuri Lestari, "Community participation in a social forestry program in central java, Indonesia: The effect of incentive structure and social capital" (2008) 74(1) *Agroforest Systems* 83-96, at 84.

in a forestry activity.¹⁴¹ This FAO definition embraces a broad spectrum for community forestry activities to include woodlots and other forest products for local needs; growing trees at farm level; artisanal forestry activities that generate employment and wages; the livelihood activities of forest dwelling communities; and activities in public forests that enhance forestry activities at the community level for rural people. In this chapter, we have adopted this broader conception of community forestry developed by the FAO as it anticipates a proactive decision making role for local people in forest management, including integration of their socio-economic targets with safeguarding forest vitality.

Community forestry, in this sense, also aims to facilitate local communities to mitigate poverty by accessing additional food sources, fuel or financial gain. Alistair Sarre argues that this community forestry therefore aims to increase both the involvement and reward for local people.¹⁴² This increment is achieved by seeking a balance between the interests of forest vitality, local community socio-economic interests, and increasing local responsibility and decision making in the management of a forest resource. The view is supported by the *Convention on Biological Diversity* Programme of Work on Forest Biodiversity, focusing on sustainable use of forest biodiversity which aims to enable indigenous and local

¹⁴¹ FAO, *Forestry for Local Community Development* (Rome: FAO, Forestry Paper 7, 1997), Introduction. <http://www.fao.org/docrep/t0692e/t0692e02.htm#INTRODUCTION> (FAO, "forestry for local community development"]

¹⁴² Alistair Sarre, "What is Community Forestry?" 1994 4(4) *Tropical Forest Update* http://www.rainforestinfo.org.au/good_wood/comm_fy.htm

communities to develop and implement adaptive community management systems to conserve and sustainably use forest biodiversity.’¹⁴³

While community forestry is often employed as justification and illustration of active roles for local people in forestry activities within and outside formally classified forests, there has been academic debate on its actual utility. Arguing in its favour, Alistair Sarre speaks of community forests as ‘increasing the involvement of local communities’ and ‘increasing their responsibility’ over the health and quality of the ecosystem. FAO broadens the parameters of community forestry as the involvement of local people in forestry activities, including tree growing outside formal forests, at farm level, and participation in public forests. Arguments in favour of community forestry therefore suggest that local communities will play individual and collective roles in decision making, with responsibilities over forest vitality, integrated with pursuit of local social, economic and cultural objectives.

Antonio Contreras disagrees with the acceptability of community forestry in resolving sustainability and poverty challenges.¹⁴⁴ While he agrees that such measures normally aim to empower local people, Contreras, points to the original objectives for initiating participation of local communities in forest activities, in the first instance, as being the ones that undermine its success.¹⁴⁵ In his view, people empowerment programmes are structural responses to the inability of the state to fulfil its contract with the people. Contreras notes

¹⁴³ Secretariat of the Convention on Biological Diversity, *Expanded programme of work on forest biological diversity*. (Montreal: CBD Programmes of Work, 2004) at 10 (Goal 4).

¹⁴⁴ Antonio Contreras, —Rethinking Participation and Empowerment in the Uplands” in P. Utting (ed) *Forest Policy and Politics in the Philippines* (Quezon: Ateneo de Manila University Press, 2000) at 150.

¹⁴⁵ *Ibid.*

that following the collapse of top-down, trickle-down development processes that favoured the state against communities there were attempts in the 1980's to revise development approaches. He argues that such revision can be viewed as part of hegemony maintenance whereby the state deliberately restructures power relations in order to maintain a position of moral leadership when faced with a political crisis marked by increased resentment' among the population. In the case of the onset of community forestry programmes that involve local communities, Contreras argues that the state tackled challenges to its forest tenure dominance by instituting reforms. These reforms, according to him, on the surface purport to empower the poor and powerless but in reality serve to regain the consent of the governed' by reorienting them away from the cause of their discontent.¹⁴⁶

In spite of the contrasting view, the role of community forestry continues to be validated. Wily and Mbaya concede that community forestry is part of the community empowerment paradigm of development but they advance different justification.¹⁴⁷ They argue that it arose from recognition that governments lack the resources to carry out large scale enforcement of the coercive forest laws typical of the fortress conservation' model, and that governments require assistance to carry out forest management.¹⁴⁸ These coercive enforcement mechanisms have also faced resistance as top-down approaches incompatible with emerging

¹⁴⁶ *Ibid.*

¹⁴⁷ Liz Wily, & Sue Mbaya, *Land, People and Forest in Eastern and Southeastern Africa at the Beginning of the 21st Century: Impact of Land Relations on the Role of Communities in Forest Future* (Nairobi: IUCN/EARO, 2001) at 43-44. [Wily & Mbaya, —*land, People and Forests in Eastern and Southeastern Africa*"]

¹⁴⁸ *Ibid.*

principles of democratic government.¹⁴⁹ Governments have also been under pressure to take measures addressing rural poverty and food insecurity, which when coupled with fortress forest conservation and failed enforcement abilities, result in higher level of degradation as people engage in short-term, albeit illegal and destructive use of resources in desperate search for livelihood.

The 1992 *UN Forest Principles* further support the utility of community forestry in the furtherance of sustainable forest management, and tackling rural poverty. The statement calls on governments to promote and provide opportunities for the participation of interested parties, including local communities, indigenous people, individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.¹⁵⁰ The principles further urge that such forest policies should recognize and support the identity, culture and the rights of indigenous and local communities, and the role of women.¹⁵¹ The policy measures should also promote conditions to enable these local communities –

to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity, and social organization, as well as adequate levels of livelihood and well-being, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests. (Emphasis added)

The concern with providing responsibilities and incentives to local communities to enhance sustainable forest management is a current issue with regard to protected state forests in Kenya. As highlighted earlier, the Mau forests National Task Force and the Interim secretariat responsible for rehabilitating the forest complex have separately addressed the

¹⁴⁹ Wily & Mbaya, —Ind, People and Forests in Eastern and Southeastern Africa,” *supra* note 147 at 43-44.

¹⁵⁰ UN, —Forest principles,” *supra* note 55, principle 2(d).

¹⁵¹ *Ibid.*

role of local communities in sustainable management of these protected state forests. The Task Force, in its 2009 report, noted that communities living within five kilometres from the Mau complex forests (forest adjacent communities) depend on these protected forests for diverse basic needs such as water, firewood, pasture, or vegetables.¹⁵² The report also noted that these socio-economic activities of local communities, such as firewood collection, overgrazing livestock, or illegal logging for timber and charcoal, have been associated with degradation of protected state forests.¹⁵³ To overcome these challenges, the 2009 Task Force report (its proposals echoed by a December 2010 briefing report of the Interim Secretariat)¹⁵⁴ recommended that -¹⁵⁵

participatory forest management should be fast-tracked to enhance the livelihoods of the communities. In particular, community forest associations should be supported to actively participate in forest management.⁶

The Interim Secretariat's April 2010 brief noted that these measures are intended to ensure that the forests play the role that they can and should play in creating and sustaining employment and alternative livelihoods in and around the forests.¹⁵⁶ The common recommendation is therefore that people residing in areas adjacent to the protected forests should be involved in reforestation and afforestation activities. The government should also promote on-farm forestry to reduce the pressure and dependency on forest resources.¹⁵⁷ The

¹⁵² RoK, "Mau Task Force Report," *supra* note 11 at 64.

¹⁵³ *Ibid* at 65.

¹⁵⁴ Republic of Kenya, *Rehabilitation of the Mau Forest Ecosystem: Executive Summary* (Nairobi: Interim Coordinating Secretariat, Office of the Prime Minister, April 2010) at 5. [RoK, "Rehabilitation of Mau Forest"]

¹⁵⁵ RoK, "Mau Task Force Report," *supra* note 11 at 65.

¹⁵⁶ RoK, "Rehabilitation of Mau Forest," *supra* note 154 at 5.

¹⁵⁷ *Ibid*. See also RoK, "Mau Task Force Report," *supra* note 11 at 65.

Task Force report, without offering specific details, also recommended that forest adjacent communities should receive payments for environmental services provided by forests as a result of their (communities') role in forest conservation.¹⁵⁸

The imperatives favouring community forestry are therefore multiple. As explained by Wily and Mbaya,¹⁵⁹ there is evident inadequacy of the state as sole manager of public forests. The long duration the Kenyan state has held dominant forest tenure rights and decision making over forest management have resulted in higher levels of degradation and deforestation. There is a high level of poverty and population increase amongst communities inhabiting agricultural lands adjacent to forests, thereby resulting in illegal forest activities that are destructive. With community forestry, either within state forests or at farm-level, members of the local community obtain legal responsibilities to safeguard the environmental quality of the forests, and integrate this concern with their socio-economic and cultural objectives. In this sense, community forestry has higher utility where law and policy seek the objective of sustainable forest management, whereby forests are enhanced to retain their health and vitality in order to regenerate; and to provide for the social and economic requirements of local communities.

4.2 HISTORY OF COMMUNITY FORESTRY IN KENYA

The role and participation of local people in community forestry has been in place for a long time. Community forestry can be examined through communities that have historical claims to forest lands, and typically inhabit those forests. There are also those communities that

¹⁵⁸ *Ibid.*

¹⁵⁹ Wily & Mbaya, —End, People and Forests in Eastern and Southeastern Africa,” *supra* note 147 at 43-44.

inhabit agricultural or pastoralist lands adjacent to forests, and either legally or illegally, utilize the forest resources for socio-economic, cultural and environmental functions. We will demonstrate the normative character and history of communities with ancestral claims to forests that are now legally protected as state forests. We highlight this discussion to demonstrate the evolving legal and judicial attitude to community forestry in Kenya. However, we restrict subsequent discussions in this chapter to roles and functions forest-adjacent communities, and individuals practising farm forestry on private agricultural land, in order to review the provisions of the *Forest Act* on community participation in state forests (*shamba* system). With respect to forest adjacent communities, we examine the legal and policy history of the *shamba* system before the 2005 *Forest Act*, including the effect on sustainable forest management. We then analyse the legal mechanisms and tools in the 2005 *Forest Act* to establish whether this forest law facilitates local communities to exercise a responsibility over the vitality of forest resources, in addition to their socio-economic activities.

On a broader scale, scholars Harrison and Suh report on research findings that local groups living in the farthest corners of Asian countries have been practising community forestry for centuries.¹⁶⁰ They point towards China, India, Indonesia, Nepal, Philippines and Thailand where local people were managing their forests long before colonial times. Local history in Kenya places most, if not all communities, as having been actively involved in management of their local forest resources. In Central highlands where colonial government expropriated

¹⁶⁰ Steve Harrison & Suh Jung ho, "Progress and Prospects of Community Forestry in Developing and Developed Countries" 2004 3(3) *Small-scale Forest Economics, Management and Policy* 287-302 at 289.

land for allocation to large scale farming by European settlers, the land use practices of the local *Kikuyu* community were depicted as being too destructive to allow them to stay next to the forest.¹⁶¹ In spite of finding vast fertile farming and forest lands upon arrival, the colonial administrators accused indigenous farming of extensive destruction. For instance the *Kikuyu* shifting cultivation approach supposedly reduced large tracts of woodland, caused soil erosion, reduced rainfall and disturbed stream flow. In actual sense, the greater justification to exclude indigenous communities was to provide more land for white highlands (colonial agricultural settlements), and forest land for timber harvesting. The colonial government also had significant security concerns as forests provided cover for *Mau Mau* freedom fighters waging a guerrilla warfare campaign.¹⁶² They were therefore determined to end the direct roles of communities in forest management. Subsequent land expropriation and later extensive land reform programmes resulted in parcelling out of land, which was then registered as individual, privately owned, and mainly agricultural land. This is a situation replicated amongst other agricultural communities,¹⁶³ and a lot of these people live adjacent to the now protected state or local authority forests.

¹⁶¹ Castro, "Facing Kirinyaga," *supra* note 71 at 43.

¹⁶² *Ibid*, 43-44.

¹⁶³ A good illustration is the communities around Kakamega forest in Western Kenya. This forest, partly managed as a national park and partly as a forest reserve is important to community members. Even though they have not been allowed in either the park or forest portion, research has established a close dependency between this community and the forest. Community members mainly prefer the forest reserve side, since the forest service has been chronically underfunded and unable to enforce its authority. See generally, Paul Guthiga, John Mburu & Karin Holm-Mueller "Factors Influencing Local Communities' Satisfaction Levels with Different Forest Management Approaches of Kakamega Forest, Kenya" 2008 (41) *Environmental Management*, 696-706.

The forest classification, under the *Forest Act*, does not make provision for forests expressly vested in communities as juridical entities.¹⁶⁴ Therefore several decades since independence in 1963, a substantial 94.5% of forests has remained under public tenure. Communities have to obtain permission to enter and take part in forest management.¹⁶⁵ In addition to communities living adjacent to protected forests, there has been a complex legal problem with tenure rights of communities that have been making a historical and ancestral claim to inhabit, utilize and manage these forest resources. The case of these communities is therefore important as it demonstrates the evolving legal position and attitude of the Kenyan state and judiciary to such claims. We illustrate the complex situation by highlighting judgments from three suits filed by the *Ogiek* and *Endorois* communities from Kenya's Rift Valley province.

4.2.1 THE *OGIEK* COMMUNITY FOREST CLAIM AND LITIGATION

The *Ogiek* community forest claim may be examined by highlighting the judgment of the High Court of Kenya in the suit 1999 *Francis Kemai and 9 Others v. The Attorney General and 3 Others*.¹⁶⁶ This suit was originated as a representative suit filed by ten applicants on behalf of 5,000 members of the *Ogiek* ethnic community, inhabiting Tinet forest, in Nakuru district in the Rift Valley Province of Kenya. The main contention involved their eviction by the government from the forest, which the applicants claimed contravened their right to life;

¹⁶⁴ Apart from state and local authority forests, the law only recognizes private and farm forests. There are instances of land collectively vested in community groups under the Land (Group Representatives) Act, through the concept of group ranches. It is conceivable that communities in this category could own forests, but that would fall into the category of private forests.

¹⁶⁵ Section 46.

¹⁶⁶ *Francis Kemai and 9 Others v. The Attorney General and 3 Others* High Court of Kenya, Civil Case No. 238 of 1999 (Unreported). The judgment was issued on 23rd March 2000. [Francis Kemai judgment]

as well as their right of protection from discrimination, and the right to be residents in any part of Kenya.

The applicants argued that they had inhabited the forest since time immemorial but had faced consistent harassment from the government, who eventually ordered them to vacate the forest, prompting the suit. They conceded that the land was declared a forest by colonial authorities, and had remained a state forest. However they contended that the government had agreed to settle them in that forest, and had proceeded to issue letters of allotment to individual members of the community. Subsequent to this they claimed to have commenced development activities such as schools, trading centres and animal husbandry as well as permanent and semi-permanent homes.

The government disputed these claims and argued that this was a gazetted state forest in which it had no intention of settling anyone. It claimed that these were not genuine members of the *Ogiek* community, arguing that those genuine members of the community had been previously settled in other areas.¹⁶⁷ The court agreed with the submissions of the government. In the opinion of the court, the modern evident lifestyles¹⁶⁸ meant that the *Ogiek* may now have to clear part of the forest to make room for modern economic tools such as a market centre or construct permanent homes, which (socio-economic activities)

¹⁶⁷ The other places mentioned by the government, as respondent, are Sururu, Likia and Teret. See Francis Kemai judgment at 3.

¹⁶⁸ See Francis Kemai judgment, *supra* note 166 at 6.

would be incompatible with conservation of the environment necessary for a forest dwelling community.¹⁶⁹

With regard to ownership rights over Tinet Forest,¹⁷⁰ the court stated that ‘colonial authorities declared the disputed area to be a forest area and moved people out of it and translocated them in certain designated areas, and that the area had remained gazetted as a forest,’ under the forest law. The court argued that one of the effects of this declaration was the isolation and exclusion of the forest as a nature preserve. The court ruled that under the forest law then in force ‘no cutting, removal of forest produce or disturbance of the flora’ was allowed except with the permission of the director of forestry, and even then with the object of conservation. Highlighting provisions of the 1942 Forest Act, which was then in force, the court noted a list of activities that were prohibited unless a person had obtained a licence. These prohibited activities included felling, cutting or removing any forest produce, or their ‘traditional livelihood activities’ of hunting of protected wildlife and gathering of fruits, and honey.¹⁷¹

The court declined to entertain any legal claims based on the period the applicants had occupied Tinet forest, arguing that the applicants did not present evidence of possessing permits or licences to enter the forest and undertake any activity. In those circumstances, their (applicants) occupation was illegal and they could not therefore claim Tinet forest as

¹⁶⁹ *Ibid.*

¹⁷⁰ See Francis Kemai judgment, *supra* note 166 at 7.

¹⁷¹ See Francis Kemai judgment, *supra* note 166 at 9.

their land, or means of livelihood.¹⁷² In any event, the court found that in their attempts to show that the government had allowed them to remain in the forest area through various letters of allotment, the applicants had recognized the government as the owner of the land in question. For this reason, the government had the right, authority and legal power to allocate the land. If the applicants then claimed the land was theirs, the court wondered how they could accept allocation to them of what was theirs by one (the government) who had no right and capacity to give what they did not own?¹⁷³

The court thereafter declined all the prayers sought by the applicants. It is important to highlight the conflicting reasoning taken by the judges in justifying their decision. On the one hand, the judges appeared to recognize the importance of integrating forest sustainability with socio-economic and cultural rights or needs of local communities, and stated –

...in grappling with our socio-economic cultural problems and the complex relationship between the environment and good governance, we must not ignore the linkages between landlessness, land tenure, cultural practices and habits, land titles, land use, and natural resources management which must be at the heart of policy options in environmental, constitutional law, and human rights..¹⁷⁴

On the other hand, the court failed to connect the above reasoning with the poverty and plight of the *Ogiek* community as the applicants before the court. In this sense, the judges ruled that there is no reason why the *Ogiek* should be the only favoured community to own

¹⁷² See Francis Kemai judgment, *supra* note 166 at 11.

¹⁷³ *Ibid.*

¹⁷⁴ See Francis Kemai judgment, *supra* note 166 at 16.

and exploit at source, the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans.¹⁷⁵

4.2.2 THE *ENDOROIS* COMMUNITY FOREST CLAIM AND LITIGATIONS

Similar to the *Ogiek* experience, there has been a complex relationship between the *Endorois* community and the government of Kenya over their (*Endorois*) claim to tenure rights, use and management of what is now a protected wildlife reserve. This complex legal relationship can be analysed by reviewing the pertinent litigation, and judicial decisions. In 2003, the *Endorois* community filed a complaint against the government of Kenya before the African Commission on Human and People's Rights.¹⁷⁶ This 2003 complaint, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council of Kenya decision (Endorois case)*¹⁷⁷ to the African Commission followed rejection of a suit in the year 2002, on the same issues, by the High Court of Kenya in *William Yatich Sitetalia and 72,000 Others v. Baringo County Council*.¹⁷⁸ The decision of the African Commission, although merely a recommendation to the Kenyan government,

¹⁷⁵ See Francis Kemai judgment, *supra* note 166 at 12.

¹⁷⁶ The African Commission on Human and People's Rights is established by Part II of the *African Charter on Human and People's Rights*. The human rights mandate of the African Commission is set out in article 45 of the African Charter.

¹⁷⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* Communication 276/2003. reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 234 [African Commission, –*Endorois* Judgment,"]

See also, Communication 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [African Commission on Human and People's Rights, unreported decision] online: http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf [African Commission, *Endorois* Judgment, unreported]

¹⁷⁸ *William Yatich Sitetalia and 72,000 Others v. Baringo County Council* High Court of Kenya at Nakuru. Miscellaneous Civil Case 183 of 2002 (unreported) [William Yatich judgment]

contrasts significantly with the position taken by the Kenyan judiciary in *Francis Kemai*, and in *William Yatich*, as we demonstrate shortly.

The legal basis of the complaint before the African Commission was the basic environmental, socio-economic and cultural rights afforded by the *African Charter on Human and People's Rights*.¹⁷⁹ It is instructive to recall the attitude of the African commission evident in the *Ogoniland* case reviewed in chapter 2.¹⁸⁰ In that case, the African Commission ruled that the right to ‘an environment satisfactory to development’ in the African charter imposes clear obligations upon a government to protect the rights of people by preventing pollution and ecological degradation, promoting conservation, and securing ecologically sustainable development and use of natural resources.¹⁸¹

In the complaint to the African Commission, the *Endorois* community alleged and claimed that:

- i). They were forcibly removed from their ancestral land around the Lake Bogoria area in Baringo and Koibatek administrative districts without prior consultations, adequate and effective compensation.

¹⁷⁹ African Commission, “*Endorois Judgment*,” *supra* note 177 at 234.

¹⁸⁰ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 330-341.

¹⁸¹ See related discussion in Chapter 2, section 3.1.2.

- ii). They are a community of about 60,000 people who have inhabited the Lake Bogoria area for centuries. Prior to dispossession through creation of a national reserve in 1973,¹⁸² they had established a sustainable way of life inextricably linked to the land.
- iii). At independence in 1963, the British Crown's claim to the *Endorois* land in question was passed on to County Councils which, under the Constitution, held the land in trust for the communities until it was declared a protected national reserve in 1973.
- iv). The area surrounding Lake Bogoria is fertile land, with green pasture and medicinal salt licks that help raise healthy cattle. They claimed that the area was central to their religious and cultural practices housing their historical prayer sites, places for circumcision rituals and other ceremonies.

In the *William Yatich* suit that preceded the *Endorois case*, the High Court of Kenya had ruled that in the evidence adduced, _there was common ground that before the lake and the surroundings were declared a game reserve, meetings were held and compensation paid to the residents who were to give way to the game reserve.¹⁸³ This implied that in the court's view the *Endorois* community had extinguished any property rights claim they once held over the disputed lake and game reserve. The Judges also echoed the views of another bench of the High Court in *Francis Kemai*,¹⁸⁴ and dismissed the *Endorois* claim of being a local community with socio-economic, cultural and environmental ties with the land in question. The judges, in this sense, ruled that _What is in issue is a national natural resource. The law

¹⁸² The Lake Hannington Game Reserve was created in 1973, but was re-gazetted as the Lake Bogoria Game Reserve.

¹⁸³ William Yatich judgment, *supra* note 178 at 4.

¹⁸⁴ *Supra*, section 4.2.1 of the chapter; See also William Yatich judgment, *supra* note 178 at 12.

does not allow individuals to benefit from the resource simply because they happen to be born close to the natural resource.¹⁸⁵ The African Commission was adjudicating the issue against this background.

The Commission reached a decision, extensively addressing questions on the rights of local and indigenous communities to the use and management of resources such as protected reserves and forests. The first question regarded the identity of the *Endorois* as a distinct community, as indigenous peoples needing protection and capable of holding collective rights to property. The Commission concluded that the *Endorois* Community has a right to property with regard to this ancestral land, possessions attached to it, and their animals.¹⁸⁶

The Commission found that after expropriation by the British, the *Endorois* were never given back full title but the land was instead made subject of a trust,¹⁸⁷ under the then Constitution of Kenya (now repealed).¹⁸⁸ This trust only gave the *Endorois* a beneficial title, administered by the relevant local authority, instead of a full title vested in the community.

The Commission argued that ownership ensures that ... a community can engage with the state and third parties as active stakeholders rather than passive beneficiaries.⁶ In this case, trust land relegated the community to passive beneficiaries on administration by the local authorities, and hence proved ineffective to protect their interests. In any event this trust status was lost once the land was gazetted into a wildlife protected area in 1973.

¹⁸⁵ William Yatich judgment, *supra* note 178 at 7.

¹⁸⁶ African Commission, *–Endorois Judgment - unreported,*” *supra* note 177 at 47.

¹⁸⁷ African Commission, *–Endorois Judgment- unreported,*” *supra* note 177 at 52.

¹⁸⁸ Constitution of Kenya [Revised Edition 2008] (now repealed).

The African Commission also found, that based on submissions before it, the *Endorois* culture, religion, and traditional way of life are intimately intertwined with their ancestral land. Without access to that land, the *Endorois* are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors. This implies that the African Commission found the *Endorois* culture to be consistent with sustainable management of ecologically sensitive lands, like the game reserve in question. In fact, the African Commission noted that “allowing the *Endorois* to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.”¹⁸⁹ In this sense, the Commission affirmed the roles and attitudes of a local community, observing that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources...”¹⁹⁰ for instance through hunting or fishing.¹⁹⁰ The Commission further adopted the position taken by a United Nations Human Rights Committee in 1994¹⁹¹ that safeguarding enjoyment of socio-economic, cultural and environmental rights of local communities may require positive legal measures “to ensure the effective participation of members of the...communities in decisions which affect them.”¹⁹²

¹⁸⁹ African Commission –*Endorois* judgment,” *supra* note 177 at 240. (Para 173)

¹⁹⁰ African Commission –*Endorois* judgment - unreported,” *supra* note 177 at para 243.

¹⁹¹ The African Commission was referring to the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See, Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, (1994). Para. 7. See also para 243 of the *Endorois* judgment, *supra* note 177.

¹⁹² African Commission –*Endorois* judgment - unreported,” *supra* note 177 at para 243.

The position taken by the African Commission certainly contrasts with the two judgments, reviewed in this section, over similar issues given by the High Court of Kenya. In *William Yatich* and *Francis Kemai*, the judges effectively argued that being born close to a natural resource such as a forest or wildlife reserve (as member of a local community) did not give a community the right to utilize, benefit or participate in management of such resources. In the *Endorois case* before the African Commission, there is recognition of the link in property rights, socio-economic, cultural activities and sustainable management of the resources. The African Commission, perhaps implicitly recognizing that culture may change with time, urges the need for positive legal measures to protect the resource while safeguarding participation of the local community in decisions affecting them.

In the *Endorois case*, the overall conclusion established new jurisprudence for Kenya, contrasting with *William Yatich* and *Francis Kemai*. The African Commission recommended that the Government of Kenya recognize the rights of ownership of the *Endorois*, and provide restitution; as well as providing unrestricted access to Lake Bogoria and other subject land for religious and cultural rites and grazing.¹⁹³ This African Commission recommendation was given in early 2010, and later in August of the same year a new Constitution came into effect in Kenya. The provisions of the 2010 Constitution provide a legal foundation, with recognition of community land, to implement these recommendations with respect to forest dependent communities like the *Ogiek* or the *Endorois* and other

¹⁹³ This decision is a recommendation, and the African Commission lacks the legal mechanisms to require compliance by the Kenya government save for requiring the parties to submit a compliance progress report within three months from the decision.

Kenyan communities that may desire to manage a forest. Article 63 provides for community land¹⁹⁴ –

- land that is lawfully held, managed or used by specific communities as community forests, grazing areas, or shrine; or
- land that is ancestral lands and lands traditionally occupied by hunter-gather communities

The 2009 report of the Mau forests national task force validates the argument that community rights to occupy and sustainably manage forests should be recognized. The report recommended that the Ogiek who were to be settled in the... (now repossessed Mau Forest complex) areas...and have not been given land should be settled outside the critical catchment and biodiversity hotspots.¹⁹⁵ The Task force report however failed to offer any suggestions on the legal format of any resettlement. This leaves it unclear whether the erstwhile state forests would be converted into community forests or whether the *Ogiek* would obtain periodic tenancies under the community participation provisions of the *Forest Act*.¹⁹⁶

In April 2010, the Mau forests Interim secretariat reported progress in seeking long term solutions for the *Ogiek* settlement issue. However, the report only noted that an updated register of *bona fide* members of the *Ogiek* community had been validated by a council of elders based on lineages and kinship. With this legal and factual background, there is now legal and policy basis, from the *Endorois case*, the Constitution and the Task Force report to justify changes to forestry law to recognize forest tenure rights of local communities by

¹⁹⁴ Constitution of Kenya, 2010, article 63(2)(d).

¹⁹⁵ RoK, “Mau Task Force Report,” *supra* note 11 at 45.

¹⁹⁶ Section 46-49.

creating community forests vested in distinct communities as juridical entities. That, however, is a task that is beyond the scope of this research. We pursue this discussion a little further in section 5.2.1 of the chapter when analysing the legal character of forest communities. The foregoing discussion on the new legal and policy attitude, with regard to communities that have claimed historical connections to forests, provides normative support and justification for the next discussion on participation of forest adjacent communities in sustainable management of state forests.

5 THE ROLE OF LOCAL COMMUNITIES IN SUSTAINABLE FORESTRY

The community forestry discussion and analyses in this section refers to communities inhabiting agricultural lands adjacent to state forests, and their participation in sustainable management of these forests. In the next section, we will examine community forestry with regard to establishment and management of farm forests. Historically the participation of forest-adjacent communities in sustainable management of states forests was not recognized by forest law in Kenya. The now repealed 1942 forest law, as explained earlier in the chapter, restricted participation unless individuals (not communities) obtained permits or user rights to carry out any forestry activities. This legal provision notwithstanding, colonial and post-independence Kenyan governments implemented the *shamba* system in state forests.

The word *shamba* means garden in the Swahili language, and the system involved allocation of plots to individuals to cultivate food crops as they planted and looked after trees grown for timber production. The *shamba* system in that form, perhaps due to unclear legal and policy positions on the nature, scope and purpose, underwent significant turbulence, and is

attributed to significant deforestation, and forest degradation. We examine this earlier form of the *shamba* system shortly in order to establish whether it integrated sustainable forest management values and responsibilities. Afterwards, we examine the current form of community participation in sustainable forest management, as anchored in the *Forest Act*. In the present legal form, community participation involves two forms. The first are agreements between the Forest Service and community forest associations for local communities to manage designated units of state forests. The second involves the issuance of permits by the Forest Service to members of community forest associations allowing for non-residential cultivation, in industrial timber forest plantations. It is this second form of community forestry that resonates with the original *shamba* system idea, but we collectively refer to both forms as *shamba* system.

5.1 HISTORY AND EVOLUTION OF THE SHAMBA SYSTEM BEFORE 2005

The *shamba* system was pursued in forest plantation establishment since 1910 to produce wood for industries and domestic uses away from natural forests.¹⁹⁷ Several types of participants such as serving and retired forest workers, landless peasants and those who live within the immediate vicinity of the forest area used to be involved in the practice.¹⁹⁸

Under the traditional *shamba* system, the resident worker would agree to work for the forest department for a period of nine months each year, to clear in his own time, the cut-over

¹⁹⁷ Joram Kagombe & James Gitonga, *Plantation Establishment in Kenya: A Case Study on Shamba System* (Nairobi: Kenya Forestry Research Institute & Forest Department, 2005) at 2. [Kagombe and Gitonga, "Plantation Establishment in Kenya"] See also FAO, *Forestry for Local Community Development*, (Rome, FAO Forestry Paper 7, 1978), Appendix 2 Case Study No. 8.

¹⁹⁸ Peter Allan Oduol, "The shamba system: an indigenous system of food production from forest areas in Kenya," (1986) 4 *Agroforestry Systems* 365-373, at 366. [Oduol, "The shamba system – an indigenous forest production system"]

indigenous bush cover from a specified area (0.5 to 0.6ha annually). The forest department would plant exotic trees in the cleared land within two years.¹⁹⁹ The farmers were allowed to cultivate the *shambas* allotted to them and grow diverse food crops including maize, potatoes, for up to two or three years having the sole right to all such produce.²⁰⁰

Various changes transformed the system, first with hitherto volunteer workers/farmers hired fulltime by the forest department. This resulted in high direct tree establishment costs incurred by the Department, and inefficiency since as civil servants, the farmers were not obliged to cultivate land, and had to rent it from the forest department.²⁰¹ With time, laxity in controls and oversight led to an influx of people, higher demand for more forest land to set up *shambas*, poorly tended *shambas* and low survival of planted trees.²⁰²

The system was suspended by a Presidential decree in 1987²⁰³ and with no arrangements put in place to carry on with alternative forests plantations methodology it resulted in stagnation of national reforestation. Subsequently all forest workers residing and other people living in forest villages were evicted in 1988, with participating farmers suffering loss of social amenities, source of food and employment.²⁰⁴ A resulting lack of fast growing non-indigenous timber for industry, firewood etc raised the risk and indigenous forests were targeted instead.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² The World Bank, –SEA of the Forest Act,” *supra* note 13 at 2.

²⁰³ Oduol, –The shamba system – an indigenous forest production system,” *supra* note 198 at 366.

²⁰⁴ *Ibid.*

The system was reintroduced in 1994 as Non-Resident Cultivation (NRC)²⁰⁵ with the non-residential component being an attempt to reduce the risk of cultivators claiming squatter rights on forest land.²⁰⁶ There was a marked shift in administrative supervision from the Forest Department to the District Development Committees (DDC).²⁰⁷ The transfer to the DDC's, which are part of the vast and powerful provincial administration structure of the Kenya Government, exposed the system to strong partisan influence by politicians and provincial administrators. This resulted in total disregard of technical advice as implementation paid no regard to either environmental or sustainability considerations, resulting in more indigenous forest areas being cleared for farming with no efforts at replanting. In 2003, shortly after election of a new government to office, the *shamba* system was stopped through a directive by the Ministry of Environment and Natural Resources,²⁰⁸ ostensibly to pave way for the passage of a new forest law and policy.

5.2 THE SHAMBA SYSTEM UNDER THE 2005 FOREST ACT

The legal concept of community participation in sustainable management of state forests, also known here as the *shamba* system, is now anchored in the 2005 *Forest Act*. Section 46 provides that ‘a member of forest community may, together with other members or persons resident in the same area, register a community forest association’ and ‘apply to the Director for permission to participate in the conservation and management of a state forest...’ Among

²⁰⁵ Kagombe and Gitonga, ‘Plantation Establishment in Kenya,’ *supra* note 197 at 2.

²⁰⁶ Lynette Obare and J.B. Wangwe, Underlying Cause of Deforestation and Forest Degradation in Kenya, Para 1.3. Online: www.wrm.org.uy/deforestation/Africa/Kenya.html

²⁰⁷ *Ibid.*

²⁰⁸ Joram Kagombe, & James Gitonga, *Plantation Establishment in Kenya: The Shamba System Case Study* (Nairobi: Kenya Forests Working Group, 2005) at 8.

other requirements, the application should include the proposals of the community forest association concerning –

- use of forest resources;
- methods of conservation of biodiversity;
- methods of monitoring and protecting wildlife and plant populations and enforcing such protection

Section 46 further states that _where there is no management plan in respect of the area, or where the (community forest) association proposes a new management plan, the application shall be accompanied by a draft management plan.‘ The implementation of these provisions is guided by the 2009 *Forests (Participation in Sustainable Forest Management) Rules*²⁰⁹ also known as the forest rules. These forest rules, just like the substantive statute, classify community participation into two forms. The first form involves community forest management agreements whereby a local community is authorized to participate in forest conservation and management, based on user rights assigned by the Forest Service.²¹⁰ The second form involves the issuance of permits to community forest associations, allowing its members to engage in non-residential cultivation of degraded industrial forest plantations, as they tend and grow tree seedlings.²¹¹

These introductory provisions highlight the key legal elements that constitute the *shamba* system under current Kenyan law. We first analyse the three common legal elements: forest community; community forest association; and forest management plans. Subsequently, we review community forest management agreements, and non-residential cultivation to

²⁰⁹ Legal Notice No. 165 (6 November 2009).

²¹⁰ Rule 43.

²¹¹ Rule 50.

examine whether the legal and policy framework provides clear responsibilities on communities to integrate their socio-economic and cultural activities with forest conservation.

5.2.1 THE FOREST COMMUNITY

The *Forest Act* creates the term ‘forest community’ as a legal concept with a definition that comprises two dimensions. In the first dimension, a forest community is defined as ‘a group of persons who have a traditional association with a forest for purposes of livelihood, culture or religion.’²¹² In the second dimension, a forest community is also defined as ‘a group of persons who are registered as an association or other organisation engaged in forest conservation.’²¹³ We can analyse the potential utility of these definitions further by revisiting the *Endorois* judgment.

The African Commission, in the *Endorois case* which regarded historically significant traditional or customary rights noted that ‘since the Endorois consider themselves a distinct people who share a common history, culture and religion, it is up to them based on their traditional customs and norms to determine the question of whether certain members of the community may assert certain communal rights on behalf of the group.’²¹⁴ In effect the Commission was urging the Kenyan state to recognize the existence of communities *qua* communities, and allow them a juridical personality based on their self identification.²¹⁵ This is an approach that is legally viable for those communities seeking complete forest tenure

²¹² Section 3.

²¹³ *Ibid.*

²¹⁴ African Commission, ‘*Endorois Judgment*,’ *supra* note 177 para 157.

²¹⁵ African Commission, ‘*Endorois Judgment - unreported*,’ *supra* note 177 at para 156-157.

rights, with conversion of the claimed state forest into a community forest. It is an approach that is viable in light of the 2010 Constitution recognizing community forests,²¹⁶ which would be vested in communities identified on basis of ethnicity, culture or similar community of interest.²¹⁷

The constitutional reference to ethnicity or culture can be interpreted to provide a basis for legislative measures to recognize the *Endorois* claim based on the recommendations by the African Commission. Similarly, it provides a legal basis to confer complete tenure rights and resolve the long enduring claims by the *Ogiek* community to parts of the Mau Forest Complex. On this basis such communities should act collectively to own property, or take other actions based on their existing norms of recognition, including traditional association with a forest.

However, with a history of land tenure reform and internal migration patterns in post-independent Kenya, communities living adjacent to state forests may not necessarily share this traditional ethno-cultural homogeneity. Instead, they may share contemporary socio-economic, cultural and environmental interests. The 2010 Constitution, in reference to community land and forests, thus includes a community identified on basis of '...similar community of interest.' The second legal dimension in definition of forest community, highlighted above, can be interpreted as having a connection with this category of community. This category represents contemporary forest adjacent communities for whom statutory legal associations based on 'similar community of interest' would facilitate

²¹⁶ Constitution of Kenya, 2010, article 63(2)(d).

²¹⁷ Constitution of Kenya, 2010, article 63(1).

participation in sustainable management of forests. In light of the new constitutional foundation, it is viable that these contemporary forest adjacent communities have a stronger legal basis to pursue stronger forest tenure rights, or even conversion of particular state forests into land managed or used by specific communities as community forests...²¹⁸

5.2.2 COMMUNITY FOREST ASSOCIATION

The *Forest Act*, as explained above, requires that any forest community interested in participating in sustainable management of a state forest must organize itself as a community forest association. In this section, we review the legal character and function of a community forest association. We also highlight the divergence between provisions of the *Forest Act* and the Forest rules on how a forest community, through a community forest association, can initiate their role in management of state forests. What are the potential impacts of this divergence on the prospects of communities securing a role in sustainable management of state forests?

5.2.2.1 Legal character of a community forest association (CFA)

Section 46(1) of the *Forest Act* specifies that the community forest association (CFA) should be registered as a Society to obtain legal status. Thereafter the forest community may apply to the Director of the Forest Service for permission to participate in the conservation and management of a state forest.²¹⁹

The Forest rules set out details on the implementation process. Rule 45(2) provides that the Forest Service may facilitate the formation of a forest association based on existing

²¹⁸ Constitution of Kenya, 2010 article 63(2)(d)(i).

²¹⁹ Section 46(2).

community structures. This is a noble provision, and considering that the capacity to register forest associations may be limited amongst rural communities, the contribution of the Forest Service would be instrumental. A 2009 Manual on forming and registering CFAs,²²⁰ and the 2007 Participatory Forest Management (PFM) Guidelines²²¹ suggest that an external facilitator or a local community leader may initiate the process. While it is unclear who the external facilitator would be, they could possibly represent the Forest Service, a Non-governmental organization or donor agency. The reference to the PFM guidelines during formation of a CFA is authorized by rule 45(3) of the Forest Rules.

Nonetheless, rule 45(2) makes reference to a forest association based on existing community structures.⁴ This contrasts with section 46, *Forest Act* which requires the associations to be registered under the *Societies Act*.²²² The *Societies Act* imposes its own complex registration procedure,²²³ and it is administered by the Registrar of Societies, a statutory office that is administratively under the Office of the Attorney General.²²⁴ The *Forest Act* and the Forest rules are unclear on how to reconcile existing community structures⁴ with registration under statutory provisions. The PFM guidelines suggest that a

²²⁰ See, Kenya Forest Service *Manual on forming and registering CFAs* (Nairobi: Kenya Forest Service; Kenya Forests Working Group, March 2009).

²²¹ See, Kenya Forest Service, *Participatory forest management guidelines* (Nairobi: Kenya Forest Service, December 2007) [KFS, “Participatory forest management guidelines”]

²²² *Societies Act*, Cap 108, Laws of Kenya.

²²³ *Ibid*, section 9 requires that every society should apply for registration within 28 days of formation. The application should be in the manner prescribed in the Societies rules. Notably, prior to making an application for registration, a society must develop, and adopt a constitution which they should attach to the application. The First Schedule to the Act specifies 16 matters that must be included in a Constitution.

²²⁴ The Registrar is appointed under section 8; The substantive Minister is the Attorney General, which means that power and function of registration and regulation of community forest societies, in their character as societies, is vested in another sectoral ministry, but there are no legal mechanism put in place to reconcile the procedure.

facilitator should identify existing community structures (formal or informal) that can be transformed to form a community forest association.²²⁵ Presumably, such structures may also include present day methods of community mobilization and organization, similar to how people for instance elect the local school committee or cattle dip committee. If that is not possible, the forest community should proceed to form a new CFA, for registration under the *Societies Act*.

The *Societies Act* requires all societies to comply with the provisions of that law, such as the adoption of a constitution,²²⁶ and filing periodic returns to the Registrar.²²⁷ The Registrar also has powers and discretion to require mandatory changes to the constitution of a society,²²⁸ and to declare a society as illegal or prohibited.²²⁹ The registration of forest associations under the *Societies Act* therefore presents multiple challenges.

First, the process is not the most straight-forward or simple, especially drafting a constitution with a list of very specific provisions. These provisions are standard, as the general category of societies includes church organizations, and until recently political parties.²³⁰ The community may need legal expertise, if there is no facilitator or such facilitator lacks the legal training required to prepare a proper constitution. This becomes an additional expense

²²⁵ KFS, “Participatory forest management guidelines” *supra* note 221 at 23.

²²⁶ Section 19(1).

²²⁷ Section 30.

²²⁸ Section 19(2).

²²⁹ Section 4(1).

²³⁰ Section 2 of the *Societies Act* defines a society to include ‘any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya...’ Political parties now enjoy distinctive legal status under the *Political Parties Act*, Act No. 7 of 2007.

to the community. More importantly, since CFA's are involved in sustainable forest management and utilization, it would serve them better if the mandatory requirements addressed closely linked issues. Even though section 46 requires the forest community to submit their proposals on forest conservation it is not specifically required that the constitution of the CFA, registered under *Societies Act*, should reflect sustainable forest management as a primary objective.

Second, the administrative role of regulating these associations, as societies, principally falls under the Registrar of Societies to whom they must submit returns, or notify on elections. The requirement for these associations to additionally report to, register with, and comply with directions from the Forest Service just increases the operational costs for communities. These forest communities carry a double load of compliance with two statutes. It would be viable for amendments to be made to the *Societies Act*, to authorize the Director of the Forest Service to receive annual returns, or monitor regular elections, youth and gender equity, and compliance with the objectives of sustainable forest management. This would consolidate the oversight role such that the Forest Service ensures forest communities uphold the values and responsibilities of governance, transparency, and accountability, which are pertinent to sustainable forest management.

The reference to existing community structures in the rules would have had better effect had the *Forest Act* provided for a generic form of association for which it (Forest Act) provided registration, and the Forest Service was the administrator and regulator. However such a stipulation has to distinguish that existing community structures are not necessarily the traditional or cultural based mechanisms. Therefore the requirements for including youth,

and gender equity should be highlighted as paramount in order to reflect the true face of the present and future generations, which is an important ingredient of sustainable development.

Once a forest association is registered, its application to the Director of the Forest Service should include: a list of the members of the association; a Constitution; financial regulations; the forest area in which the association proposes undertake conservation and management; proposals on use of forest resources, biodiversity conservation methods, and methods to monitor and protect wildlife and plant populations.²³¹ In the event there is no management plan prepared for the area in question, or if the association proposes a new one, a draft management plan will be included in the application submitted to the forest service.

5.2.2.2 Procedure for CFA's to commence community participation in forestry

There is contradiction between the principal legislation and the Forest rules regarding how participation of a CFA in sustainable forestry should commence. Section 46 *Forest Act* anticipates a situation where registered forest associations may apply to the Director for permission participate in conservation and management of a state forest. On the contrary, the Forest rules appear to reserve the authority to, and empower the Forest Service whenever circumstances make it necessary or appropriate to do so, to invite forest associations to participate in the sustainable management of state forests.⁶

The Forest rules appear to reverse the letter and spirit of the *Forest Act* that grants a legal basis for any forest community to proactively apply for registration of its forest association. This contradiction can be problematic because even though the *Forest Act* was enacted in

²³¹ Section 42(3).

2005, the *shamba* system is relatively still in the infancy stages of implementation. This implies that the current version of the *shamba* system is very much in a transitional phase from the 1942 law that generally excluded local communities from state forests. A process of legal and policy transition and reform, such as the current one, is therefore always difficult because of the entrenched power of the status quo²³² based on the culture of the previously exclusionary forest regulatory framework.

Since the Forest Rules have been enacted as guidelines, they are most likely to be the operational guide available to most frontline forest officers dealing with these situations. The wording of the rules gives the Forest Service an upper hand in determining which local communities will engage in state forest management and utilization. If the rules are followed as written, communities could be locked out just by the Forest Service, for instance, declining to extend invitations for anyone to participate in forest management. If the substantive statute is followed instead, any CFA that applied for community participation and was denied permission can declare a dispute and, as provided for by the *Forest Act*,²³³ appeal to the National Environment Tribunal (NET) to make a final determination. The NET is established under the framework environmental law, *EMCA*.²³⁴ The decisions from this Tribunal have a final appeal at the High Court,²³⁵ which provides an additional avenue for communities to access environmental justice for objective determination, and review of

²³² Charles W. Powers & Marian R. Chertow, “Industrial Ecology: Overcoming Policy Fragmentation” in Marian R. Chertow & Daniel C. Esty eds., *Thinking Ecologically: The Next Generation of Environmental Policy* (New Haven: Yale University Press, 1997) at 30.

²³³ Section 63(2).

²³⁴ Section 125.

²³⁵ Section 130.

administrative decisions by forestry officials. A similar state of legal contradiction is evident with regard to powers of the Director to terminate the community forest management agreements, and is discussed in section 5.2.4.2 of the chapter.

5.2.3 COMMUNITY FOREST MANAGEMENT PLANS

When submitting an application to participate in sustainable forest management, a CFA is required to include a draft management plan. This is permissible if there is no forest management plan for the area, or when the CFA proposes a new plan.²³⁶ The legal concept of a management plan is first introduced by section 35, *Forest Act* which requires the Forest Service to prepare a management plan with respect to each state forest. Section 3 defines a management plan as a systematic programme showing all activities to be undertaken in a forest or part thereof during a period of at least five years, and includes conservation, utilization, silvicultural operations and infrastructural developments.⁴ This definition and requirement of a management plan reveals an attempt to give effect to the objectives of sustainable forest management by integrating forest conservation with socio-economic activities. However even though the state forest management plans are intended to guide human decisions to sustainable forestry practices, the statutory definition of management plans does not overtly refer to the objective of sustainability, or an explicit obligation or responsibility to safeguard forest health or vitality.

Forest management plans, in the Kenyan legal sense therefore contrast, for instance, with *Crown Forest Sustainability Act* of Ontario which makes it a condition precedent that the

²³⁶ Section 46(4).

Minister will not approve a management plan unless it provides for the sustainability²³⁷ of the crown forest especially regarding plant life, animal life, water, soil, air and social and economic values...²³⁷ In this sense, the management plan must be explicit in demonstrating how forestry activities and practices, carried out under the plan, will integrate forest vitality with socio-economic values.

Section 47 of the *Forest Act* requires CFAs to protect, conserve and manage a state forest pursuant to an approved management agreement and the provisions of the management plan for the forests. The reference to management plan here suggests those plans made for state forests by the Forest Service under section 35. However, the Forest rules introduce the term community forest management plans²³⁸ which the rules state are prepared by the CFA in partnership with the Forest Service to govern implementation of a community forest management agreement.²³⁹

The basis for this community forest management plans is derived from the fact that under the Forest rules, each CFA can only be allowed authority over a management unit which ideally is a forest area under one forest station,²⁴⁰ several of which could be found in one state forest. A community forest management plan can therefore only be prepared with respect to the specific forest management unit allocated to a particular CFA.²⁴¹ This implies that several community forest management plans would be prepared over the several

²³⁷ Section 9(2).

²³⁸ Rule 44.

²³⁹ Rule 2.

²⁴⁰ Rule 44. These forest stations are the administrative units of the Forest Service.

²⁴¹ Rule 44(2).

sections/units of a state forest under management of different community forest associations. This further suggests that community forest management plans are site-specific and therefore subordinate to the overall management plans that are strategic for the entire state forest.

It can therefore be interpreted that section 47 refers to these site-specific community forest management plans, which CFAs are required to adhere with, in their function to ‘protect, conserve and manage’ the forest. The legal interpretation that is necessary in order to obtain congruence between the *Forest Act* and the Forest rules, on the sustainability object of management plans, is however a fairly tenuous exercise. The nature, scope and sustainability objectives of community forest management plans should be apparent from a basic reading of the statute and rules. This is because these plans represent the operational guide for local communities on how their collective or individual actions and decisions can integrate forest vitality with socio-economic and cultural values. It is however notable that in 2010, the Forest Service admitted that although thirty one community forest management plans have been prepared, ‘as of November 2010’ none of them has been signed.²⁴² This implies that, for now, forest communities are not legally bound to follow these management plans.

5.2.4 THE TWO LEGAL FORMS OF THE *SHAMBA* SYSTEM

The *shamba* system, legally titled as community participation in state forests management, is evident in two forms: community forestry management agreements; and non-residential cultivation permits.

²⁴² This information is obtained from submissions made by the Kenya Forest Service during the hearing of a petition by the non-governmental National Association of Community Forest Associations before the National Environment Tribunal in 2010. See the final judgment in, *National Alliance of Community Forest Associations (NACOFA²⁴²) v. NEMA & Kenya Forest Service* (Tribunal Appeal No. NET 62 of 2010) at 5. (unreported)

5.2.4.1 Community forest management agreements

Community forest management agreements are one of two legal mechanisms through which a forest community may apply to participate in the *shamba* system. An agreement in this sense entitles the community, through a CFA,²⁴³ to conserve and utilize a forest for purposes of livelihood, cultural or religious practices. Before concluding the forest management agreement with the Forest Service, a CFA is required to collaborate with the Forest Service to prepare a community forest management plan, which will be adopted by both parties to guide the implementation of the agreement.²⁴⁴

The *shamba* system is only practiced in state forests, and this highlights the issue of forest property and tenure rights, which are typically important to the legal decision making ability over forestry activities. State forests fall under the public tenure category, which pursuant to section 21 of the *Forest Act* are vested in the government. They are under the administrative authority of the Kenya Forest Service. According to the Forest rules, any state forest that is subject of a community forest management agreement with a CFA remains the property of the Kenyan state.²⁴⁵

The forest tenure rights obtained by CFAs can therefore only be limited rights, as assignees of the state under a permit.²⁴⁶ Section 46(2) of the *Forest Act* highlights this, providing that a registered CFA may apply to the Director for ‘permission’ to participate in the conservation

²⁴³ Rule 43.

²⁴⁴ Rule 45(2(a)).

²⁴⁵ Rule 68.

²⁴⁶ It is notable too that a forest association may only assign any rights obtained under a management agreement only with the written consent of the Forest Service.

and management of a forest. The community forest management agreement embodies the ‘permit’ or ‘permission’ and at the determination of the Forest Service, sets out the exact user rights that the forest association is entitled to exercise over the duration of its permit. The decision making capability of the forest community with regard to forest activities is therefore predicated on the scope of the user rights allocated to the particular CFA, and any other statutory limitations.

Neither the *Forest Act* nor the Forest rules set out a specific duration for the permission but Rule 43(2) indicates that the community forest agreement shall be in the form and content of the model agreement set out in the schedule to the Forest rules. Clause 4 of the model agreement is also not explicit on the actual duration, but states ‘this agreement has a term of ... years from ...’. In the interim period, as the capacity of communities to sustainable management forests is evolving, it may safeguard long-forest health to set out definitively shorter durations for the agreements, to allow for review of progress. However, in the longer term, with communities investing time, skills and resources in sustainable forest management, it will be necessary for the agreements to last longer, possibly over a decade. Illustratively, if a community obtains tenure rights over a portion of degraded indigenous forest, it may take decades for those trees to mature hence justifying longer term agreements. For further discussion on this issue see section 4.6.2 of chapter 5.

Sustainability under community forest management agreements

The core objective of community forest management agreements is to provide a legal tool that facilitates forest associations to conserve and utilize a forest in pursuit of livelihood,

cultural or religious practices.²⁴⁷ In this sense, the purpose is consistent with the FAO conception that community forestry ‘intimately involves local people’ in forestry activities.²⁴⁸ Rule 43 in setting out the objective, manifests integration of forest conservation with forest (socio-economic, cultural) utilization, which is important to sustainability. The same rule further states that this ‘conservation’ and ‘utilization’ by a CFA are ‘for purposes of livelihood, cultural and religious practices.’

The reference to cultural and religious practices endorses the view taken by the African Commission in the *Endorois case* that culture and religious practices are not inconsistent with conservation of natural resources.²⁴⁹ It also corresponds with the 2010 Constitution of Kenya that acknowledges the role of local and indigenous knowledge in achieving ecologically sustainable development, and creates an obligation on the state to protect this knowledge.²⁵⁰ The scope of ‘livelihood’ activities that may be permitted under a community forest management agreement however raises some legal concerns. The principal forests legislation and the Forest rules are unclear on the actual meaning or parameters of the term ‘livelihoods’ or the limits of ‘allowing communities to conserve and utilize a forest for purposes of livelihood.’ Arguably this concern can be settled based on the breadth of user rights that a particular CFA may be assigned by the Forest Service. Section 49(2) lists the possible user rights that may be assigned to a CFA, including –

²⁴⁷ This conclusion is drawn from the statutory intention of community participation in sustainable management of state forests, *Forest Act*, section 46.

²⁴⁸ FAO, ‘Forestry for local community development,’ *supra* note 141.

²⁴⁹ African Commission, ‘Endorois judgment,’ *supra* note 177 para 173.

²⁵⁰ Constitution of Kenya, 2010, article 69(c).

- collection of medicinal herbs;
- harvesting of honey;
- harvesting of timber or fuel wood;
- grass harvesting and grazing;
- collection of forest produce for community based industries;
- ecotourism and recreational activities;
- scientific and education activities;
- plantation establishment through non-resident cultivation;

On reading these general user rights that could be granted to communities, it is still unclear whether ‘livelihood’ includes cultivation of agricultural crops as a permissible activity within the scope of a community forest management agreement. Considering the complex, and at times destructive history of the *shamba* system that was previously implemented without definitive policy, it is important to have clarity on the issue. In addition, the Forest rules authorize the Forest Service to issue separate non-residential cultivation permits to members of a CFA, but only with respect to degraded commercial plantations.²⁵¹

There are several legal issues arising from community forest management agreements that are pertinent to sustainable forestry. These issues concern the responsibilities of communities to undertake forest conservation; monitoring and enforcement; and the basis and reasons for termination of agreements. We now analyse these three issues:

i). Legal responsibility to integrate forest conservation with forestry activities

The *Forest Act* sets out the functions of a community forest association when participating in the conservation and management of state forests. Among other functions, section 49(1), in mandatory terms requires a CFA to –

²⁵¹ Rule 50.

- protect, conserve and manage the forest pursuant to an approved management agreement and the provisions of the management plan for the forests;
- formulate and implement forest programmes consistent with the traditional forest user rights of the community concerned in accordance sustainable use criteria;
- protect sacred groves and protected trees;
- keep the Forest Service informed of any developments, changes and occurrences within the forest which are critical for the conservation of biodiversity;
- help in fire fighting

In view of the highlighted functions of a CFA, section 49 appears to stipulate clear legal responsibilities for the forest association and its members to protect, conserve and manage the forest area. This (sustainable) management is required to concur with a community forest management plan, developed with the assistance of the Forest Service. The management plan, as highlighted earlier, is therefore the legal tool that is directly available to forest community members to offer them guidance on the forestry land uses or activities that will uphold sustainability. It may be argued that such a management plan will be prepared in keeping with the sustainability objectives of the *Forest Act*. It is however still notable that the Forest rules, which more openly capture the idea of community forest management plans, have not expressly stipulated that forest vitality and sustainability must be apparent from their aims and scope.

This divergence from explicitly setting out sustainability obligations was earlier demonstrated earlier in section 5.2.3 of this chapter, when provisions of the *Forest Act* regarding state forest-level management plans, were contrasted with similar provisions of the *Crown Forest Sustainability Act* of Ontario. The absence of explicit and unequivocal sustainability obligations is therefore a uniform weakness in the legal provisions governing the objects and roles of both state forest and community forest (site-specific) management plans.

Against this background, forest communities in their assigned roles have to comprehend the convoluted legal responsibilities, prepare management plans, and observe the responsibilities to protect and conserve forests, keep records, prevent fires, and generally undertake sustainable forestry practices. These are fairly complex tasks, and may be further complicated by two reasons. First this community forestry is being introduced after decades of forest adjacent communities being excluded from state forests. Literature records that such communities have nonetheless, albeit illegally at the time, used state forests for pasture, water, charcoal, firewood, and timber, especially in view of the high prevalence in rural poverty in Kenya.²⁵² Secondly the forest adjacent communities may dominantly be used to agricultural land use, especially crop farming. As explained in chapter 3, land tenure and land use law are lacking statutory responsibilities on farmers to integrate environmental quality of the land with their productive agricultural activities.²⁵³

These two scenarios suggest that, with respect to the *shamba* system, forest adjacent communities need to be facilitated in order to change or alter their collective or individual attitudes concerning the state forests they have user rights over. This implies that because forest adjacent communities may have been used to pursuing short term, but ecologically destructive goals, the gist of their conservation responsibilities must now be made abundantly clear. This relates to Aldo Leopold's land ethic, in which he calls for people to exercise an ecological conscience, which will ensure their economic activities safeguard the vitality of the land.

²⁵² RoK, "Mau Task Force Report," *supra* note 11 at 12.

²⁵³ See the discussion in chapter 3, section 4.3.

Attaining this ecological conscience maybe achieved in two ways. The first involves reviewing the breadth of forest tenure rights given to the CFAs to ensure the responsibility to practice conservation is overtly and specifically set out as part of these rights. We pursue this approach in chapter 5. The second approach involves undertaking a process of education and exchange of ideas on the successful implementation of sustainable forestry management. This education, otherwise referred to as ‘extension,’ ‘technical assistance’ or ‘capacity building’ is important to influence the personal or collective behaviour of individuals. Technical assistance and forestry extension are mandated by the *Forest Act*, and the Forest rules specifically require the Forest Service to extend the same to CFAs. We examine the instrumental role of forestry extension in section 7 of this chapter.

Socio-economic benefits, in terms of revenue, are pertinent to the success of the *shamba* system since forest communities engage in sustainable forestry for purposes of livelihood. It is arguable that clarity and accountability in the handling, sharing or distribution of financial benefits are therefore central to success of forest sustainability. The *Forest Act* appears to assume that a forest association will internally provide for the sharing of financial benefits, hence when they apply for registration, the CFAs should submit their financial regulations to the Director.²⁵⁴ Inequity in the sharing of benefits between members of a CFA could disorient the commitment of some members to sustainability, and undermine conservation or adherence to the management plan. Such inequity in distribution of financial benefits, which may have been derived from socio-economic activities or payment for environmental services, manifests a failure in fulfilling intragenerational equity, which is a key pillar of

²⁵⁴ Section 46(3).

sustainable development.²⁵⁵ It may therefore be necessary to amend the Forest rules in order to require that a CFA submits a benefit sharing criteria for approval by the Forest service.

The legal provisions are also silent on whether any specific payments such as rates, rent or taxes should be paid to the Forest Service or the government by the community of use of the forest. Additionally, it is unclear whether any portion of the income received by a CFA should be invested into the forest management unit under the CFA to finance or pay for any aspect of sustainable forest management.

ii). Monitoring and enforcement of the management agreements

Section 47 requires a forest association to assist the Service in enforcing the provisions of the *Forest Act*, any rules and regulations in particular in relation to illegal harvesting of forest produce.²⁵⁶ Impliedly, this responsibility to enforce the law is vested both on the forest association collectively and on the individual members. However, neither the principal law nor the rules offer any proposal how this enforcement role maybe performed. It is unclear whether the enforcement is against members of the forest association, or the general public. Enforcement against the public, who are not affected by any disciplinary provisions that may be contained in the constitution of a particular CFA, would require extensive collaboration with forest officers.

²⁵⁵ See, for instance, the argument by scholar Edith Brown Weiss, who argues that the concept of intergenerational equity implies an intragenerational aspect that current generations should provide members with equitable access to planetary legacy and, and then conserve the planet and its resources for future generations. See, Edith Brown Weiss, *“In Fairness to Future Generations”* (1990) 3 *Environment* 7, at 10.

²⁵⁶ Section 47(1)(d).

With respect to state forests generally, the Forest Service is authorized to monitor compliance with the law, and enforce any provisions as explained in section 3.2.3 of this chapter. The Forest rules specifically require the Forest Service to monitor and evaluate the implementation of the community forest management plan.²⁵⁷ This may result in revisions or alterations to the management plan. If there is a breach of the agreement, it may also be subject to termination of the community roles in forest management.

iii). Breach and termination of the management agreement

Section 49 of the *Forest Act* empowers the Director of the Forest Service to terminate a community forest management agreement, or withdraw a user right from a forest association if there is a breach of any of the conditions of the agreement. According to the model forest management agreement, one obligation for a forest association is to protect, conserve and manage the assigned forest based on the agreement, and the community management plan.²⁵⁸ Therefore, the failure to fulfil the responsibility to exercise forest conservation is a legal basis for termination of the agreement. Termination of the agreement may also be at the discretion of the Forest Service, where the Director considers considers such action as necessary for purposes of protecting and conserving biodiversity.²⁵⁹

When the process of termination or withdrawal of a user rights is commenced, the Forest Service must give thirty days notice to the forest association to show cause why the action should not be finalized. According to the *Forest Act*, if a forest association is aggrieved with

²⁵⁷ Rule 48.

²⁵⁸ Clause 12.

²⁵⁹ Section 49(1)(b).

the decision at this point, it may appeal to the Board of the Forest Service. One difficulty concerns a contradiction arising from the Forest rules, and the draft model agreement on community forestry management agreements. Clause 15 of the model agreement, which provides for termination of agreement, fails to expressly stipulate that the forest association has additional recourse to the Board for a final appeal, which section 49 of the *Forest Act* clearly sets out. Instead, Clause 14 of the model agreement directs a different legal avenue, providing that -

- a) When the forest service is dissatisfied, it should submit the dispute for arbitration in accordance with the *Arbitration Act*.²⁶⁰
- b) In the case of the forest association being dissatisfied, it may in the first instance appeal to the Board. In this case, if the decision of the Board is not acceptable to both parties, the matter should be submitted for arbitration under the *Arbitration Act*.

If the procedure set out in the *Forest Act* is applied, any CFA that is aggrieved with a decision by the Board of the Forest Service can declare a dispute, and refer the same dispute for determination by the National Environment Tribunal (NET).²⁶¹ The NET has rules of procedure²⁶² that have simplified the rules of evidence and technicalities, thereby making it possible for people to represent themselves without requiring a lawyer.²⁶³ The Tribunal is therefore a good, affordable legal avenue to resolve any disputes by forest communities. Introducing the provisions of the *Arbitration Act* through the Forest rules is an outright affront to, and violation of the *Forest Act*.

²⁶⁰ *Arbitration Act*, Laws of Kenya, Act No. 4 of 1995.

²⁶¹ Section 63(2).

²⁶² The *Environmental Management (National Environmental Tribunal Procedure) Rules*, 2003 (Legislative Supplement No. 57, Kenya Gazette Supplement No. 92, 21 November 2003).

²⁶³ See arguments by Donald Kaniaru, "Environmental Tribunals as a Mechanism for Settling Disputes" (2007) 37(6) *Environmental Policy and Law*, 459-463.

A recent dispute between the Forest Service, NEMA and CFAs, which was filed before the NET demonstrates the role the tribunal can play in resolving such disputes. This appeal, *National Alliance of Community Forest Associations (NACOFA²⁶⁴) v. NEMA & Kenya Forest Service²⁶⁵* was filed at the tribunal on 19 November 2010. The appeal arose after the Forest Service was served notice by NEMA under section 12 of the framework environmental law *EMCA*, which empowers NEMA to issue instructions to any lead agency to perform a function that the lead agency is required by law to perform, but which in NEMA's view the agency has not performed. In this case, NEMA instructed the Forest Service to secure state forests and stop further degradation and illegal human activities.²⁶⁶

Prior to the instruction from NEMA the Forest Service had allowed forest adjacent communities to exercise user rights for grazing and pay a monthly fee. However, at the end of the month in October 2010, when community members went to make payments, the Forest Service informed them that the user rights would not be renewed for another month. There was no notice given, even the 30 day required by the *Forest Act*.²⁶⁷ When the matter came up for hearing, the tribunal was informed that NEMA did not specifically require the Forest Service to terminate grazing rights. Further, the Forest Service argued they did not have to give notice to the communities, because while community forest management

²⁶⁴ Nacofa is a community alliance is a registered society, to act as a focal point for all Community Forest associations (CFAs) in Kenya, see online: <http://www.fankenya.org/nacofa/>

²⁶⁵ *National Alliance of Community Forest Associations (NACOFA²⁶⁵) v. NEMA & Kenya Forest Service* (Tribunal Appeal No. NET 62 of 2010). [NET, –Community forest associations judgment”]

²⁶⁶ NEMA advises KFS to conserve government forests, ‘
Online: http://www.nema.go.ke/index.php?option=com_content&task=view&id=213&Itemid=37

²⁶⁷ NET, –Community forest associations judgment,” *supra* note 265 at 4.

agreements had been prepared, only one out of sixteen had been signed.²⁶⁸ This implied the agreements were not enforceable *inter partes*, as between the communities and the Forest Service. The tribunal declined to order the Forest Service to allow communities to resume grazing, but asked the Forest Service to issue a notice confirming whether the step was permanent or temporary. It is noteworthy that the tribunal highlighted with concern the fact that the Forest Service did not take preparation and signing of community forest management plans seriously, and noted that there is potential for forest-adjacent communities to contribute meaningfully to forest management efforts.²⁶⁹

5.2.4.2 Non-residential cultivation permits

Non-residential cultivation permits are the second legal avenue through which community forestry, for forest-adjacent communities, has been given effect under the *Forest Act*. This aspect of the *shamba* system is similar in format to the failed pre-2005 *shamba* system, as they are both adopted from the Taungya system, which was first developed in Myanmar.²⁷⁰ Taungya or agroforestry is a system where forestry practices are combined with agricultural and agriculture related activities.²⁷¹ In the ideal taungya setting, farmers were given parcels of degraded forest reserves to produce food crops and to help establish and maintain trees.²⁷² The traditional idea was to produce a mature crop of commercial timber in a relatively short

²⁶⁸ NET, –Community forest associations judgment,” *supra* note 265 at 5.

²⁶⁹ NET, –Community forest associations judgment,” *supra* note 265 at 8.

²⁷⁰ J.E. Ehiagbonare, –Effect of taungya on regeneration of endemic forest tree species in Nigeria: Edo State Nigeria as a case study” (2006) 5 (18) *African Journal of Biotechnology*, 1608-1611, 1609. [Ehiagbonare, –Effect of taungya on regeneration of endemic forest species in Nigeria”]

²⁷¹ *Ibid.*

²⁷² *Ibid.*

time, while also addressing the shortage of farmland in communities bordering forest reserves.²⁷³ Land preparation and after planting maintenance practices are the responsibilities of the farmer and the underlying principle is low cost of plantation establishment.²⁷⁴ The Non-residential cultivation permit system is a Kenyan modification of the Taungya system, designed as a periodic tenancy, whereby short-term tenants are granted defined user rights and obligations in a state forest.

The literature on the suitability of this system of forest management is divided in its assessment. Some literature cites the *shamba* system as one of the worst forms of forest management arguing it is a stimulus for encroachment into indigenous forests.²⁷⁵ Wangari Maathai²⁷⁶ also argues that *shamba* plantations are monocultures with little biodiversity value, and are an excuse for encroachment into indigenous forests. While this criticism is well deserved considering the history of the *shamba* system, other assessments make credible positive claims. The 1992 *UN Forest principles* highlight the role of plantation forests in contributing to the maintenance of ecological processes, offsetting pressure on

²⁷³ V.K. Agyeman, K.A. Marfo, K.R. Kasanga, E. Danso, A.B. Asare, O.M. Yeboah and F. Agyeman, "Revising the taungya plantation system: new revenue-sharing proposals from Ghana," (2003) 212 (54) *Unasylva* 40-47 at 40.

²⁷⁴ Ehiagbonare, "Effect of taungya on regeneration of endemic forest tree species in Nigeria," *supra* note 270 at 1608.

²⁷⁵ See, World Wildlife Fund, *Poverty and the Environment Initiative – Kenya* (Nairobi, WWF EARPO, UNEP, UNDP, August 2006).

²⁷⁶ Wangari Maathai, *The Challenge for Africa: A New Vision* (London: William Heinemann, 2009) at 241. [Maathai, "The Challenge for Africa"]

primary/old-growth forests and providing local employment and development with the involvement of local communities.²⁷⁷

Kagombe and Gitonga²⁷⁸ who analysed the *shamba* system in 2004 prior to its reintroduction also concur that exotic forest plantations, while being monocultures, have a role in conservation as they reduce pressure on the natural forests. They found that in areas benefiting from the *shamba* system, food production declined significantly after its cessation, with peasant farmers having few alternative resources facing severe food insecurity. According to the Ministry of Environment, the objective of the current non-residential cultivation permit system is to implement a cost effective method of growing plantation forest trees. The programme is also intended to make a significant contribution to food security and socio-economic well-being of rural communities.²⁷⁹ When it was commenced in 2008, the programme opened up 8,000 hectares of fallow forest plantation area for cultivation and reforestation in phase one of the scheme to be replanted with plantations by the end of the second year of cultivation.²⁸⁰ The target would then spread in 15 districts with each district having not more than two forest stations under the scheme.”²⁸¹

In the present legal framework, the Forest Service may only enter into agreements with community forest associations to allow their members to engage in non-resident cultivation

²⁷⁷ UN, “Forest principles,” *supra* note 55, principle 6(d).

²⁷⁸ Kagombe and Gitonga, “Plantation Establishment in Kenya,” *supra* note 197 at 40.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ David Mbugua., “Kenya Forest Service to Roll out New Organized Shamba System.”
Online: <<http://www.kfs.go.ke/html/news%20events.html>>

in adjacent forest areas.²⁸² Individuals can therefore only validly be permitted to carry out forest cultivation if they are members of a community forest association with which the Forest Service has an agreement. We analyse this aspect of the *shamba* system with a focus on the legally qualifying forest areas, and the quantum of tenure rights that impact on the decision making capability of the permit holders to observe sustainable farming and forestry practices.

i). The qualifying forest areas

According to the Forest rules, non-resident cultivation is restricted to areas of state forests intended for the establishment of industrial plantations²⁸³ presumably those that have either not been replanted, or have been degraded. The Forest Service is required to identify and zone off the earmarked forest areas that qualify for cultivation. These forest areas are then demarcated into individual plots with a minimum of a quarter hectare with a maximum determined on a case by case basis. The Forest Service must then prepare a sketch map of all the plots, which will be prominently displayed at the local forest station.²⁸⁴ In a bid to ensure transparency in the process, allocation of plots by the Forest Service is to be done using a balloting system organized through the forest associations, after which the selected persons will be issued with written permits. By law, the chosen method of allocation must give preference to the poor and vulnerable members of the community.²⁸⁵

²⁸² Rule 43(1).

²⁸³ Rule 50.

²⁸⁴ Rule 51.

²⁸⁵ Rule 46.

There is an express provision prohibiting the allocation of plots for cultivation in certain forest areas. This include areas within important water catchment areas or sources of springs; on slopes exceeding thirty percent gradient; within thirty metres on either side of a river course or wetland, spring or other water source; or in firebreaks, road reserves, natural glades, natural forest areas and areas under mature plantations.²⁸⁶

While the issuance of non-resident cultivation permits has been restricted to degraded industrial plantations, Kenya is a country that has a very low combined forest tree canopy cover averaging between 1.7%²⁸⁷ According to the National Task Force investigating degradation of the ecologically important Mau forests complex, afforestation and rehabilitation of the degraded indigenous forest areas is an urgent task.²⁸⁸ In this realization, and in line with the objective of achieving ecologically sustainable development, the 2010 Constitution has imposed an obligation on the Kenyan state to work to achieve and maintain a tree cover of at least 10% of the land area.²⁸⁹ The two approaches are supported by the 1992 *UN forest principles* which suggest that measures to –

maintain and increase forest cover and forest productivity should be undertaken in ecologically, economically and socially sound ways through the rehabilitation, reforestation and re-establishment of trees and forests on unproductive, degraded and deforested lands, as well as through the management of existing forest resources. (Emphasis added)

Further support for taking measures of reforestation and forest rehabilitation are evident from the two objectives of the 2008 *UNGA resolution on a non-legally binding*

²⁸⁶ Rule 45.

²⁸⁷ RoK, –Mau Task Force Report,” *supra* note 11 at 15.

²⁸⁸ RoK, –Mau Task Force Report,” *supra* note 11 at 12.

²⁸⁹ Constitution of Kenya, 2010, article 69(1)(b).

instrument on all types of forests. These are ‘reversing loss of forest cover through sustainable forest management, including protection, restoration, afforestation and preventing forest degradation’ and ‘enhancing the forest-based economic, social and environmental benefits including by improving the livelihoods of forest dependant people.’²⁹⁰ The Mau forest Task Force focused significantly on the roles and participation of previously excluded forest adjacent communities, noting that the actions of these communities contributed to the degradation to a large extent. In this particular case, the 2009 taskforce report recommended that ‘people residing in areas adjacent to the Mau forests complex should be involved in reforestation and afforestation.’²⁹¹

With the constitutional mandate to increase and maintain the national forest tree cover to at least 10% of the total land area, the non-resident cultivation permit system can be adapted for communities to practise agroforestry with indigenous trees. This will assist the Forest Service to rehabilitate, reforest and afforest other state forests in Kenya that are administratively classified as forests, but do not have tree cover or biodiversity. It will also enhance the role of community forestry, and its utility to the realization of sustainable forest management.

ii). The breadth of tenure rights

²⁹⁰ UN, ‘Non-legally binding instrument on all types of forests,’ *supra* note 52.

²⁹¹ RoK, ‘Mau Task Force Report,’ *supra* note 11 at 65.

As with community forest management agreements, the property rights in these state forests remain vested in the state. The permit only confers user rights, and a tenancy not exceeding three years with respect to a particular plot.²⁹² This three year period would have to change to a much longer period if this programme was expanded to include rehabilitation of indigenous forests, ostensibly to ensure there is sufficient time for the indigenous trees to mature.

Individuals authorized to take part in this programme are only given user rights in the form of a cultivation permit. They are not authorized to lease or sublet the allocated plot and must pay annual rental fees. The cultivation permit may be terminated if any conditions are violated. This cultivation permit only authorizes the forest community to plant annual crops such as maize, non-climbing beans or potatoes. Cultivators may only use hand tools for land preparation and cannot erect any structures on the plot, except in areas with high incidences of wildlife-induced crop damage.²⁹³ Since the cultivation permits are issued in plantation forests, a primary responsibility is to plant tree seedlings after the completion of one crop season.

The permit holders therefore have specific sustainability obligations that include looking after tree seedlings, or replanting in cases of low survival rate of seedlings, controlling illegal forest activities, and preventing or fighting forest fires. The Forest service and community forest associations carry out monitoring of the tree growth and development.²⁹⁴

²⁹² Rule 55.

²⁹³ Rule 47(1).

²⁹⁴ Rules 49 & 50.

The overall administration and implementation of non-residential cultivation is hinged to the permit holders being members of a CFA, and is therefore undertaken through mechanisms similar to community forest agreements. Holders of cultivation permits have no property or tenure rights over the trees that they plant and look after in the allocated plots and therefore obtain no financial benefit from the sale of the trees and timber.

6 LEGAL FRAMEWORK FOR SUSTAINABLE FARM FORESTRY

Farm-level forestry activities represent another manifestation of community forestry, as the on-farm activities entail the intimate involvement of local people. Farm forestry is also known interchangeably with other terms such as ‘trees outside forests’ or ‘on-farm agroforestry.’ The FAO generally uses the other interchangeable term, ‘trees outside forests.’ The term farm forestry more specifically signifies that these activities take place on agricultural or farm land that is not vested on traditional state agencies that own public forests. In these circumstances, the land owner or occupier either holds complete or limited tenure rights²⁹⁵ that confer legal ability to make decisions on land use for their socio-economic needs.

The FAO defines ‘trees outside forests’ as all trees excluded from the definition of formal forests,²⁹⁶ and located on land not defined as forest lands. The various categories of land include especially agricultural land and built-up areas, both in rural and urban areas. The planning and undertaking of farm forestry activities is useful because, when possible, forest

²⁹⁵ See further discussion on land tenure rights in Chapter 3, section 2.

²⁹⁶ FAO, *Trees Outside Forests: Towards a Better Awareness* (Rome, FAO, 2002), First Part, at 14. [FAO, ‘Trees Outside Forests’]

management should be integrated with management of adjacent land areas so as to maintain ecological balance and sustainable productivity.²⁹⁷

Farm forests serve a multiplicity of functions since they are usually planted and cultivated by land owners, who often make the decisions over the desired output. The trees may be indigenous or exotic species that have been domesticated to serve particular local purposes.²⁹⁸ These purposes are broad and wide, and may vary from community to community. The trees and accompanying biodiversity may be a major source of food for rural communities, enhancing food security, but also promoting dietary balance, diversity and good health.²⁹⁹ They also provide fodder which may be a major source of livestock feed, as well as shelter for livestock.

These trees may also be grown as orchards, growing fruits for trade; fuel wood for direct use or as charcoal; for sale as timber and building poles; and to enhance security of land rights by serving as demarcation points marking boundaries. The trees may also serve as water catchments, or to prevent soil degradation³⁰⁰ that has significantly outstripped the ability of land in Kenya to regenerate soil without assistance. Farm forests may serve these purposes effectively, especially because some tree species regenerate faster, or support extensive undergrowths full of biodiversity, thus reducing soil degradation and slowing the spread of desertification. When implemented properly farm forestry plays a significant environmental

²⁹⁷ UN, "Forest principles," *supra* note 55, principle 8(e).

²⁹⁸ FAO, "Frees Outside Forests," *supra* note 296 at 20.

²⁹⁹ FAO, "Frees Outside Forests," *supra* note 296 at 22.

³⁰⁰ *Ibid.*

role in stabilizing soil, reducing soil erosion and enhancing soil fertility through agroforestry.³⁰¹ There is therefore a need to integrate sustainable land use practices in agriculture and forestry systems to ensure economic choices made by land owners respect the environment and nurture biodiversity in order to maintain soil fertility.

Most of the land on which farm forestry activities are undertaken would be agricultural land,³⁰² thereby bringing these land use activities under the direct authority of the *Agriculture Act*. In addition, the 2005 *Forest Act* applies to all categories of forests, including private and farm forests. This amounts to a complex legal situation where two land use frameworks simultaneously assume competence over farm forestry activities. In this section, we examine farm forestry in the context of forestry and agriculture laws, to highlight whether the legal provisions integrate mechanisms to facilitate sustainable land and forest management.

6.1 FARM FORESTRY UNDER THE *FOREST ACT*

The 2005 *Forest Act* expanded the jurisdiction of forest law and policy to apply to all forests and woodlands on state, local authority and private land. Section 25 requires every person who owns a private or farm forest, or is in the course of establishing a farm forest on their land, to apply to the Forest Service for registration. The *Forest Act* defines farm forestry as the practice of managing trees on farms whether singly, in rows, lines, boundaries, or in

³⁰¹ *Ibid.*

³⁰² Section 2, *Agriculture Act* defines agricultural land as “all land which is used for the purpose of agriculture, not being land which, under any law relating to town and country planning, is proposed for use for purposes other than agriculture.”

woodlots or private forests.³⁰³ Farm forestry is one of the major core programmes³⁰⁴ currently being implemented by the Forest Service. The program operates on farm lands with higher and medium agricultural potential areas such as parts of Nyanza, Western, and Central provinces. The Forest Service categorizes similar activities in the arid and semi-arid lands (ASALs) as dry land forestry, with target areas including the group ranches, and low agricultural potential areas of Eastern, Coast and North-Eastern provinces with annual rainfall of 800mm or less.³⁰⁵

The main objective of this farm and drylands forestry programme is to support and facilitate farmers to raise trees and forest products in their farms in order to ease pressure on gazetted state forests, and also manage the woodland forestry resources in the ASALs.³⁰⁶ This is informed by a high demand for forest products, and the fact that gazetted state forests are inadequate to supply both forest products, and ecosystem services such as catchment areas and retention of soil fertility.³⁰⁷ Areas initially set aside for monoculture plantations to provide timber have been shrinking, and competing with charcoal production as an average 70% of the population uses wood or charcoal fuel.³⁰⁸

³⁰³ Section 2 defines farm forestry as the practice of managing trees on farms whether singly, in rows, lines, boundaries, or in woodlots or private forests.

³⁰⁴ Officially the programme is titled —Service Extensions Service Division” with principal areas including farm and dryland forestry.

³⁰⁵ Doctoral research, —Interviews with forestry respondents, July-August 2009.”

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ Doctoral research, —Interviews with forestry respondent, September 2009.”

The Forest Service has been implementing farm and dry land forestry as projects running for a determinate period of time in selected parts of the country. There have been past pilot projects under the now repealed 1942 forest law, for intensification of farm forestry on agricultural land. One illustration is the ‘Nakuru-Nyandarua Farm Forestry project’ implemented to enhance on-farm tree growing for farmers’ benefits and ease pressure from natural forests.³⁰⁹ In general terms, farm forestry in most high potential areas is carried out by farmers on their private land. In a 2005 strategic environmental assessment of forestry law in Kenya, it was reported that long-term government prohibition of timber logging in state forests had created one beneficial side-effect by stimulating farm forestry.³¹⁰ The report noted that ‘individual landowners have increasingly been planting commercially valuable timber species based on their own financial assessments of the opportunities in promoting short rotation plantations.’³¹¹

The Forest Service also implemented an intensive dry land forestry project titled ‘Intensified Social Forestry Project’ (ISFP), undertaken as a donor funded project.³¹² It was aimed at seeking ways and means of implementing forestry development in the expansive arid and semi arid lands (ASAL) of the country. Objectives of the programme included providing

³⁰⁹ For instance, see the description and analysis given by James Kiyiapi, ‘Frees Outside Forests: Kenya’ in FAO (ed) *Trees Outside Forests: Towards a Better Awareness* (Rome, FAO, 2002), Second Part, at 165. [James Kiyiapi, ‘Frees Outside Forests: Kenya’]

³¹⁰ The World Bank, ‘SEA of the Forest Act,’ *supra* note 13 at 3.

³¹¹ *Ibid.*

³¹² See website: <http://www.isfp-fd.org>. See also (1) Kenya Forests Service (KFS), Kenya Forests Research Institute (KEFRI) & Japan International Cooperation Agency (JICA), *Intensified Social Forestry Project in Semi-Arid Areas in Kenya: Baseline Survey* (Nairobi: Development Consultants, 2004) [Kenya Forest Service et al., ‘Baseline survey for social forestry in arid areas of Kenya’]; and (2) Kenya Forests Service (KFS), Kenya Forests Research Institute (KEFRI) & Japan International Cooperation Agency (JICA), *Pilot Study for Intensified Social Forestry Project in Semi-Arid Areas in Kenya* (Nairobi: Development Consultants, 2004) [Kenya Forest Service et al., ‘Hot Study for Intensified Social Forestry in Kenya’]

social forestry extension services to farmers in the focus districts, and ensuring that farmers and other stakeholders obtain enough practical knowledge and techniques. The project was carried out in three focus ASAL districts of Kitui, Mbeere and Tharaka all in Kenya's Eastern province. From information and literature available, this project appears to have been strictly targeted at the 3 districts out of over 200³¹³ and only focused on forestry activities carried out on private or community farmland. At the time of this research and writing, the project was being wound up having completed the funding cycle in March 2009.

A mid-term assessment of the project in 2007, by the FAO, reported remarkable evidence of increased farm fertility, productivity, tree planting and survival.³¹⁴ The success of ISFP pilot project was particularly linked to effective and relevant skills, technical assistance and building of farmers' capacity through extension education.³¹⁵ This extension education provided farmers with skills on planting seedlings, crop management, and land husbandry and effectively changed the attitudes of the farmers such that they embraced the environmental and economic benefits of farm-level forestry. We examine forestry extension, in this particular context, in section 7 of the chapter.

The *Forest Act* has set up a structure of incentives available to land owners practising farm forestry, and who apply to register their farm forests with the Forest Service.³¹⁶ Such a land owner is entitled to receive technical advice regarding appropriate forestry practices and

³¹³ Kenya Forest Service et al., —Baseline survey for social forestry in arid areas of Kenya,” *supra* note 312 at 4.

³¹⁴ FAO, JICA, *Kenya: Intensified Social Forestry Project in Arid Areas Impact Assessment Report*, (Rome: Food and Agriculture Organization & Japan International Cooperation Agency, 2007) at 11-12 [FAO, “Kenya: intensified social forestry project”]

³¹⁵ *Ibid.*

³¹⁶ Section 25(3).

conservation;³¹⁷ or loans from the Fund for the development of forests.³¹⁸ A land owner may also apply for exemption from payment of all or part of the land rates and other charges that may be levied on the land in question. This is a very innovative incentive programme, but it fails to determine the criteria through which a private or farm forest qualifies for this financial benefit. It is possible that land owners could benefit once they register farm forests with the Forest Service. However section 25(2) provides that the farm forests will be registered where the forest meets the criteria prescribed in regulations made under this Act.³¹⁹ Interviews with forestry respondents in August 2009 revealed that the farm forest criteria would be determined through subsidiary regulations, but these regulations were later published by the Ministry of Agriculture under authority of the *Agriculture Act*.³¹⁹

At face-value, this publication of farm forestry rules under the *Agriculture Act* appears as a move to integrate sectoral legislative and administrative operations to ensure that farm forestry receives coordinated technical and administrative values from both forestry and agricultural sector. Such institutional reconciliation and integration would be instrumental and beneficial to enhance the responsibility and participation of farmers proactively, since farm forestry plays a major role not only in enhancing food security and poverty alleviation for rural communities.³²⁰ We examine the farm forestry rules in the next section.

³¹⁷ Section 25(3)(a).

³¹⁸ Section 25(3)(b). This fund is established by section 18 of the *Forest Act, 2005*.

³¹⁹ See, *The Agriculture (Farm Forestry) Rules 2009* (Legal Notice No. 166, 20 November 2009).

³²⁰ James Kiyapi, "Frees Outside Forests: Kenya," *supra* note 309 at 167.

6.2 FARM FORESTRY UNDER THE AGRICULTURE LEGAL FRAMEWORK

The discussions and analyses in chapter 3 revealed that decision making over land use choices in agricultural land is influenced by two legal regimes. The first is the land tenure framework that confers tenure rights on land owners, with the legal ability to make decisions over land use choices and activities. We established that the quantum of tenure rights under the *Registered Land Act*³²¹ does not incorporate a responsibility on land owners to safeguard the environmental quality of land. The second legal regime is the *Agriculture Act*, the principal regulatory authority over agricultural land use in Kenya. While this agriculture law identifies preservation of soil and fertility as a key objective, the same law assumes a command and control approach to land use administration. This is a legal approach that is characterized by rules and orders, made by public officers to land owners, if and when the need arises. This is in contrast to the existence of land use standards that would set out statutory responsibilities of land owners to integrate sustainable land practices with their economic activities. We now examine the legal provisions on farm forestry under the *Agriculture Act*, highlighting how the law impacts on sustainable land use practices by land owners.

Section 48 of the *Agriculture Act* empowers the Minister to make rules imposing mandatory obligations on land owners to take land preservation measures such as afforestation and reforestation, intended to prevent or reverse soil erosion. It is under this legal authority that the *Agriculture (Farm Forestry) Rules, 2009* were enacted. The farm forestry rules define

³²¹ *Registered Land Act*, Cap 300, Laws of Kenya.

farm forestry, in similar terms as the *Forest Act*,³²² as the practice of managing trees on farms whether singly or in rows, lines, boundaries or in woodlots or private forests.³²³

6.2.1 SUSTAINABILITY OBJECTIVE OF THE RULES

The farm forestry rules, *prima facie*, set a clear legal responsibility on land owners or occupiers by creating a mandatory requirement for every land owner or occupier to establish and maintain a minimum of 10 percent of the land under farm forestry...³²⁴ The objectives of the rules, in addition to maintaining the 10% tree cover are -

- Conserving water, soil and biodiversity
- Protecting riverbanks, shorelines, riparian and wetland areas
- Sustainable production of wood, charcoal and non-wood products
- Providing fruits and fodder, and
- Carbon sequestration and other environmental services

These objectives reflect some legal concern with sustainability of land use practices. The objectives also suggest that a variety of possibly complex land use practices would be necessary to ensure the conservation, and environmental protection aims are integrated with socio-economic objectives of farming. Unlike the *Forest Act* in which case a landowner voluntarily applies for their farm forest to be registered, these rules make farm forestry compulsory. The *Forest Act* however explicitly states that a land owner is entitled to receive technical assistance from forest officers.³²⁵ This technical advice is important because after receiving it, as the IFSP dry lands forestry project demonstrated,³²⁶ land owners may appreciate and connect the utility of trees to soil and biodiversity conservation with the

³²² Section 3.

³²³ Rule 3.

³²⁴ Rule 5(1).

³²⁵ Section 25(3).

³²⁶ See, section 6.1 of this chapter for analysis and illustration.

benefit to their productive economic activities. The Farm forestry rules do not implicitly or explicitly suggest that land owners will be offered extension advice by agriculture officers. It is useful to recall the discussion in chapter 3 which revealed that agricultural extension is in any case only provided in ‘focal areas’ or upon demand by a farmer.³²⁷

6.2.2 INSPECTION AND ENFORCEMENT

The Farm forestry rules provide for inspection and enforcement of compliance by agricultural officers acting as inspectors. The inspector is authorized to enter any agricultural land to ascertain ‘whether the farm owner or occupier has complied with the 10% farm forestry’ requirement.³²⁸ If the inspector finds that the requirement has not been complied with, the inspector is empowered to issue a farm forestry establishment order requiring the farmer to institute measures to put the farm forest in place.³²⁹ Further inspection is required, and if there is further non-compliance, the offending person shall be reported to the district agricultural committee.³³⁰

Apart from the otherwise clear legal responsibility on land owners to maintain a 10% minimum tree cover on their farms, the rules offer no tools or mechanism to guide decision making by land owners on tree or land husbandry. This is evident when the inspector is only required to ascertain there is a 10% tree cover, without more. The Farm forestry rules do not offer indications of how farmers can plant trees or promote biodiversity through efforts such

³²⁷ See, chapter 3, section 7.

³²⁸ Rule 5.

³²⁹ *Ibid.*

³³⁰ There is a system of appeals from decisions of the District Agriculture committee to the Agriculture Appeals Tribunal.³³⁰ On the other hand, if a farm forest is subject to the operation of the forest law, it also becomes subject to its dispute resolution and appeals system, which is through the National Environment Tribunal.

as preventing soil erosion or safeguarding riverbanks, in order to sustain the environmental quality of land. Equally, the rules are silent on techniques of how farmers may enhance their economic returns for instance by combining indigenous trees that preserve biodiversity with fast growing exotic trees suitable for timber. Instead, the farm forestry rules just state that ‘the species of trees or varieties planted shall not have adverse effects on water sources, crops, livestock, or soil fertility’ and should not be invasive species.³³¹

The extensive regime of inspection and enforcement echoes with the legal attitude of the *Agriculture Act* of orders imposed from time to time by public officers. As highlighted in chapter 3,³³² in spite of being in force since 1955, this agriculture law has not prevented high levels of land degradation, soil erosion, fertility loss and decline in agricultural productivity. This implies, as Kameri-Mbote has argued,³³³ that command and control structures alone have not worked, and cannot work in achieving sustainable land use in Kenya.

6.2.3 INCENTIVES TO LAND OWNERS

The Farm forest rules reflect a minor attempt at extending some incentives to land owners. Rule 8 requires the District Agriculture Committee to identify land under its jurisdiction which is at risk of degradation, and institute measures to ensure its conservation including tree planting. In addition to enforcing mandatory requirements to establish 10 percent tree cover on such land, the committee is also required to pursue measures to encourage voluntary self-help tree planting activities; and to undertake farm forest activities financed

³³¹ Rules 5.

³³² See, chapter 3, section 6.15.

³³³ Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (Nairobi: Acts Press, 2002) at 75.

through funds available to devolved levels of government. This last incentive is however quite non-specific, including a failure to identify the particular devolved funds that may legally be available for use by the District Agriculture Committee for these purposes.

It is instructive here to recall that the *Forest Act* extends financial assistance and technical advice through extension services to land owners who register their farm forests. The other incentive entitles a land owner to apply for exemption from land rates and other land charges. This provision, if adapted to the farm forestry rules may provide a direct financial incentive that land owners or occupiers can identify as an economic benefit. However, the effect of exemption from land rates alone is also limited because agricultural land, being freehold or absolute estate, is rural land that does not attract land rates in Kenya. Nonetheless, because farmers have tended to turn to farm forestry mainly because of the economic and environmental benefits,³³⁴ they may be more responsive to incentives and relevant technical assistance that helps farmers advance their objectives.

6.2.4 ADMINISTRATION

The administrative implementation of the legal and policy framework for farm forestry is divided between institutions created by different statutes. It mainly revolves around the power to carry out inspections and determine adherence with the minimum 10% rule. On the one hand, the farm forestry rules confer overall jurisdiction for implementation on District Agriculture Committees and entirely rely on the administrative structure of the *Agriculture*

³³⁴The World Bank, –SEA of the Forest Act,” *supra* note 13 at 3.

Act.³³⁵ Agriculture officers are designated as inspectors, and empowered to enter land to carry out inspection on whether the land owner or occupier is observing the prescribed standards.³³⁶ On the other hand, the *Forest Act* requires the maintenance of a register of farm forests, and forest officers are empowered to enter any land and inspect a private farm forest to assess its condition and perform any action that may be necessary.³³⁷

There is no credible attempt to link the Farm forestry rules with the *Forest Act* provisions in the sense of collaborative administration of sustainable farm forestry. However, farm forestry rules cede authority over large-scale harvesting of farm forestry produce to forest produce harvesting rules, implemented by the forest service.³³⁸ There is evidence of some vertical integration with the provisions of the framework environmental law, *EMCA*. In this regard, the District Agriculture Committee is required to consult with the District Environment Committee (DEC), which is established under *EMCA*.³³⁹ The role of the DEC, in the context of farm forestry, is however restricted to being consulted by the agriculture committee to determine the nature of non-compliance that has actual or potential negative environmental impacts. The DEC also assists in certifying that a land owner has reduced farm tree cover below 10 percent; and in assessing whether the ecological considerations and

³³⁵ See, for instance, the entire Part II, which confers authority over inspection and enforcement on the district agricultural committees.

³³⁶ Rule 6.

³³⁷ Section 50.

³³⁸ Rule 10 reserves authority over the harvesting of trees but cedes authority over large-scale harvesting to the Forests (Harvesting) Rules, 2009.

³³⁹ Section 29, *EMCA* establishes District Environment Committees, Section 30 states that the functions include being “responsible for the proper management of the environment” within respective district. See discussion in chapter 3, section 6.2.1.

principles of good land management require more trees on a particular farm even beyond the 10 percent cover.

As stated earlier, farm forestry is a mechanism that assists to reverse land degradation and to enhance soil fertility on farmland. If the socio-economic and environmental benefits are made apparent to land owners, and the land owners receive useful skills and technical assistance, their attitudes are bound to change in favour of farm-level forestry activities. In this sense, the legislative framework for farm forestry could serve as a mechanism that enhances the responsibility of land owners towards the land, beyond the mere economic utility or value.

7 ROLE OF FORESTRY EXTENSION IN SUSTAINABILITY

Forestry extension follows the same approach as agricultural extension.³⁴⁰ Forestry extension involves facilitating the flow of knowledge, skills and technology to farmers or other people involved in forestry. Forestry extension also aims to widen the knowledge of people beyond the range of their food crops and animals, to understand more fully how forests fit the pattern of their lives and whether they are being managed as wisely as they should be.³⁴¹

The current forest law and policy framework requires the Forest Service to provide extension services by assisting forest owners, farmers and community forest associations that are involved in the sustainable management of forests.³⁴² This is an important provision, as it establishes a legal basis for extension function for the benefit of private forest owners, farm

³⁴⁰ See chapter 3, section 7.

³⁴¹ D. Sim and H. A Hilmi, *Forestry Extension Methods*, (Rome: FAO Forestry paper 80, 1987) at 1-2.

³⁴² Section 5(h).

forestry, and Community Forest Associations (CFA) involved in the *shamba* system. Since the CFAs are the only legal mechanism for community participation in management of state forests (*shamba* system), the legally mandated extension function presents a useful opportunity for engagement and collaboration between the Forest Service and concerned community members as both parties set out to undertake their responsibility to implement sustainable forest management.

With the 2005 forest law making provision for forestry extension, the administrative structure of the Kenya Forest Service includes a Forest Extension Services Division, and a drylands and farm forestry branch within this division.³⁴³ All forest officers are expected to play an extension role, including rendering extension service to communities involved in the *shamba* system and private land owners. There are about 250 extension offices countrywide.³⁴⁴ However, interviews with forestry respondents suggest that forestry extension staff lack mobility due to underfunding and lack of vehicles.³⁴⁵ There is also no formal arrangement in place for collaboration with the Ministry of Agriculture even though there is commonality of interest especially over farm forestry, and agricultural activities practised through the *shamba* system.³⁴⁶

Kagombe and Gitonga found that where the *shamba* system has been successful it was due to a large component of extension education, whereby the local forester had actively engaged

³⁴³ Kenya Forestry Service, *Strategic Plan: 2009/10-2013/14*, Nairobi, Kenya, Kenya Forest Service (Nairobi, Kenya Forest Service, 2009) at 19.

³⁴⁴ Website: http://www.kenyaforestservice.org/index.php?option=com_content&view=article&id=93:about-kenya-forest-service&catid=70:about-kenya-forest-service 30 September 2010

³⁴⁵ Doctoral research, "Interviews with forestry respondent September 2009."

³⁴⁶ *Ibid.*

the local community on forestry management.³⁴⁷ The failure of past models of the *shamba* system therefore suggests that, overall, forestry extension was ineffective in terms of utility and relevance of skills, and the geographical scope of extension services. There is however some experience with success in forestry extension in Kenya, in the context of farm forestry. This arose from the ‘Intensified Social Forestry Project’ (ISFP) reviewed in the last section, and a further analysis of the project’s outcomes will provide useful insights on potential role of extension in meeting the sustainability objectives of forest law.

The ISFP, as explained earlier, was a five year donor funded pilot project from 2004, and concluded in March 2009.³⁴⁸ The project focused on forestry development in the expansive arid and semi arid lands (ASAL). Its objectives included providing social forestry extension to farmers in focus districts, and ensuring that farmers and other stakeholders obtain sufficient practical knowledge. The project was carried out in three focus ASAL districts of Kitui, Mbeere and Tharaka all in Kenya’s Eastern province.

A baseline study undertaken in 2004, before the ISFP project revealed tree planting was prevalent in all 3 project districts, but with very low survival rate because of limited knowledge on tree growth and management.³⁴⁹ The 2007 mid-term survey of the ISFP, cited earlier,³⁵⁰ corroborated earlier findings by Kagombe and Gitonga that extension services bring about positive outcomes. The ISFP project had enhanced extension training, building

³⁴⁷ Kagombe and Gitonga, ‘Plantation Establishment in Kenya,’ *supra* note 197 at 25.

³⁴⁸ See discussion in section 6.1 & *supra* note 312.

³⁴⁹ Kenya Forest Service et al., ‘Baseline survey for social forestry in arid areas of Kenya,’ *supra* note 312 at 80 - 81.

³⁵⁰ See, FAO, ‘Kenya: intensified social forestry project,’ *supra* note 314.

the capacity of forestry officers, who then trained farmers, including as peer trainers to other farmers at village level.³⁵¹ There was remarkable evidence of increased farm fertility, productivity, tree planting and survival. There was an average 14% expansion of productive lands for food crops by farmers who received training.³⁵²

The analysis of such information suggests strongly that forestry extension is functionally important in meeting objectives of sustainable forest management, which include fulfilling the needs of local communities and addressing unsustainable land use. This suggests that extension is an important practical consideration in the pursuit of sustainability objectives of forestry law, whether through the *shamba* system or farm forestry. This makes extension a component in any legal strategy for sustainability, such as enhancing the responsibilities of land owners/forest communities to practice sustainable land use. Enhancing these responsibilities can be effected through the transfer and exchange of knowledge and skills that will impact the attitudes of land owners and forest communities on the utility of forestry activities to their socio-economic objectives, and the environmental quality of the land.

A fundamental restriction to the effectiveness of forestry extension with respect to farm forestry, in addition to relevance of information to sustainability, arises from the *Forest Act* provisions that land owners may only receive extension assistance upon registration. These provisions contrast with the *Agriculture Act* based compulsory Farm forestry rules which make no explicit reference to extension services. This implies there is need to reconcile the mechanisms of the two legal instruments. In any event, there would be need to undertake

³⁵¹ See, FAO, “Kenya: intensified social forestry project,” *supra* note 314 at 11-12.

³⁵² *Ibid.*

concerted extension education to highlight and communicate to farmers that the provisions of the *Forest Act* entitle a land owner to receive technical assistance on conservation, and makes them eligible for loans, or exemption from certain taxes and rates. Without such communication to land owners or farmers, these potentially useful legal provisions will not perform their intended objective of propagating sustainable forestry.

8 CONCLUSION

In this chapter, we have analysed the legal arrangements and challenges to the implementation of sustainable community forestry in Kenya. We have examined the legal framework that administers forest tenure rights, and forestry land use activities in Kenya. The information reveals that most of the forest land in Kenya is vested in the state, which not only exercises the tenure rights but also legally determines the land use activities. The objective of the *Forest Act* is to facilitate the realization of sustainable forest management, and ensure that forests provide for socio-economic development of the country. This suggests that the forest legislation is vertically integrated with the environmental duty set out by the framework environmental law, *EMCA*. However, investigations into the actual legal mechanisms that facilitate integration of forestry vitality with socio-economic activities reveal that management plans do not explicitly set out forest sustainability as a primary goal. Similarly, in order to establish the sustainability objectives of community forest management plans, which are the operational sustainability guides for local communities, there is a tenuous exercise of reading through various statutory provisions. This implies that the utility of community forest management plans, as the guide for forest communities towards integrated decision making, can be significantly vitiated.

While Kenya has had a history of community exclusion from state forests, the chapter has established there are now statutory provisions and literature supporting participation of communities in sustainable management of state forests. The provisions of the forest law allowing for community participation have resulted in reintroduction of the *shamba* system, whereby communities acquire user rights to engage in those forestry activities permitted by the breadth of user rights. This implies that forest communities are now obtaining some legal decision making power to make the choices over forestry activities, within the scope of the tenancy rights. This process is important, since community forestry contributes to socio-economic activities that assist communities to mitigate poverty, and their conservation activities can enhance sustainable forestry. However, because of the history of community exclusion from state forests, the new form of *shamba* system may not succeed unless mechanisms are put in place that further reinforce the conservation responsibilities of the communities, and offer guidance for behaviour change, to secure adoption of sustainability practices. This behaviour change is similarly important to the implementation of farm forestry. The provision of technical advice and skills through forestry extension is mandated by forest legislation, as a necessary mechanism to support forest communities, and land owners engaged in farm forestry.

Both the *shamba* system and farm forestry are useful legal mechanisms that can assist the government of Kenya fulfil its constitutional obligation of planting and maintaining a minimum 10% national tree cover. Sustainable community forestry however requires unequivocal commitment that sustainability is the overarching objective, reflected through statutory responsibility to protect forest vitality, and a clear sustainability objective of forest

management plans. The mechanisms of forest extension reviewed here, while implemented on a limited scale, have demonstrated the ability to change the behaviour of people, who have then embraced sustainable forest practices that have supported their socio-economic activities. Extension is therefore an integral policy tool that can assist forestry law in realization of sustainability. In the next chapter, we examine the idea of distinctive statutory responsibilities requiring any person holding land or forest tenure rights to prevent land degradation, and to undertake specific measures to ensure their land use activities are sustainable. Chapter 5 therefore addresses our proposal for reform with regard to both agriculture and community forestry.

CHAPTER FIVE : TOWARD A LEGAL AND ETHICAL DUTY TO SAFEGUARD SUSTAINABLE LAND USE

1 INTRODUCTION

The foregoing chapters of this research have evolved from a theoretical analysis on integrated decision making for sustainability in chapter 2, to critical inquiry into the conceptual and sectoral/institutional integration for agriculture and forestry land uses, in chapters 3 and 4 respectively. In chapter 2, we introduced the idea of integration, deriving from the legal concept of sustainable development. We argued that conceptual integration which will result in a balance of legal principles is only possible where the right to development is reconciled with an equivalent right (and duty) to a clean environment. It is this reconciliation that therefore sets the legal basis for integration of environmental protection and the socio-economic objectives and activities of sectoral laws or institutional policies, plans and decisions. The challenge has been finding suitable mechanisms to facilitate the millions of small-scale farmers,¹ or widespread forest communities in Kenya,²

¹ It is notable that a 2004 Government of Kenya agriculture policy statement reported that about 80% of the population lives in rural areas, relying on subsistence agriculture as the principal economic activity, and most of these people live in poverty and food insecurity. See, in *particular*, Republic of Kenya, *Strategy for Revitalizing Agriculture: 2004 – 2014* (Nairobi, Ministry of Agriculture, 2004) at 1-2. See further the analysis linking small-scale land use activities, environmental degradation and poverty, in Chapter 2, section 4.

² The *Forest Act, 2005* legally defines the terms —Forest Community” to mean either a group of persons who have a traditional association with a forest for purposes of livelihood, culture or religion,‘ or a group of persons who are registered as an association or other organization engaged in forest conservation.‘ See, Chapter 4, section 5.2.1 for further analysis of forest communities.

Existing literature suggests that about 3-4 million people inhabit lands adjacent to protected forests (as forest-adjacent communities) within a five kilometre radius, and they use forests for socio-economic activities like charcoal burning, water, grazing, fruits, vegetables and medicinal plants. See, in *particular* (1) Republic of Kenya, *Report of the Government’s Task Force on the Conservation of the Mau Forests Complex* (Nairobi: Office of the Prime Minister, 2009) at 64 [RoK, —Mau Task Force Report”]; and (2) The World Bank, *Strategic Environmental Assessment of the Kenya Forest Act 2005* (Washington D.C., The World Bank, 2007) at xii.

to exercise this integration and obtain the balance of interests they need in order to overcome debilitating poverty and reverse the widespread land and forest degradation.

The concept of ecologically sustainable development, which is mandated by the 2010 Constitution of Kenya,³ reinforces the argument that integration is a key pillar that is necessary to ensure sustainable practices. This ecologically sustainable development is actually anticipated to be an outcome of people exercising the constitutional environmental duty to conserve the environment.⁴ The constitutional environmental duty, linked to ecologically sustainable development, is therefore a potential mechanism that could be applied to create affirmative responsibilities that will guide land owners or occupiers and forest communities towards integrated decision making. However, in chapter 2, we argued that with the high level of environmental and land degradation in Kenya there is need for a system of values that will facilitate a change in attitude and behaviour by land owners, occupiers or forest communities to ensure they adopt land stewardship in a manner consistent with the constitutional principles. Those values of land stewardship would also be consistent with the land ethic that is advanced by American forester, Aldo Leopold.⁵

Our analysis in chapter 3 established that the statutory and indigenous land tenure system confers sufficient property rights to allow land owners or occupiers the legal right to make land use decisions for agricultural productivity. However, the bundle of tenure rights does

³ See, *Constitution of the Republic of Kenya, Revised Edition 2010*, [“Constitution of Kenya, 2010”]

⁴ *Ibid*, article 69(2).

⁵ Aldo Leopold, *A Sand County Almanac with Other Essays on Conservation from Round River* (New York: Oxford University Press, 1981) and reprinted in VanDeveer and Christine Pierce (eds) *The Environmental Ethics and Policy Book* (California: Thomson/Wadsworth, 2003) 215-224. [Leopold, —ASand County Almanac”]

not reflect a legal responsibility on land owners or occupiers to integrate environmental protection with their socio-economic rights. Since property rights are a category of socio-economic rights, this suggests that the land tenure framework is not vertically integrated with the environmental duty, and the environmental norms set out by the framework *Environmental Management and Coordination Act (EMCA)*.⁶ We analysed the agricultural land use regulatory framework, which manifests the police power of the Kenyan state and is implemented through a vast command and control structure. In this case, while the *Agriculture Act*⁷ clearly stipulates that the preservation of soil fertility is one of its objectives,⁸ the provisions of that law do not specify any minimum sustainability responsibilities for land owners to use as a guide in their regular land use decision making. Instead, the *Agriculture Act* operates a system of prescriptive rules whereby public officers can impose *ad-hoc* orders on land owners, but only where a land owner has not practised good land husbandry. This suggests that the utility of these orders is significantly vitiated because they are most likely imposed after environmental quality of the land has diminished. We therefore supported arguments that it is conceivable that the application of legal prohibition as a primary land use regulatory tool in Kenya has reached its farthest limits, and failed. This poses the challenge of finding a legal mechanism that will create a responsibility on land owners to adopt sustainable land use practices, and further offer practical guidance to change the behaviour or attitude of land owners to embrace sustainability.

⁶ Act No. 8 of 1999 (Laws of Kenya). The environmental duty to ‘safeguard and enhance’ the environment is set out contingent to the right of every Kenyan resident to a clean and healthy environment by section 3(1) of *EMCA*. See extensive discussion in chapter 2, section 5.3 of this research.

⁷ Cap 318, Laws of Kenya.

⁸ *Ibid*, Part IV, section 48-62. See also, the discussion in Chapter 3, section 6.1.2.

Chapter 4 represents our analysis or inquiry into the legal framework and challenges of sustainable community forestry. We noted that the current *Forest Act* was enacted in 2005 after the 1999 framework environmental law, *EMCA*. This suggests that with the *Forest Act* having set out sustainable forest management as an overt objective, there is *prima facie* evidence of vertical integration with the environmental norms set out in the framework environmental law. The discussion argued that community forestry is consistent with sustainable forest management, but only where the responsibilities on communities to undertake forest conservation activities are unequivocal. This is important because, historically, communities in Kenya have generally been excluded from management of state forests. Further, the *shamba* system, the only programme that allowed public participation in state forestry before 2005, was grossly mismanaged and resulted in forest degradation. Nonetheless, the 2005 forest law now provides for community forestry, with communities obtaining limited tenure through issuance of user rights. This implies that, to the extent that it is consistent with their user rights, communities engaged in the new form of *shamba* system become primary decision makers on forest activities. This new role is important because there is a significant number of people inhabiting agriculture land adjacent to these state forests, and facing diminished agricultural productivity due to population increase, and significant decline in the fertility of their agricultural lands. Therefore, using the law to facilitate community forestry allows, and can be applied to nurture and enhance the conservation capacity of the local people. In this context, forest communities can lawfully play constructive a role in sustaining forest vitality while deriving some socio-economic and cultural benefits.

However, with the history of community exclusion from state forests, and the degradation of agricultural lands, it is important for the law to explicitly set out a responsibility for the forest communities to uphold forest sustainability. Such a mechanism is equally necessary with regard to farm forestry in order to assist land owners to appreciate the socio-economic and environmental benefits of farm forests. The question of changing the attitudes and behaviours of people such that they adapt sustainability into their land use decisions is therefore a cross-cutting issue of concern to agricultural and forestry land use. In both chapter 3 and 4, we reviewed the role played by extension services in facilitating transfer of skills and knowledge. We established that extension services are quite limited in scope, and substantively focus on increasing productivity. However, in spite of the conceptual and substantive limitations, it was evident that where extension had been effective, there had been credible impact on the attitudes and behaviours of farmers, resulting in adoption of some sustainability practices. We have therefore advanced agriculture and forestry extension as a potent mechanism that could be applied to give effect to the sustainability objectives of land use law and policy.

This proposed role of extension is consistent with our suggestion in chapter 2 that there is need for a legal mechanism to facilitate people engaged in the use of natural resources to behave constitutionally, by undertaking the environmental duty to ensure ecologically sustainable use of natural resources. This objective involves influencing the practical behaviour of those people that have to make regular land use decisions, but whose land use activities fall outside the scope of ordinary integration tools such as environmental impact

assessment. Our argument therefore proposed that Aldo Leopold's land ethic represents a system of useful values, especially the ecological conscience.

This ecological conscience connotes a human responsibility to safeguard the environmental quality of the land, while using the land as a resource for economic benefit. It is essentially an ethical duty that is consistent with the constitutional duty on people to conserve the environment. Both the ethical and constitutional duties further provide a practical approach to implement the environmental duty set out by *EMCA*. The complex question and challenge is how to frame and model the legal and ethical mechanism, which will reflect minimum sustainability responsibilities, as well as ethical and other values that will guide people towards integrated decision making.

Arguments by James Karp, with respect to private property rights, suggest a potential approach. He relates the ethical duty to the question of conceptual integration of the right to a clean environment with socio-economic rights, arguing that while human life is governed by rights, these rights must also give rise to duties.⁹ Karp further urges that these duties emanate from a community-based ethic inherent in humans, that, individual rights though important, must submit to the rights of the community and its future.¹⁰ In specifying the nature of this duty, Karp explains that the rights of individuals and members of the present

⁹ James Karp, —A Private Property Duty of Stewardship: Changing our Land Ethic” 1993(23) Environmental Law, 735-762, at 738. [Karp, A Private Property Duty of Stewardship.”]

¹⁰ Karp, —A Private Property Duty of Stewardship” *supra* note 9 at 738.

generation must be tempered by the duty to sustain life-support systems and ecological processes‘ to retain good environmental and human life, including for future generations.¹¹

Conceivably, any such duty that seeks the objective of changing individual behaviour toward integrated decision making would be founded upon elements comprising a system of legal, cultural, ethical or environmental values. These values, according to scholar Ben Minteer, make more compelling justifications for adoption of sustainability oriented policies, when they are public values shared by citizens‘ rather than being fragmented individual interests.¹² Such a system of shared environmental values, rather than economic self-interest in land use choices, is reflective of Aldo Leopold’s ecological conscience (ethical duty). As an individual responsibility to the land that is shared by multiple land owners, the normative structure of this ethical duty suggests it has potential in changing human land use decision making behaviour or attitudes. This is a role that is consistent with a legal (constitutional or statutory) duty that would require individual persons or sectoral institutions to integrate development activities with measures to safeguard the environmental quality of the land ecosystem. Therefore the objectives of such ethical and legal duty, for people to care for the environmental quality of land, should embody the principle of ecologically sustainable development that environmental conservation should be a fundamental consideration in decision making.¹³

¹¹ *Ibid* at 738-739.

¹² Ben Minteer, *The Landscape of Reform: Civic Pragmatism and Environmental Thought in America* (Massachusetts: The MIT Press, 2006), at 151-152. See also, *in particular*, arguments advanced regarding the ecological conscience theory by Aldo Leopold, in chapter 5, —Aldo Leopold, Land Health, and the Public Interest.”

¹³ See discussion in chapter 2, section 6.2-6.3.

The reference to a ‘duty to care’ necessarily provokes thoughts on the legal concept of a ‘duty of care’ which as a key plank of establishing liability in the law of negligence, works to reinforce responsibilities on people to avoid behaviour or actions that may harm the interests of others.¹⁴ Section 2 of this chapter examines this concept of a duty of care that has evolved over the years, originating from English common law. With respect to this research, the pertinent question is the role this common law duty of care, being representative of the ‘legal duty,’ can play in changing institutional and individual behaviour and facilitate integration of environmental protection with socio-economic activities. We discuss the conceptual limitations that restrict applicability of the common law duty of care as a tool for changing human behaviour towards environmental protection. Therefore section 3 shifts from the common law, to a statutory duty of care, and examines the normative and legal character of statutory duties of care, as manifested by sectors other than environmental law.

Applying the lessons learnt from section 3, section 4 explores the utility of a statutory duty of care to environmental protection. We review academic and other literature, as well as comparative statutory provisions to establish the potential objects, norms and best practices. We thereafter propose a model statutory duty of care, for environmental protection. We further suggest a specific duty on land owners to take reasonable measures to remedy existing land degradation, and prevent any foreseeable degradation that adversely affects their own land, or the land of another land owner. Bearing in mind that there is a high

¹⁴ See a general discussion on duty of care in Allen Linden, Lewis Klar & Bruce Feldhusen, *Canadian Tort Law: Cases, Notes & Materials* (Ontario: LexisNexis, 2009) at 285-290. [Linden & Feldhusen, “Canadian Tort Law”]

prevalence of existing land degradation, we propose the duty of care looks into the past, for rehabilitation of already degraded land. We further explore and suggest a standard of care that clearly pre-states the expected responsibilities of land owners.

The standard of care is proposed as a higher level of conduct, considering that ‘ordinary conduct’ as perceived at common law, has already been permissive of unsustainable land use practices. We suggest that to fulfil this higher standard of care, land owners and forest communities should be involved in preparation of codes of practice that will set out clear minimum sustainable land use standards. The discussion notes that preparation of the codes of practice, as well as implementation of the sustainability responsibilities will require collaborative engagement between land owners or occupiers and public officials. It will also require significant change in behaviour and attitude such that land owners ultimately adopt sustainable land use practices.

Section 6 therefore explores the role that extension can play in securing this behaviour modification. We suggest a shift from production to sustainability extension, as the mechanism that will combine ethics, culture, local and scientific knowledge and provide appropriate know-how for land owners to implement their sustainability obligations. The sustainability extension will facilitate implementation of the statutory duty of care, the overarching legal mechanism proposed by this research, in order to guide small-scale land owners and forest communities in Kenya to fulfill the constitutionally mandated ecologically sustainable development.

2 THE COMMON LAW DUTY OF CARE AND ENVIRONMENTAL PROTECTION

In this section we examine the common law basis for a duty of care. We ask the question: Can a common law duty of care effectively infuse, support or enhance ethical values, such as the ecological conscience, and succeed in changing the behaviours and attitudes of people toward integrated decision making for sustainability? What would be the utility of a common law duty of care in guiding people to adapt their behaviour and make decisions that are consistent with the constitutional duty to conserve the environment? We commence with analysing the normative character of the common law duty of care, and how effectively it is applicable to protection of non-private rights or interests such as environmental quality.

2.1 DUTY OF CARE AT COMMON LAW

The concept of duty of care derives from the English common law. Insightful illustrations may be drawn from the ‘neighbour concept’ developed by Lord Atkin in the 1932 seminal case of *Donoghue v. Stevenson*.¹⁵ Setting out the common law duty of care, Lord Atkin stated that ‘you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’¹⁶ He then defined neighbour as ‘persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’¹⁷ This implies therefore that ‘in order to hold a defendant liable to the plaintiff, the plaintiff has to prove that the defendant owes him a duty

¹⁵ *Donoghue v Stevenson* [1932] AC 562.

¹⁶ *Ibid* at 580.

¹⁷ *Ibid*.

of care; that that duty has been breached and that as a result of that breach, the plaintiff has suffered injury.¹⁸

The duty of care at common law evolved gradually, and in the 1990 decision of *Caparo Industries plc v Dickman*,¹⁹ the British House of Lords settled the standard of proof to justify imposition of a duty of care at common law. The decision settled a on a three-point criteria that the plaintiff must show²⁰ -

- i). The plaintiff's loss was a reasonably foreseeable consequence of the defendant's conduct;
- ii). That there was a sufficiently proximate relationship between the parties; and
- iii). That it is fair, just and reasonable for the court to impose a duty of care in light of applicable policy considerations

Once there is justification for imposition of a duty of care, the plaintiff must then adduce evidence to support the finding of liability in negligence, if the duty of care was breached by the negligent actions of the defendant. This implies the existence of some legal and social expectations or norms that prescribe the ordinary conduct necessary to fulfil the duty of care. This ordinary conduct, also known as the standard of care, is determined based on the nature of the duty of care that is owed.²¹ In ordinary circumstances, the courts have established the 'reasonable person' test in reference to general expectations of human conduct in a society.

¹⁸ *Kenya Breweries Ltd v Godfrey Odoyo* Civil Appeal 127 of 2007, [2010] eKLR. www.kenyalaw.org

¹⁹ *Caparo Industries plc v Dickman*, [1990] 2 AC 605.

²⁰ *Ibid.* See especially the judgment of Lord Bridge of Harwich.

²¹ At times there can be special duties of care, for instance, the duty owed to children, or the intoxicated persons. See, Robert Solomon, Mitchell McInnes, Erika Chamberlain & Stephen Pitel, *Cases and Materials on the Law of Torts* (Scarborough, Thomson Carswell, 2007) at 309-350. [McInnes & Pitel –Cases and materials on the law of torts”]

The 1955 Canadian (Ontario Court of Appeal) decision in *Arland v. Taylor*²² is illustrative of the ordinary test for standard of care. Laidlaw J.A. stated that the reasonable man is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time.²³ The reasonable actions are in accord with general and approved practice, and the expected standard is guided by considerations which ordinarily regulate the conduct of human affairs. Therefore, the reasonable test, reasonable measures and reasonable conduct reflect the standard adopted in the community by persons of ordinary intelligence and prudence.²⁴ To this end, the 'reasonable test' and the legal use of phrases such as 'reasonable measures' or 'reasonable steps' imply the requisite standard of care.

Application of the duty of care at common law has been fairly effective in securing remedies for plaintiffs whose private rights have been violated by the negligent actions of defendants. Presumably, the breach of the common law duty of care may result in remedies that protect the environment, such as where the damage has adversely affected the property rights of another person. Nonetheless, there are certain weaknesses which derive from the legal and normative structure of the common law duty of care. These weaknesses vitiate the utility of the duty of care as a tool to secure the behaviour change necessary for integration of

²² *Arland v. Taylor* [1955] 3 D.L.R (Ont C.A). [Canada]

²³ *Ibid* at 358 at 366.

²⁴ *Ibid*. See also *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, at 784.

environmental protection with socio-economic activities in decision making, in the exercise of property or tenure rights. We examine three of these weaknesses -

2.1.1 THE DUTY OF CARE IS OWED TO THE PRIVATE INTERESTS OR RIGHTS OF PEOPLE

The common law duty of care aims to protect negligent conduct that harms the private interests of people. Australian author Gerry Bates notes that a –²⁵

_common law action ... may compensate a landholder for damage to the environment, but because the common law views this as an infringement of the landholder's property rights, not because it perceives a breach of a duty to protect the environment.'

In contrast, environmental protection is invariably a matter of public interest, and while the benefits may accrue to private persons, the benefits also accrue to members of present and future generations of a society. In any event, when the duty is owed to individuals, the focus is on the financial consequences (such as damages) of breaching that duty, rather than encouraging individuals to consider their impacts on the environment,²⁶ *before any harm is done*. This private rights focus further suggests that if a plaintiff brought action in anticipation of a breach of the common law duty of care, they would be seeking to protect their private property rights in land, although any injunctive relief issued may also prevent (consequential) environmental harm to the land in question.

²⁵ Gerry Bates, *A Duty of Care for the Protection of Biodiversity on Land*, (Canberra: Consultancy Report, Report to the Productivity Commission, AusInfo, Canberra, 2001) at 15. [Bates, –Duty of care for protection of biodiversity on land”]

²⁶ M Young,, T Shi,, & J. Crosthwaite, *Duty of Care: An Instrument for Increasing the Effectiveness of catchment Management* (Victoria: Department of Sustainability and the Environment, 2003) at 7. [Young, –Duty of care: instrument for increasing effectiveness”]

2.1.2 LIMITED DETERRENCE, AND *EX POST FACTO* OPERATION OF THE DUTY OF CARE

Salmond on Torts suggests that tortious liability exists for the purpose of preventing people from hurting one another, whether with respect to legal rights or entitlements.²⁷ Thus, there are arguments that tortious liability plays a deterrent function, “designed to control the future conduct of the community in general.”²⁸ In this context, the publicity accorded to libel suits, and the high damages, may arguably have had the effect of making some people careful in making defamatory statements about others.²⁹ Legal scholars Linden & Feldhusen however fault such a conclusion, pointing to the absence of any psycho-analysis or research statistics to unequivocally establish whether tortious liability fulfils this deterrence function.³⁰ They suggest there could be other unnamed but more important causes for decline in certain instances of tort liability.³¹

In any event, even if people took preventive measures (of protecting the environment) to individually avoid tort liability (due to self-interest), we argue that this deterrence function would be inherently insufficient. This is because, in contrast with the common law duty of care, the threshold necessary for effectively integrating environmental protection with socio-economic activities requires collective and holistic action and awareness about any legal duty to care, by individuals and institutions involved in land use decision making. This is

²⁷ R.F.V Heuston & R.A Buckley, *Salmond & Heuston on the Law of Torts* (London: Sweet & Maxwell, 1987) at 15. [Heuston & Buckley, —Salmond on the Law of Torts”]

²⁸ Linden & Feldhusen, —Canadian Tort Law,” *supra* note 14 at 19.

²⁹ *Ibid*, at 21.

³⁰ *Ibid*, at 20.

³¹ *Ibid*, see at 20 where they argue that “it seems unlikely that the tort of enticement is responsible for the comparatively small number of —eternal triangles” in society, ‘ suggesting that other causes could be named that are far more important.

the thrust of arguments by Aldo Leopold and James Karp, that there is need for a sense of obligation by all those making land use decisions, and this obligation becomes a value shared collectively in the community.³² Such an approach that the duty to care for the land should be held by everyone who owns or holds property rights in land demonstrates implicit recognition that land is in fact a biotic mechanism that is interconnected as a community, and self-interest without obligations to the community of land will not safeguard vitality of the land community.³³ It is therefore arguable that in order to achieve sustainability in land use practices, the integration of environmental protection with socio-economic activities would involve taking holistic measures to prevent foreseeable harm to the environment before it happens. This is a view that is supported by the precautionary principle which urges the taking of measures to *prevent* environmental degradation when there is threat of serious damage, in spite of any scientific uncertainty.³⁴

In further contrast to the foregoing arguments favouring reasonable foreseeability for preventing environmental harm, actions for breach of the common law duty of care as an ingredient of negligence are often brought after some act done by a defendant who has caused some harm to the plaintiff without any lawful justification.³⁵ This implies that

³² See, for instance, Karp, —“Private Property Duty of Stewardship” *supra* note 9 at 738-739.

³³ See the discussion in Chapter 2, section 7.2.3.

³⁴ See for instance, arguments by Preston J., in *Telestra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10 where he pointed out that “the application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage...,” see para 128.

³⁵ Heuston & Buckley, —“A Handbook on the Law of Torts,” *supra* note 27 at 15.

judicial application of the common law duty of care is often *ex post facto*, when a plaintiff seeks to recover damages for the civil wrong caused on them by the negligent defendant. Under such circumstances, the court is called upon to examine evidence of past conduct to justify finding the existence of a duty, and then assess whether the standard of care was fulfilled, before providing remedies, such as damages.³⁶ In the context of the current research, in this case the court is applying the common law duty of care to adjudicate the private (land) rights of the plaintiff after the fact, when the environmental harm would already have occurred, thereby undermining any claim of effective deterrence by the common law duty of care.

2.1.3 DUTY IS SUBJECT TO JUDICIAL INTERPRETATION, AND POTENTIAL POLICY LIMITATIONS

The common law duty of care is owed only with respect to injury or harm, which is reasonably foreseeable, within the *Donoghue* conception of a ‘neighbour.’ Reasonable foreseeability ordinarily must be complemented by ‘a relationship of sufficient proximity’ as set out in *Caparo Industries*. It is the actual legal import of ‘reasonable foreseeability’ read together with ‘proximate relationship’ that is important here, because the meaning varies with facts and judicial interpretation.

Decisions by the Supreme Court of Canada offer some persuasive insights. In *Cooper v. Hobart*,³⁷ the Court ruled that defining the relationship of proximity ‘may involve looking at

³⁶ See a summary outline on the elements of a negligence action, McInnes & Pitel —Case and materials on the law of torts,” *supra* note 21 at 269.

³⁷ *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79. [*Cooper v. Hobart*]

expectations, representations, reliance, and the property or other interests involved.³⁸ In *Hill v. Hamilton-Wentworth Regional Police Services Board*³⁹ the Court ruled that different relationships raise different considerations such that “the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case.”⁴⁰ The determination whether there is reasonable foreseeability and sufficient proximity therefore depends on the facts, and judicial interpretation, which vary from time to time.

Judicial interpretation is also important when judges must establish whether “it is fair, just and reasonable for the court to impose a duty of care in light of applicable policy considerations” as set out in *Caparo Industries*. The Supreme Court of Canada has delved into the meaning of “policy considerations” and ruled this considerations “are not concerned with the relationship between the parties, but with the effect that the recognition of a duty of care will have on other legal obligations, the legal system and society more generally.”⁴¹ Linden & Feldhusen note that as a matter of legal policy, the courts must decide whether to apply tort law supervision to particular activities and institutions or whether they should be exempted from that control.⁴² The particular policy considerations will be evaluated depending on the facts of a specific case. A court may therefore decline to recognize a duty of care where such a duty will result in indeterminate liability that may likely overload the

³⁸ *Ibid* para 34.

³⁹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.

⁴⁰ *Ibid* para 24.

⁴¹ *Ibid*, para 37.

⁴² Linden & Feldhusen, “Canadian Tort Law,” *supra* note 14 at 285.

legal system, or an economic sector.⁴³ Perhaps with foregoing reasons in mind, Australian scholar Mark Shephard notes that at times these policy restrictions may mean that certain kinds of harm, or harm caused in a certain way, or by certain categories of people, will not trigger liability, even if caused negligently.⁴⁴

The illustrations discussed above suggest that the common law duty of care is owed to people, but not directly for protection of the environment. It is also notable that the duty of care at common law does not restrain a landowner from degradation of their own land unless the harm accrues to another person, or affects the property rights of another person.⁴⁵ Apart from the contested possibility of deterrence, the common law duty of care often applies after the fact, and by the time a matter is brought to court, the environmental harm will have occurred. Further, the concern of the court is to enforce contemporary or ‘ordinary’ standards, not to enforce higher standards upon society,⁴⁶ as would be necessary to reverse the widespread environmental degradation in a country such as Kenya. Since this common law duty of care is subject to significant judicial interpretation, the circumstance in which the duty is intended to arise may be imprecise, and vary from time to time. The utility of the

⁴³ See for instance, *Hercules Management Ltd v Ernst & Young* [1997] 2 S.C.R. 165, para 31, where the Supreme Court of Canada declined to recognize a duty of care on auditors where shareholders of one company had relied on financial reports to make decisions on other investments and suffered losses. The court said that finding a duty of care would result in ‘tort liability applying to an indeterminate class of persons, for an indeterminate amount’ as many other shareholders could bring suits on auditors for similar reasons.

⁴⁴ Mark Shephard, *Some Legal and Social Expectations for a Farmer’s Duty of Care* (Armidale: Australian Centre for Agriculture and the law – Cooperative Research Centre for Irrigation Futures, 2010) at 5. [Shephard, —Egal and Social Expectations for a farmer’s duty of care”]

⁴⁵ Young, —Duty of care: instrument for increasing effectiveness,” *supra* note 26 at 7.

⁴⁶ Shephard, —Egal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 4.

common law duty of care as a legal tool to guide behaviour change toward integration of environmental protection with socio-economic activities is therefore significantly vitiated.

In looking for a more conceptually coherent alternative, with respect to preventing human conduct that is destructive to the environment, Gerry Bates suggests that a duty of care incorporated in a statute can be more precise about the circumstances in which the legal duty/responsibility will arise⁴⁷ for protection of the environment. However, he notes that because courts are heavily influenced by the common law, any introduction of a duty of care into a statute will need to define (as clearly as possible) the circumstances in which it is intended to arise, the standard of care, and the available remedies.⁴⁸ In order to obtain a clear baseline on the distinction between the common law, and statutory duty of care, we now examine the statutory duty of care concept. We will highlight some of the current legal manifestations of a statutory duty of care, in order to effectively review its utility and applicability to changing human behaviour such that environmental protection is integrated into land use decision making.

3 THE STATUTORY DUTY OF CARE

A statutory duty of care is one that is framed and set out by legislation. Legal systems often enact legislation setting out various forms of tort liability, such as the specific liability in negligence arising from breach of occupational safety statutory provisions.⁴⁹ The instances of duty of care arising from statutory provisions are therefore evident from many diverse

⁴⁷ Bates, "Duty of care for protection of biodiversity on land," *supra* note 25 at 20.

⁴⁸ *Ibid.*

⁴⁹ See for instance the Kenyan *Occupational Health and Safety Act*, Act No. 15 of 2007 which is reviewed later in this section.

fields of law, including environmental law. The duty of care in statutory provisions is manifested through various legal forms, which are important to review, because the specificity of the breaches that result in negligence, as well as the civil liability will depend on the content and intention of the legislation. We examine two possible approaches -

3.1 GENERAL STATUTORY RESPONSIBILITIES

One manifestation is where a statute sets out responsibilities for different parties but the legislation is silent on the civil consequence of failure to perform these statutory responsibilities. The statute in such an instance does not also apply the word ‘duty.’⁴ The complex question then arises on whether the statutory responsibilities give rise to a legal duty that is independently actionable in court to recover any losses arising from a breach, in addition to penalties set out in the legislation.

The Supreme Court of Canada has adjudicated over such an issue in *R. In Right of Canada v Saskatchewan Wheat Pool*,⁵⁰ a case that holds persuasive value to this discussion. The respondent had delivered infested wheat to the Canadian Wheat Board in violation of the *Canada Grain Act*.⁵¹ Section 86(c) of the statute prohibited the delivery of infested grain out of grain elevators.⁵² However the statute did not address the question of any private cause of action that would arise if there was a breach of any of the statutory provisions. In such a case the intention of the legislature on when civil liability should arise is unclear. The Wheat Board contended that the duty imposed by the Act was absolute, and that the Wheat Pool

⁵⁰ *R. In Right of Canada v Saskatchewan Wheat Pool* [1983] 1 S.C.R. 205. [Saskatchewan Wheat Pool judgment]

⁵¹ *Grain Act* RSC 1970-71-72 c. 7.

⁵² Saskatchewan Wheat Pool judgment, *supra* note 50 at 209.

was liable even in the absence of fault, so long as it could be shown that the provisions of statute have not been complied with.⁵³ The trial judge agreed with the Wheat Board, and held that section 86(c) pointed to a litigable duty on the defendant, enforceable by persons injured or aggrieved by a breach of that duty.⁵⁴

Dickson J., for the Supreme Court, disagreed with this contention holding that 'one of the main reasons for shifting a loss to a defendant is that he has been at fault' but there seems little defensible policy for holding a defendant who breached a statutory duty without intending, to be negligent.⁵⁵ The court ruled that in circumstances where the civil liability of statutory breach is not set out in the legislation, 'the civil consequences of the statutory breach should be subsumed in the law of negligence.'⁵⁶ Similarly, proof of statutory breach, which has caused damage, may be evidence of negligence.⁵⁷

The judicial holding suggests that setting out statutory responsibilities without indicating the actual civil liability leaves the scope and nature of remedies subject to judicial interpretation, because the breach is then absorbed into, and analysed as part of the general law of negligence. Such an approach therefore leaves statutory provisions subject to the same restrictions of policy considerations, similar to the common law duty of care, which may restrict circumstances under which such statutory obligations may be applied to protect the environment.

⁵³ *Ibid*, at 225.

⁵⁴ *Ibid* at 209.

⁵⁵ *Ibid* at 223.

⁵⁶ *Ibid* at 227.

⁵⁷ *Ibid* at 227.

3.2 EXPLICIT STATUTORY DUTY OF CARE

In contrast, other statutes set out an explicit manifestation of the legislative intention to create a statutory duty of care that sets out higher standards of conduct for the duty holder. Such situations where a duty of care is clearly apparent from the statutory provisions can possibly arise when legislation is enacted as an amendment to some aspect of the common law duty of care. Illustrative, the 1963 Kenyan *Occupiers Liability Act*⁵⁸ states that ‘the rules enacted ... shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.’⁵⁹ The statute also sets out the standard of care that is applied to determine if the modified duty of care has been breached.⁶⁰

The more recent 2007 *Occupational Health and Safety Act*⁶¹ sets out the statutory duty of care more explicitly. Section 6(1) sets out a general responsibility that ‘every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.’⁶² In more specific terms, the statute further provides that ‘without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes...’

- the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;
- arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

⁵⁸ *Occupiers Liability Act*, Cap 34 Laws of Kenya, 1963.

⁵⁹ Section 2.

⁶⁰ For instance, section 3 provides that in exercise of an ordinary duty of care to visitors, an occupier an occupier must be prepared for children to be less careful than adults.

⁶¹ *Occupational Health and Safety Act*, Act No. 15 of 2007.

⁶² Section 6(1).

- the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed⁶³

In addition to the duties of care, the *Occupational Health and Safety Act* also sets out a standard of conduct that an occupier should adhere to, in order to avoid being in breach of the duty. Therefore an occupier should prepare ... a written statement of his general policy with respect to the safety and health at work of his employees and the organisation and arrangements ... in force for carrying out that policy.⁶⁴ The occupier should also bring the statement and any revision of it to the notice of all of his employees.⁶⁵ In order to provide guidance on the legal and social responsibilities expected from an employer, the legislation requires the Director of Occupational Safety to prepare an approved code of practice⁶⁶ to provide practical guidance⁶⁶ on how to comply with the duties set out by the law.⁶⁶ While the law is silent, it appears the code of practice is voluntary because failure to observe any provision of an approved code of practice shall not render [a] person liable to any civil or criminal proceedings...⁶⁷

This approach by the Kenyan *Occupational Health and Safety Act* offers a more specific idea on the nature of a statutory duty of care, and the existence of both civil and criminal liability for breach. The specific duties of occupiers are clear, and the code of practice provides guidance on the boundary of responsibilities and expectations (standard of care) that the duty

⁶³ This list is merely indicative of the specific duties set out in section 6(2) of the *Occupational Health and Safety Act*.

⁶⁴ Section 7.

⁶⁵ *Ibid.*

⁶⁶ Section 4.

⁶⁷ Section 5.

holders should exercise. This code of practice would be useful in setting out affirmative environmental management responsibilities, especially due to the specificity. One challenge appears because the duties set out in section 6 of the legislation appear almost absolute, and do not leave room for what is reasonable. Presumably however, the intention of the legislature was to cast a higher standard for occupational safety because of the seriousness of industrial accidents and the catastrophic injuries that can arise.

Nonetheless, the approach whereby statutory provisions explicitly set out the legal duty of care, and provide indications on the expected reasonable conduct to fulfil the duty of care are consistent with the search for clear proactive responsibilities to guide adoption of sustainable land use practices by land owners. In this sense, a duty holder such as a land owner or occupier has a clear knowledge of the scope of the duty, the nature of responsibilities arising from the duty, and a code of practice that sets out the expectations of conduct and actions necessary to fulfil the duty. There is hardly any need for judicial interpretation to determine whether such duty should arise in certain instances because the law would be clear about the duty holders. Equally, when there is an explicit and clear expression of a standard of care such as through the code of practice, the need for judicial interpretation is diminished or possibly eliminated. In the next section, we explore whether this legal approach involving an explicit statutory duty of care is suitable for modelling specific responsibilities for environmental conservation and land stewardship.

4 THE STATUTORY DUTY OF CARE FOR ENVIRONMENTAL PROTECTION

In this section we argue for the idea of a statutory duty of care for environmental protection, first applicable generally to every citizen of Kenya, and secondly applicable in specific terms

to every person or entity that holds and exercises land tenure rights. This is especially important with regard to the millions of small-scale farmers and forest users in Kenya, in order to facilitate integrating environmental protection with their socio-economic uses of land or forests. The analysis therefore adopts the statutory approach whereby the responsibilities are explicitly set out as a legal duty. We first review literature on the basis and function of an environmental duty of care, and then undertake a brief comparative analysis to demonstrate the salient features of the environmental duty of care from other jurisdictions. Thereafter, we review the environmental duty that is set out by *EMCA*, reiterating that this duty is intended to assist realization of the statutory environmental right. We argue that the content of the duty is silent and ambiguous on possible mechanisms to implement it as practical guide for individuals whose socio-economic activities impact on the environment.

The analysis then considers a model environmental duty of care for Kenya. We propose a general environmental duty of care that would be set out in the framework environmental law, in order to give effect to the constitutional duty. The *EMCA*, as a basic structural law is further responsible for horizontal integration by setting out the overarching environmental and sustainability norms. Thus in order to vertically integrate the sectoral agricultural and forest land use laws and policies, we propose a specific statutory duty on land owners or occupiers requiring them to take measures to remedy past land degradation and prevent foreseeable degradation that adversely affects the sustainability of their land, or the land of another land owner. We subsequently restrict the scope of analysis to this duty of care on land owners.

4.1 REVIEWING THE BASIS AND FUNCTION OF THE ENVIRONMENTAL DUTY OF CARE

The Australian Industry Commission, in a 1998 report, proposed a statutory environmental duty of care, as a new approach to regulation.⁶⁸ According to the report, a statutory duty of care would require everyone who influences the management of the risks to the environment to take all reasonable and practical steps to prevent harm to the environment that could have been reasonably foreseen.⁶⁹ In this sense, the scope of such a duty would be broad and would not be confined to landholders.⁶⁹ It would also cover those who manage any other natural resources — such as water and vegetation — and others who indirectly influence the risks of environmental harm to that resource.⁷⁰ Existing literature has advanced certain justifications to support the utility of a statutory duty of care as a tool to influence the behaviour of people to embrace sustainability practices –

- i). The duty of care shifts responsibilities and onus of taking action to protect and enhance the environment or land to the duty holders.⁷¹ This suggests that while duty holders may have to rely on guidance provided as to the actual practical meaning of reasonable measures, the duty of care provides protection from prescriptive regulations,⁷² and may stimulate innovation for instance by farmers on methods to safeguard sustainability.

⁶⁸ Industry Commission, *A Full Repairing Lease: Inquiry into Ecologically Sustainable Land Management* (Canberra: Australian Industry Commission Report No. 60, 1998) at 133. [Industry Commission, —Full Repairing Lease”]

⁶⁹ *Ibid* at 134.

⁷⁰ *Ibid* at 134.

⁷¹ Young, —Duty of care: instrument for increasing effectiveness,” *supra* note 26 at 7.

⁷² Shephard, —Egal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 19.

ii). The statutory duties provide an effective way to define the stewardship responsibilities that limit the exploitative freedom implicit in property rights.⁷³ Stewardship helps to form norms of conservation practices, and requires positive management actions on the part of a landholder, not merely the avoidance of actions that could cause harm.⁷⁴ Such positive obligations would be set out in a code of practice for a particular locality⁷⁵ to specify what amounts to ‘reasonable measures.’

iii). The notion of reasonableness that is associated with an environmental duty of care means any statutory duty is much easier to enforce if the definition has the support of the community.⁷⁶ This suggests an importance for public participation, consultations and exchange of information and knowledge as well as planning for local management plans, or codes of practice that are necessary for implementation of the duty of care.

Scholar Mark Shephard further notes that inclusion of the duty of care into statutes dealing with natural resources like land suggests redefining the responsibilities of land owners, such as farmers.⁷⁷ He urges that in this sense, a statutory duty of care seeks to import concepts of ethical responsibility or ‘virtue’ into farmers’ responsibilities, as evident from the stewardship language in the legislation.⁷⁸ The land owners, for instance, have to exercise their duty of care constructively and practice stewardship to prevent environmental harm or

⁷³ *Ibid*, at 18.

⁷⁴ *Ibid*.

⁷⁵ Young, —Duty of care: instrument for increasing effectiveness,” *supra* note 26 at 7.

⁷⁶ *Ibid*.

⁷⁷ Shephard, —Egal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 16.

⁷⁸ *Ibid*.

degradation before the harm is done, or gets worse. A key feature of influencing the effectiveness of this duty of care is realizing that sustainability involves setting out the appropriate principles and standard of care that will guide the behaviours of landowners⁷⁹ or the general public on how to integrate environmental protection into their regular decisions.

Before delving into concerns about the nature of the standard of care, it is important to review the legal experience with environmental duties of care from comparative jurisdictions. This will provide useful lessons for proposing a similar undertaking that will facilitate integration of environmental protection with socio-economic activities for realization of sustainable land use in Kenya.

4.2 COMPARATIVE ANALYSIS

Several jurisdictions have applied statutory duties of care with the objective of reconciling environmental protection with socio-economic activities. Some early illustrations of statutory environmental duties of care can be traced to the *Environmental Protection Act* of England (1990)⁸⁰ and several Australian state jurisdictions such as: South Australia (1993),⁸¹ Victoria (1994);⁸² or Queensland (1994).⁸³ Other examples include the *National*

⁷⁹ Mark Shephard & Paul Martin, "The Multiple Meanings and Practical Problems with Making a Duty of Care Work for Stewardship in Agriculture" (2009) *MqJICEL* 6 191-215 at 214.

⁸⁰ *Environmental Protection Act* Laws, Chapter 43, Online: http://www.opsi.gov.uk/acts/acts1990/ukpga_19900043_en_1.

⁸¹ *Environmental Protection Act 1993*, Online: http://www.austlii.edu.au/au/legis/sa/consol_act/epa1993284/

⁸² *Catchment and Land Protection Act 1994*, online: http://www.austlii.edu.au/au/legis/vic/consol_act/calpa1994267/s20.html

⁸³ *Environmental Protection Act 1994*, online: http://www.austlii.edu.au/au/legis/qld/consol_act/epa1994295/

Environmental Management Act (NEMA) of South Africa (1998),⁸⁴ and the *Ontario Water Resources Act*, Canada. We now set out illustrations from some of these jurisdictions, to demonstrate the nature of the duty, and its manifestation. The illustrations from Australia are set out in tabular form for adequate comparison, as they are from the same national jurisdiction:

| Statute | Nature of duty | Manifestation of duty |
|---|-------------------------------|---|
| Environmental Protection Act 1993 (South Australia) <i>section 25</i> | General environmental duty | A person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm. |
| River Murray Act, 2003 (South Australia) <i>section 23</i> | General duty of care | A person must take all reasonable measures to prevent or minimise any harm to the River Murray through his or her activities. |
| Catchment and Land Protection Act 1994 (Victoria) <i>section 20</i> | General duties to land owners | The Act requires a land owner, in relation to their land, to take reasonable steps to – <ul style="list-style-type: none"> i). avoid causing or contributing to land degradation which causes or may cause damage to land of another land owner ii). conserve soil iii). protect water resources iv). eradicate regionally prohibited weeds; and v). prevent the growth and spread of regionally controlled weeds vi). prevent the spread of, and as far as possible eradicate, established pest animals. |
| Environmental Protection Act 1994 (Queensland) <i>section 319</i> | General environmental duty | A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm |

Section 34 of the 1990 *Environmental Protection Act* of the United Kingdom imposes a duty of care, restricted to the handling of wastes. It states in part that it shall be the duty of any person who imports, produces, carries, keeps, treats or... has control of such waste, to take all

⁸⁴ *National Environmental Management Act*, South Africa, Act 107 of 1998, (as last amended by National Environmental Laws Amendment Act 14 of 2009) *reprinted in* Van der Linde, Morne & Feris,, Loretta (eds) *Compendium of South African Environmental Legislation* (Pretoria: Pretoria University Press, 2010) at 32-87. [–NEMA, South Africa”]

such measures applicable to him in that capacity as are reasonable in the circumstances.’ The intended outcomes include preventing the waste from escaping from control of the primary duty holder, to ensure it is only transferred to authorized persons, and to ensure any authorized recipients are fully informed on the nature of the waste to prevent it from escaping. The Ontario *Water Resources Act*⁸⁵ of Canada imposes a duty on every director or officer of a corporation, to take all reasonable care to prevent the corporation from discharging or causing or permitting the discharge of any material, in contravention of the law, or failing to report such discharge.⁸⁶

The South African *NEMA* legislation also creates a general environmental duty such that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or ... minimise and rectify such pollution or degradation of the environment.⁸⁷ (Emphasis added) The duty to take reasonable measures is imposed on a land owner, owner of premises, a person in control of land or premises or a person who has a right to use the land or premises on which the pollution or degradation occurred.⁸⁸

It is notable from these statutes that the duty of care is very specific about the circumstances in which it arises, therefore removing the possibility that judicial interpretation of policy

⁸⁵ *Ontario Water Resources Act*, R.S.O. 1990, Chapter O.40, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o40_e.htm#BK189

⁸⁶ Section 116.

⁸⁷ Section 28(1).

⁸⁸ Section 28(2).

considerations' will negate existence of a duty to protect the environment in certain circumstances. The nature of the duty holder is diverse, depending on the objective of the duty. Therefore, general environmental duties of care manifest a general responsibility on a wide range of persons whose actions may impact the environment. The *Catchment and Land Protection Act* is rather specific, creating a duty on land owners, and *Ontario Water Resources Act* creates the duty with respect to directors of companies that may discharge waste into water sources.

It is important to highlight a key distinction between the statutes from Australia, England and Canada –which are developed countries, and South Africa – which is a developing country. The first three statutes address environmental harm, pollution or degradation that is occurring in the present time, or which is likely to occur in the future. In the South African *NEMA* legislation the duty of care includes pollution or degradation that has occurred in the past, evident in use of the phrase has caused.⁸⁹ It is however unclear how far in the past (in terms of existing land degradation) the duty would be applicable to require remedial measures. Nonetheless, South Africa, similar to Kenya, is facing significant land degradation and increased human poverty (explained in chapter 2)⁸⁹ and therefore the role of the legal duty of care in remedying environmental degradation from the past is important as a mechanism to rehabilitate the environmental quality of land. The duty of care, in these circumstances, should therefore aim to prevent but also rehabilitate pre-existing environmental degradation.

⁸⁹ See, chapter 2, section 4.

All the highlighted statutes commonly require the diverse duty holders to take ‘reasonable’ measures to prevent harm, suggesting two things. First that the duty is ‘preventive’ thereby intended to change the behaviour of people to ensure the environmental harm does not occur. This legal approach is unlike the common law duty of care that is often applied after private interests have been injured. Secondly, the reference to ‘reasonable measures’ infers the existence of a certain standard of conduct that is acceptable to the society. This aspect could be problematic in the event that the reasonable measures are not specified, as it may open the duty of care to judicial interpretation and possibly result in varying interpretations that could vitiate the utility of the duty in securing human conduct that upholds values and practices of sustainability. The idea of a ‘code of practice’ provided by the Kenyan *Occupational Health and Safety Act* is a potential approach to set out guidance on the legal and social expectations of what amounts to reasonable conduct.

4.3 REVISITING THE LEGAL AMBIGUITY OF THE ENVIRONMENTAL DUTY IN THE *EMCA*

We have, in various parts of this research, highlighted that the Kenyan framework environmental law, *EMCA*, sets out an environmental duty. We have further highlighted that while the duty is on every person to ‘safeguard and enhance’ the environment, the *EMCA* is unclear about the circumstances in which the environmental duty of care is applicable. It is also unclear regarding the specific nature of the reasonable standard of care or conduct that would ensure the duty is not breached. The *EMCA* based environmental duty, is part of the statutory right to a clean environment,⁹⁰ which is enforceable through a suit in the High

⁹⁰ Section 3(1).

Court,⁹¹ which perhaps provides the only legal clue on how the duty maybe applied. When a plaintiff files such a suit claiming violation of their right, that suit conversely suggests that the defendant has not fulfilled the duty to safeguard the environment, thereby violating the plaintiff's right. In this context the plaintiff alleges that their right to clean environment _has been or is likely to be contravened in relation to him.'⁹² We illustrate in the next paragraph.

In *Peter Kinuthia Mwaniki & 2 Others v. Peter Njuguna Gicheha & 3 Others*,⁹³ the defendants had built a slaughterhouse on their (defendants) land. The plaintiffs claimed violation of their right to a clean environment contending that this slaughterhouse would affect the livelihoods of the local community negatively when it started operations. The negative effect would arise because the blood from the slaughter house would flow out and mix with the sand and mud, and spill onto their homes and farms. The High Court of Kenya found for the plaintiffs noting there was a _likelihood of harm,'⁹⁴ a finding that *EMCA* requires a court to establish if it determines that the actions in question are _likely to contravene' the rights of the plaintiff.

The foregoing analysis and judgment suggests that the duty to safeguard and enhance the environment, as set out by *EMCA* is not self-executing as there needs to be a court finding. However, the duty when judicially applied clearly works to protect the environment, to the extent that a clean environment is a right vested in a plaintiff. Equally, unlike the common

⁹¹ Section 3(3).

⁹² *Ibid*.

⁹³ *Peter Kinuthia Mwaniki & 2 Others v. Peter Njuguna Gicheha & 3 Others*, High Court Civil Case No. 313 of 2000 [2006] eKLR, online: www.kenyalaw.org

⁹⁴ *Ibid* at 9.

law duty of care, this statutory duty applies before the fact such that the defendants in *Peter Kinuthia* were prevented from operating their slaughterhouse before the environment was harmed. It is also notable that the court referred to ‘likelihood of harm’ just as *EMCA* refers to ‘likely to contravene’ suggesting a requirement for the prevented harm to have been ‘foreseeable.’ In further contrast, the defendant here (unlike at common law) did not breach any private (property) rights of the plaintiff, but rather the plaintiff brought suit to purely enforce a statutory right to a clean environment.

The *EMCA* duty to safeguard and protect the environment is however still insufficient because to a certain extent, it requires judicial application and interpretation to give it effect. While *EMCA* is a basic structural law that is intended to set the sustainability and integration norms in the Kenyan legal system, this inadequacy implies two things. On the one hand, while this duty could be applied through land tenure legislation, research in chapter 3 revealed absence of an explicit legal obligation on holders of land tenure rights or their assignees to exercise a responsibility to integrate environment protection with their socio-economic activities.⁹⁵ This has left millions of small scale farmers without positive action responsibilities and guidance to integrate environmental protection with their socio-economic activities, and a prescriptive agriculture regulatory framework that is proven to be ineffective. Further, with respect to forestry tenure, the *Forest Act* refers to the objective of sustainable forest management, but the management plans with respect to community forestry are insufficient in setting out the objective of sustainability and safeguarding the

⁹⁵ See discussion in chapter 3, section 4.3.

environmental quality of forests.⁹⁶ Further, any serious effort to implement large scale community forestry for purposes such as indigenous forest rehabilitation will require unequivocal expression of legal obligation on forest communities to practice conservation.

4.4 TOWARDS AN ENVIRONMENTAL AND SUSTAINABLE LAND USE DUTY OF CARE IN KENYA

The objective of the foregoing analysis has been to review and highlight the normative and legal character of environmental duties of care, and compare with the current legal framework in Kenya. To a general degree, the statutory duties aim to influence how individuals behave such that people, in their regular socio-economic activities and decision making, take reasonable steps to prevent environmental harm or take remedial measures. More specific duties of care have varied the legal boundaries of responsibilities for land owners by requiring these land owners to care for the environmental quality of the land, while they carry on with their regular socio-economic activities. This finding supports a conclusion that it is conceptually and legally viable to frame a statutory duty of care that will assist in addressing the high levels of unsustainable land use practices, and prevalent land degradation in Kenya.

A consequential effect of such a duty would be enhancing the socio-economic productivity of the land, and provide a means to address the high levels of rural poverty and food insecurity. Such a duty of care will therefore require land owners or occupiers to take reasonable measures that will rehabilitate already degraded land, or prevent any foreseeable or likely harm or degradation that adversely affects, or may affect the sustainability of land.

⁹⁶ See discussion in chapter 4, section 5.2.3

It is important to recall that the 2010 Constitution of Kenya, as highlighted variously in this research,⁹⁷ provides a basic right to a healthy environment. One of the ‘legislative and other measures’⁹⁸ to give effect to this basic right, is creation of a mandatory duty on every person to cooperate with others, and with the Kenyan state to ‘conserve and protect the environment, and ensure ecologically sustainable development and use of natural resources.’⁴

The constitutional provisions set out the essential criteria of the duty of care on the Kenyan people as including –

- The cooperation amongst citizens, and between citizens and the state
- The responsibility to conserve and protect the environment
- The responsibility to uphold ecologically sustainable use of natural resources
- The responsibility to ensure ecologically sustainable development

This duty, whose objectives highlight a sense of proactive responsibility to safeguard sustainability, conceptually plays a key role in fulfilling the basic right to a clean environment. This concurs with the ruling by Claassen J in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*⁹⁹ that the environmental right enshrined in a constitution is at par with other such basic rights, like freedom to trade or right to property and none should be considered in priority to the other. Comparatively, the constitutional duty in Kenya, aims to ensure ecologically sustainable development and use of natural resources, thereby inferring that a legal responsibility by individuals and

⁹⁷ See discussion in chapter 2, section 5.3.2.

⁹⁸ See discussion in chapter 2, section 5.3.2.3.

⁹⁹ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W)., see arguments and discussion in chapter 2, section 5.2.2.

institutions to integrate environmental protection, and socio-economic activities is central to its application.

It is important to point to other mandatory constitutional obligations that require the Kenyan state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources.¹⁰⁰ This suggests that, in order to encourage people to behave sustainably as required by the basic law of Kenya, it is necessary to enact a broad statutory duty of care to safeguard sustainability in the use and management of the environment, land and natural resources. In the hierarchy of laws, such a duty of care to safeguard sustainability would be anchored in the framework environmental law, *EMCA*, which, as a basic structural law should ideally influence the nature and character of environmental management norms.¹⁰¹ More specific duties of care, to provide guidance on sustainable use of land and other natural resources, can then be framed through sectoral legislation, as manifestation of vertical integration with the framework environmental law.

4.4.1 BASIC INGREDIENTS OF A STATUTORY ENVIRONMENTAL DUTY OF CARE

In general terms, a statutory duty of care to the environment or land should be clear and unequivocal, and its contents well structured. This clarity is intended to ensure that duty holders are versed with the duties, and the reasonable measures required, so that it is possible to adhere to the standards. Applying lessons from the comparative analysis of statutory duties from other jurisdictions, we set out two principal elements of the duty of care. The

¹⁰⁰ Article 69(1)(a).

¹⁰¹ See arguments and discussion about 'basic structural laws' in chapter 2, section 5.1.

ideal standard of care, representing the ‘reasonable measures’ is examined later in the chapter.

4.4.1.1 Duty holder

A general environmental duty of care should specify that the duty is applicable to every person whose activities affect or impact the environment and its components. A duty of care with respect to sustainable use and management of land should specify that it is applicable to holders of land tenure rights, or assignees (land owners or occupiers). In the context of Kenya, and the complex interface between formal and indigenous tenure rights over agricultural land, or public and community tenure rights in forestry, a definition of land owners should include people holding limited or preferential tenure rights. Therefore, the duty holders in this category should include occupiers, tenants, assignees, or holders of customary interests in land. The terms could be adjusted accordingly to reflect any lawful assignees who could be exercising beneficial use of land at any particular time.

4.4.1.2 Object of the duty of care

The overall objective of the statutory duty of care is to safeguard environmental quality, and prevent degradation. With these objects in mind, author Gerry Bates suggests that, from a legal perspective, this can be achieved in two ways:¹⁰²

- i). to make the duty of care owed to individuals

The duty of care in this category is established to protect and safeguard the environmental interests of land that is owned by other people. Section 20 of the *Catchment and Land*

¹⁰² Bates, “Duty of care for protection of biodiversity on land,” *supra* note 25 at 23.

Protection Act 1994 of Victoria (Australia) is illustrative as it specifies that landholders must take all reasonable steps to ... avoid causing or contributing to land degradation that causes or may cause damage to the land of another landholder...¹⁰³ (Emphasis added) Bates contends that a fundamental problem of defining the duty as one owed to individuals is that the duty focuses on the potential financial, rather than environmental impacts of the breach and thus does little to foster the concept that a duty may be owed to the environment *per se*.¹⁰³ This is a potential problem because having the duty owed to other land owners also creates *locus standi* for civil actions to recover damages for any environmental harm caused to the other land owners property.

Arguments by Eric Freyfogle however suggest that such a duty owed to neighbouring land owners will enhance a much needed sense of community and collective environmental quality. He notes that while distinct property rights and demarcation usually lead to separate land management regimes, the natural ecosystem that regulates environmental quality does not recognize the discrete land parcels.¹⁰⁴ He also argues that private property rights often result in uncoordinated land management by people without a sense of an ecological community,¹⁰⁵ such as that anticipated by Aldo Leopold's land ethic. Freyfogle therefore suggests that private ownership of land needs governing norms that draw upon a shared vision of land health, with land owners synchronizing their work with the work of others in

¹⁰³ *Ibid*, at 24.

¹⁰⁴ Eric Freyfogle, "Ethics, community and private land", (1996) 23 *Ecological Law Quarterly* 631-661 at 649. [Freyfogle, "Ethics, Community and Private land"]

¹⁰⁵ *Ibid*.

the community to ensure it collectively promotes land integrity.¹⁰⁶ In consonance with the arguments by James Karp set out earlier in this chapter,¹⁰⁷ Freyfogle concludes that land owners “...need to sense that they are part of a community of responsible neighbours, each guided by a similar vision of sustainable life, each knowing that ownership means duty, that duty means care, and that care, in the end is our sole source of hope.”¹⁰⁸ The constitution of Kenya definition of the duty as including an obligation on people to cooperate with each other, and with the state¹⁰⁹ implicitly endorses this rationale.

ii). to make the duty of care owed to the environment

A statutory duty of care owed to the environment is consistent with the land ethic proposed by Aldo Leopold, and especially its key component, the ecological conscience.¹¹⁰ In recapitulation, this ecological conscience infers a human responsibility to safeguard the vitality and environmental quality of land, even while utilizing the land as a resource. Such a duty of care will create a legal responsibility for a landowner to safeguard the environmental quality of their own land, which the common law duty of care is unable to safeguard. It manifests abandonment of anthropocentric approaches to environmental management, and

¹⁰⁶ *Ibid.*

¹⁰⁷ See discussion in section 1 of this chapter where Karp is cited as arguing that there is a “community-based ethic inherent in humans, which individual rights though important, must submit to the rights of the community and its future.”

¹⁰⁸ Freyfogle, “Ethics, Community and Private land,” *supra* note 104 at 649.

¹⁰⁹ Constitution of Kenya, 2010, see generally, article 69(2).

¹¹⁰ Leopold, “A Sand County Almanac,” *supra* note 5 at 217.

reverses the feeling that, in an anthropocentric world, human beings have responsibilities *regarding* the natural world, but no direct responsibilities *to* the natural world.¹¹¹

Earlier in chapters 2 and 3 this research, we established that there is a high level of land degradation in Kenya, a high level of rural-based small scale farming, and a higher socio-economic dependence on fast declining agricultural production. This extends a conceptual justification that a statutory environmental duty of care should aim to protect both the interests of other land owners, and enhance the sustainability responsibilities of land owners over their own parcels. As highlighted earlier, a duty that aims to prevent degradation of land belonging to other land owners is also important in terms of the constitutional duty that requires people to cooperate with each other towards ecologically sustainable use of natural resources, and development.

A conceptual and legal fusing of these two objectives will allow a legal duty of care to protect the sustainability of the land holders land, and require them, as a duty holder to prevent degradation that adversely affects the sustainability of neighbouring land. We now attempt to frame a basic statutory duty of care, in line with the 2010 Constitution, that should offer legal and ethical guidance for people to behave constitutionally and integrate environmental protection with their regular socio-economic activities.

4.4.2 A MODEL STATUTORY ENVIRONMENTAL DUTY OF CARE

We propose a model statutory environmental duty of care in two categories. The first category is a general duty of care to prevent environmental harm. The second category

¹¹¹ Joseph Des Jardins, *Environmental Ethics: An Introduction to Environmental Philosophy* (California: Wadsworth Publishing, 1997) at 9. [Des Jardins, –Environmental Ethics”]

represents the duty of care on landowners, occupiers or assignees to assume positive responsibilities that enhance sustainability of the land.

4.4.2.1 General environmental duty of care

A general environmental duty of care underpins the right to a clean environment that is guaranteed as a basic right by the constitution and as a statutory right by the framework environmental law, *EMCA*. This environmental duty of care will strengthen the conceptual basis for the statutory responsibilities of a broad range of persons, whose actions impact the environment, to integrate environmental protection with their socio-economic or cultural activities. The environmental duty of care is proposed as follows:

In giving effect to the right to a clean and healthy environmental right -

–Every person involved in activities impacting the environment must take all reasonable and practical measures to protect and enhance the environment where environmental harm has occurred, is occurring, is likely to occur, or is recurring; and every such person must take reasonable and practical remedial measures where such environmental harm has occurred.”

The legal meaning of the term ‘environmental harm’ is central to application of the duty and defining the boundaries within which the duty will be operational. Environmental harm should therefore be defined clearly, but the definition can be broad to include any activities that adversely affect the quality of the environment, or degrade any components of the environment including air, water, land, biodiversity and other natural resources. The Australian Industry Commission that proposed a statutory environmental duty of care borrowed a definition from the 1994 *Queensland Environmental Protection Act*.¹¹² This statute defines environmental harm as ‘an adverse effect, or potential adverse effect (whether

¹¹² Section 14.

temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value and includes environmental nuisance.¹¹³ It then defines environmental value in terms of ‘a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety,’ or an environmental quality that is declared by law or policy to be an environmental value.¹¹⁴ The legal meaning and implication of environmental harm can therefore signify those effects that are adverse or deleterious to the ‘environment,’ or the components of the environment depending on how ‘environment’ is defined by law.¹¹⁵ We now propose a model duty of care on land holders, and limit the scope of our subsequent analysis to this duty of care.

4.4.2.2 Duty of care on land owners to practice ecologically sustainable land use

This category of the statutory environmental duty of care is more specific, in line with the focus of this research, and in recognition of the pivotal role played by tenure rights in decision making over land use choices. Property or tenure rights (whether complete, limited

¹¹³ *Ibid*; See also, Industry Commission, ‘Full Repairing Lease,’ *supra* note 68 at 139.

¹¹⁴ *Ibid*; See also, section 9, *Queensland Environmental Protection Act, 1994*.

¹¹⁵ The legal definition of environment often determines whether the approach taken by a statute or treaty is integrative or anthropocentric. See for instance, the Kenyan *Environmental Management and Coordination Act, (EMCA) 1999*, section 2 defines environment to include ‘the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.’

In contrast the 2006 *East African Protocol on Environment and Natural Resources Management* (article 1) terms environment to mean ‘...complex set of physical, geographic, biological, social, cultural and political conditions that surround an individual or organism and that ultimately determines its form and nature of its survival.’ In noting that ‘...factors comprising the environment ultimately determine the form and nature of an individual,’ the Protocol highlights that human survival, livelihood, and economic and development pursuits of any country depend on how they manage environmental health and integrity, thereby highlighting the important role of balancing interests in decision making. Kenyan legal scholar Charles Okidi suggests the *EMCA* definition is overwhelmingly anthropocentric, looking at the environment from a human utility perspective rather than from the actual ecosystem role the environment plays. See, Charles Okidi, ‘Concept, Function and Structure of Environmental Law’ in Charles Okidi, Patricia Kameri-Mbote and Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008) at 4.

or preferential) manifest the legal decision making ability and power of land owners or occupiers. This decision making authority, without a responsibility to integrate environmental protection with socio-economic or cultural activities, does not support or facilitate sustainability. We now advance a duty of care proposal that will introduce a legal responsibility to practice sustainable land use as a duty that is contingent on the quantum of rights conferred by land or forest tenure.

In chapter 3, we highlighted that the *2009 Sessional Paper on National Land Policy*¹¹⁶ notes that sustainable land use practices are key to providing food security.¹¹⁷ The policy suggests that law and policy should address problems such as land quality deterioration that impact sustainable agricultural production. The principles of national land policy set out by the 2010 Constitution (in similar terms as the *National Land Policy*)¹¹⁸ urge there should be sustainable and productive management of land resources. While all these policy proposals and land principles point towards integration of environmental protection with socio-economic activities for sustainability, they are silent on the actual legal tools or mechanisms that should facilitate the process. We suggest that the principles of national land policy should be amended to include four additional principles that embody the duty of care, and the spirit of the constitutionally mandated sustainability duty -

¹¹⁶ See, Republic of Kenya, *Sessional Paper No.3 of 2009 on National Land Policy* (Nairobi: Ministry of Lands, August 2009) at 28. [RoK, –Sessional Paper on National Land Policy”]; See further analysis in chapter 3, section 4.3.

¹¹⁷ *Ibid*, at 1 & 28.

¹¹⁸ RoK, –Sessional Paper on National Land Policy,” *supra* note 116 at 2.

- i). Every person has a duty of care to prevent unsustainable land use practices or degradation that may adversely affect sustainability of their own land, or the land of another land owner, or a public resource such as rivers or forests
- ii). Every person should cooperate with, and inform other people by informing other land owners when there is risk of harm, or where harm that adversely affects the sustainability of the land belonging to other land owners has occurred or is about to occur due to activities by that person
- iii). Every person should cooperate with the state by reporting any risk of serious harm, or occurring serious harm that adversely affects a public natural resource or affects a significant part of the local ecosystem thereby inhibiting the sustainability of other lands
- iv). Every person should cooperate with the state and other land owners to exchange information or knowledge on reasonable measures that will assist in fulfilling the constitutional duty to cooperate to conserve and protect the environment, and ensure ecologically sustainable development.

The duty of care on land owners is proposed as follows –

The General duty of care:

Every land owner or occupier must take all reasonable measures to prevent any form of degradation or risk of degradation to their land or which may adversely affect the sustainability, of their land, and of the land of another landowner or occupier.’

Specific duty of care:

- (1) Without any prejudice to the generality of the foregoing section, any landowner or occupier must take all reasonable measures to -
 - a. Prevent any form of degradation or risk of degradation which may adversely affect the sustainability of their land, and/or of the land of another landowner or occupier
 - b. To reverse any existing form of degradation on their land, which is adversely affecting the sustainability of their land, and/or of the land of another landowner or occupier
 - c. Conserve soil fertility, and prevent soil erosion
 - d. Conserve the groundwater and any river, lake or ocean water resources running through, or fronting the land.
 - e. Prevent the growth and spread of any invasive species
 - f. Protect biodiversity especially the native species

- g. Inform other land owners when there is a risk of degradation, or degradation has occurred to their land, which may adversely affect the sustainability of their land
- h. Inform the state or public authorities when there is a risk of degradation, or degradation has occurred to public natural resources, or significant degradation or harm has occurred to lands comprising a major part of the local ecosystem, and the degradation may or have adversely affected the sustainability of the natural resource or lands
- i. Participate in, and engage with public authorities and neighbouring landowners for education and extension services for skills to enhance execution of these duties.

The proposed statutory duty of care should be applicable to all categories of land, including private land, community land, public lands held by the government, forests and protected areas.¹¹⁹ Implementation will require amendment of the property rights sections of land tenure legislation to include this duty as contingent to the quantum of ownership and decision making rights vested in tenure holders.

The content of the proposed duty of care is merely indicative of the nature and character of a statutory duty of care whose objective is to enhance ecologically sustainable land use. The design of this proposed duty has in part been influenced by the earlier conceptual and comparative analysis of statutory environmental duties of care. The duty to inform other land owners about the risk or actual land degradation that adversely affects sustainability of their land, and the duty to report degradation to the state, represents an attempt to give effect to that constitutional duty which requires people to cooperate amongst themselves, and with the state. Such a duty to inform other land owners about environmental harm is evident from

¹¹⁹ See analysis of the land tenure system in Kenya, in chapter 3, section 2.1; analysis of forest tenure system in chapter 4, section, 3.2.1. See also, article 61, Constitution of Kenya, 2010, which sets out the classification of land in Kenya as public, community or private.

the Queensland *Environmental Protection Act* that requires a person carrying out environmental activities and who becomes aware that serious or material environmental harm is caused or threatened by the person's or someone else's act or omission to inform their employer, or a public authority as soon as it is reasonably practicable.¹²⁰

4.4.3 THE STANDARD OF CARE

At common law, the standard of care refers to the conduct expected of a reasonable person¹²¹ implying the ordinary norms of behaviour that are acceptable in a community or society to avoid harming the private interests of other people. The Australian Industry Commission, while proposing a statutory environmental duty of care, suggested that duty holders should be held to take reasonable and practical measures.¹²² The Commission contended that the test and stringency for what is reasonable and practical would reflect community attitudes and expectations.¹²³ Further, community attitudes and expectations will vary with generations of people, and change with geographical, climatic, biodiversity, socio-economic and cultural conditions. This in turn implies that the standards of conduct required by the duty of care evolve with community attitudes and expectations,¹²⁴ such that land use practices that were unacceptable or considered unsustainable in the past may be considered acceptable in present times.

¹²⁰ Section 320.

¹²¹ See the conception of a reasonable person by Laidlaw J., in *Arland v Taylor*, *op cit*.

¹²² Industry Commission, —Full Repairing Lease,” *supra* note 68 at 140.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

The projected evolution of standards of conduct that define human behaviour and attitude to integrating environmental protection with their socio-economic activities is particularly relevant to this research for two reasons: First the chapter 2, 3 and 4 analysis demonstrated that agriculture and forest land use practices have deteriorated over the years. This has resulted in significant loss of soil fertility; soil erosion; land degradation; forest degradation; deforestation, and a very low national forest tree cover of 1.7 percent.¹²⁵ There is also a very high prevalence of rural poverty and food insecurity which only exacerbates the destructive but dominant anthropocentric land use practices. This state of affairs points to an absence of effective legal or policy mechanisms to influence and moderate the behaviours and attitudes of people such that they integrate environmental protection with their socio-economic and cultural activities.

Second, the standard of care at common law basically revolves around and enforces the ‘ordinary’ norm of behaviour or conduct for a particular society, in the case of land use decision making in Kenya. If that was applied as the acceptable standard of conduct with respect to the statutory environmental duty of care or duty on land owners, the ‘ordinary conduct’ would be permissive to the current unsustainable land use practices, and they would continue as the acceptable behaviour. This suggests that there is a need for legal and ethical norms that will frame a higher standard of human conduct as the required ‘reasonable measures’ to entrench human conduct that will repair or remedy the existing state of land degradation and deforestation and prevent future harm.

¹²⁵ See, analysis on the nexus between land degradation, poverty and food insecurity, in chapter 2, section 4; See further, the statistics on the low forest cover and a report on the large scale forest degradation in RoK, –Mau Task Force Report,” *supra* note 2 at 15.

4.4.3.1 Conceptual basis for a higher standard of care

In chapter 2 of this research, we analysed the potential role of ethics as a tool that would reinforce and support the law in effecting the integration of environmental protection with socio-economic activities, especially over land use.¹²⁶ We argued that this was necessary with regard to the large number of small scale farmers, and forest communities whose regular land use decisions were out of the legal scope of ordinary mechanisms governing integration through environmental impact assessment (EIA) processes. That analysis found that Aldo Leopold's land ethic reflects the idea of an ecological conscience, which essentially is a human responsibility to care for the environmental quality of land, even while people utilize the land as a resource. We urged that this ecological conscience is an ethical human responsibility that is consistent with the legal duties of care that are contingent on the environmental right. The environmental right and duty are necessary ingredients for sustainability when balanced with development rights.

We perceive that the role of this ecological conscience is - to introduce, or re-introduce ethical value or norms, that existed, were previously abandoned or have evolved or developed – such that these ethical norms can assist people in adapting their land use practices to sustainability. These ethical values may be manifested through culture, or traditional values or local knowledge. Scientific knowledge will play a key role in providing information to supplement culture and ethical values, and strengthen the human responsibility, with clarity of expected actions to fulfil the duty of care. We now examine the

¹²⁶ See analysis in chapter 2, section 7.3.

role and place of culture and scientific knowledge in establishing the standards of conduct for sustainability.

i). Culture in law and sustainability

It is the 2003 *Revised African Convention*, as explained in chapter 2,¹²⁷ which requires state parties to have regard to ethical and traditional values when taking measures to fulfil the objectives of ecologically sustainable development.¹²⁸ The role of culture, as a manifestation of ethical values, is reinforced by the *African Charter on Human and People's Rights*, whose preamble stipulates that culture, socio-and economic rights cannot be dissociated, as they are necessary to fulfilment of other civil and political rights.¹²⁹ Culture as a system of values implies either traditional or ordinary knowledge or values that are prevalent in a society. The *Convention of Biological Diversity* (CBD),¹³⁰ for example, urges countries to use their national legislations to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities that are relevant for the conservation and sustainable use of biological diversity.¹³¹ The CBD further urges countries to promote the wider application of such knowledge, innovations and practices. A similar approach, as we argued in chapter 2,¹³² can be deduced from the constitutional obligation on the Kenyan state to

¹²⁷ See chapter 2, section 6.3.2.

¹²⁸ Article 4.

¹²⁹ See preamble, *African Charter on Human and People's Rights* (1981/1986), 27 June 1981, reprinted in Christopher Heyns & Magnus Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 29 [African charter]

¹³⁰ *Convention on Biological Diversity*, United Nations, 1760 UNTS 79.

¹³¹ *Ibid*, article 8(j).

¹³² See chapter 2, section 6.3.2.

protect and enhance traditional knowledge; and to develop environmental impact assessment systems.

This attitude to cultural values and traditional knowledge is supported by the African Commission in the 2010 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council of Kenya decision (Endorois case)*¹³³ The African Commission stated that ‘culture manifests itself in many forms, including a particular way of life associated with the use of *land resources*...’ The Commission found that the cultural and religious practices of the *Endorois* were not inconsistent with conservation or sustainability practices.¹³⁴ The logic in this judicial decision, on the function and role of culture in land use, finds support from one of the guiding principles in the South African *NEMA* legislation, that the integration of environmental and development considerations in decision making should recognize all forms of knowledge, including traditional and ordinary knowledge.¹³⁵

ii). Scientific knowledge and sustainability

Scientific knowledge plays an important role in supplementing the culture and knowledge of people, and consequently influencing the ethics and attitudes of people towards safeguarding environmental quality, in decision making. Agenda 21 highlights the role of scientific knowledge as ‘to provide information to better enable formulation and selection of

¹³³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* Communication 276/2003. reprinted in Heyns, Christopher & Killander, Magnus (eds) *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Law Press, 2010) at 234. [African Commission, —Endorois Judgment,“]

¹³⁴ *Ibid* at 240, Para 173.

¹³⁵ Section 4(j).

environment and development policies in the decision-making process.¹³⁶ It also indicates that in order to fulfill this requirement, it will be essential to enhance scientific understanding, and improve long-term scientific assessments through research. The role of scientific research and knowledge is endorsed by the 2003 *Revised African Convention* as an important issue that parties should incorporate in measures to implement the convention. Interestingly, Agenda 21 suggests a nexus between scientific knowledge and research with generation and application of knowledge, especially indigenous and local knowledge.¹³⁷ This nexus implies the need for collaboration between local people, and scientific authorities to coordinate and supplement both the basis of knowledge, and its application to land use decision making. Such collaboration involves exchange of information and knowledge, through the agriculture or forestry extension services reviewed in chapter 3 and 4. We examine the role of extension in fostering the sustainability function of the statutory duty of care in section 5 of this chapter.

In conclusion, an effective standard of care that aims to remedy land and environmental degradation from the past, and prevent the same from occurring in the future, implies a higher standard of conduct beyond ordinary or conventional reasonable behaviour. This higher standard of conduct requires consolidation of science, culture, ethics, local and traditional knowledge – such that the standard of care reflects the collective body of knowledge that is available. This will make it possible for people and land owners to know

¹³⁶ —Agenda 21” in *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (New York: United Nations publication, Sales No. E.93.I.8 and corrigenda). vol. I: Resolutions Adopted by the Conference , resolution 1, annexes I a n d I I . See also, Agenda 21, online: http://www.un.org/esa/dsd/agenda21/res_agenda21_35.shtml [Agenda 21]

¹³⁷ *Ibid*, online : http://www.un.org/esa/dsd/agenda21/res_agenda21_35.shtml at para 35.6.

the boundaries of their responsibilities as set out by the duty of care, and importantly, be clear on the expectations of conduct or behaviour necessary to safeguard sustainability.

4.4.3.2 Legal manifestation of the standard of care

The statutory duty of care, with respect to land use, makes it clear that land owners or occupiers have definite responsibilities to protect and enhance the sustainability of the land that they use or manage. The required standard of care will introduce modification of behaviour such that land owners' conduct adapts and applies higher standards from culture and science with the outcome that environmental quality and conservation become a fundamental consideration in decision making. This suggests that there is a need for affirmative responsibilities that will clearly signify what is 'reasonable' for land owners to undertake in remediation of existing degradation, or in preventing foreseeable degradation to land. Several approaches are evident from existing academic literature and legislation -

Model 1 – farm systems management

The first model, highlighted by Mark Shephard, proposes the 'farm systems management' approach which involves specific standards and principles to guide sustainable natural resource use.¹³⁸ He notes that these standards are intended to provide practical guidance about the management of sustainable agriculture, in an attempt to specify behavioural norms

¹³⁸ Shephard, "Legal and Social Expectations for a farmer's duty of care," *supra* note 44 at 34.

for sustainable land management.¹³⁹ Susan McIntyre proposes a similar approach through principles of rural land management that, for instance, advise farmers how to –¹⁴⁰

- manage soils to prevent erosion and to maintain productive capacity and water quality; or
- maintain local native trees for the long-term ecological health of the property and catchment; or that
- all properties require core conservation areas for species that are sensitive to agricultural land use

The illustration by McIntyre is fairly specific on the conduct expected of farmers. Shepherd however argues that these approaches represent statements of aspiration with no legal implications thereby limiting their usefulness as a basis for specifying the legal responsibilities of land owners.¹⁴¹

Model 2 – voluntary environmental management arrangements

Gunningham, also writing about influencing the behaviours of land owners in farm management suggests a second model on voluntary environmental management arrangements.¹⁴² He perceives them as including not just environmental management plans, but also farm management plans, nutrients management plans, best management practices, and codes of practices.¹⁴³ However, Gunningham points that these arrangements highly depend on voluntarism. He notes that, with regard to environmental management, it is only under very limited and relatively unusual circumstance that pure voluntarism can deliver

¹³⁹ *Ibid.*

¹⁴⁰ Susan McIntyre, “The wayforward - from principles to practice” in Susan McIntyre, John McIvor, & Katina Heard (eds) *Managing and Conserving Grassy Woodlands* (Victoria: CSIRO, 2002), 201-221 at 202.

¹⁴¹ Shepherd, “Legal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 34.

¹⁴² Neil Gunningham, “Incentives to improve farm management: EMCA, supply chains and civil society” (2007) 82 *Journal of farm management* 302-310 at 303.

¹⁴³ *Ibid.*

satisfactory results.¹⁴⁴ Where the existing standards of conduct have implicitly permitted unsustainable land use practices to thrive such as in Kenya, purely voluntary arrangements without more will have limited effect in achieving behaviour change. A hybrid approach, where voluntary instruments such as farm-level nutrients management plans are complementary to legally defined responsibilities or codes of practice, maybe more effective in supplementing the efforts of land owners to implement the statutory duty of care.

Model 3 – legally mandated and approved codes of practice

The third model borrows from Gunningham's suggestion of a 'code of practice' which he proposes as part of the voluntary arrangements. We propose statute-mandated codes of practices to set out the legal responsibilities and expectations of land owners. We further suggest that land owners should participate in developing local level codes of practice, to ensure that the standard of conduct specified is truly 'reasonable' by including the local and traditional knowledge and experiences of communities. We argue that management plans, which are required by legislation and prepared to set out the priorities of forest management and set out approved activities and practices, perform a similar role as the codes of practice. First, we analyse two illustrations of codes of practice to highlight some of the best practices that would help guide this discussion further.

Codes of practice, as indicators of the standard of care expectations, are evident from legislation that sets out the duty of care in environmental and other areas of law. Illustratively, the Kenyan *Occupational Health and Safety Act* reviewed earlier in this

¹⁴⁴ *Ibid.*

chapter requires the Director of Occupational Safety to prepare an ‘approved code of practice’ to provide ‘practical guidance’ on how to comply with the duties set out by the law.¹⁴⁵ In this instance however, although the code is statutory and gazetted, section 4 specifies that failure to comply with a provision of the code may not automatically result in civil or criminal liability. This gives the impression that the code of practice is somewhat voluntary.

The idea of a code of practice, setting out the expected responsibilities of land owners and offering practical guidance is also applied by the 1985 *Forest Practices Act*¹⁴⁶ of Tasmania, Australia. Section 30 of this law authorizes the Forest Practices Authority, in consultations with the public, land owners and other stakeholders, to prepare and gazette a forest practices code. The current (2000) forest practices code¹⁴⁷ states that it provides ‘...a practical set of guidelines and standards for the protection of environmental values during forest operations...’¹⁴⁸ The code therefore offers guidelines regarding: soils; water quality and flow; geomorphology; flora; fauna; genetic resources; visual landscape; and cultural heritage.¹⁴⁹ The practices of land owners or licensees in establishing forests, timber harvesting, building roads or engaging in forest conservation should therefore integrate the listed issues. For each

¹⁴⁵ Section 4.

¹⁴⁶ *Forest Practices Act*, 1985 section 30.

Online: http://www.austlii.edu.au/au/legis/tas/consol_act/fpa1985183/s30.html

¹⁴⁷ Forest Practices Board, *Forest Practices Code* (Hobart: Forest Practices Board, 2000).

Online: http://www.fpa.tas.gov.au/fileadmin/user_upload/PDFs/Admin/FPC2000_Complete.pdf
[Tasmania, —Forest Practices Code’]

¹⁴⁸ *Ibid* at 2.

¹⁴⁹ *Ibid*.

forestry activity or practice, the forest code sets out ‘General Principles’ and the ‘Basic Approach.’¹⁵⁰

The basic approach sections of the code set out two different types of statements: the ‘will’ and ‘should’ statements. The ‘will’ statements are to be applied in a practical manner to forest operations covered by the *Forest Practices Act*.¹⁵¹ An illustration of a ‘Will’ statement with regard to building access roads to a forest¹⁵² states that ‘Local government will be consulted where construction of new or substantial upgrading of existing access onto municipal roads is required.’¹⁵³ The ‘should’ statements show the desirable practice for most other situations.

Although this forest practices code is extensive, and mandated by statute to ‘prescribe’ forest practices so as to ‘provide reasonable protection to the environment,’ it has several visible inadequacies. While the code sets out the ‘Will’ and ‘Should’ statements, ostensibly intended to represent ‘reasonable measures,’ most of these statements are technical requirements. The applicability of these technical specifications as the standard of care may be difficult because, while there is some form of public participation, the development of the forest code is largely the reserve of the forest practices authority. This is similar to the ‘approved code of practice’ under the Kenyan *Occupational Health and Safety Act* whereby

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Tasmania, ‘Forest Practices Code,’ *supra* note 147 at 2 See also section B – Building Access to a forest: Planning and locating roads, at 6.

¹⁵³ *Ibid* at 2.

the code is developed by the Director, rather than a committee that includes people involved in the concerned activities.

The Tasmanian forest code leaves substantial discretion about how the set out forest practices will be implemented,¹⁵⁴ and it is unclear what the legal implications of non-compliance with the guidelines set out are. A code that sets the reasonable standards of conduct to guide human actions should specify the administrative penalties or steps that could be taken against a land owner who is in default. This is especially important where a duty of care aims to reverse existing land degradation, or includes a duty to inform other land owners or the state about some kinds of foreseeable degradation.

Proposal for model code of practice

We propose two model codes of practices to represent the standard of care for duty holders, with respect to land owners or occupiers –

i). National code of practice

We propose that there should be an overarching national code of practice for each sectoral land use. This code of practice should set out the duty of care on land owners or occupiers in simple non-legal terms. The code of practice should also set out the specific responsibilities that land owners should observe, in terms of land use practices, scientific input, and sustainability needs for the different climatic, geographic, or rainfall zones in the country.

¹⁵⁴ Shephard, —Egal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 9.

The national code of practice for specific land use sectors should set out the role of the state in providing technical assistance.

A Statute will provide for the development of the national code of practice, as well as development of a local code of practice that will be prepared with the full participation of the local community and land owners. The local code will draw upon principles and measures from the national code, but focus on local priorities. In order to ensure and safeguard integration of sectoral institutional policies, planning and decision making, each national sectoral code of practice should be aligned with and draw sustainability goals from a National Strategy on Sustainable Development.¹⁵⁵ Preparation of the national code of practice should be the responsibility of the relevant sectoral lead agency, such as the Minister of Agriculture, or Kenya Forest Service with participation by relevant stakeholders and with public comments.

¹⁵⁵ A discussion on the normative and legal character of sustainable development strategies is beyond the scope of this research. However, it is useful to note that the idea of National Sustainable Development Strategies was reiterated by Agenda 21, which in chapter 8 recommends that governments should adopt a national strategy for sustainable development to build upon and harmonize the various sectoral economic, social and environmental policies and plans that are operating in the country. Agenda 21 also proposes that the experience gained through existing planning exercises such as national reports for the Conference, national conservation strategies and environment action plans should be fully used and incorporated into a country-driven sustainable development strategy. Further the goals of a national sustainable development strategy should be to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations. Agenda 21 proposes that the strategy should be developed through the widest possible participation and should be based on a thorough assessment of the current situation and initiatives. See, online: http://www.un.org/esa/dsd/agenda21/res_agenda21_08.shtml

See a discussion on formulation, objectives, legal nature and operationalisation of sustainable development strategies, in, Barry Dalal-Clayton & Stephen Bass,, *Sustainable development strategies: a resource book* (Paris: OECD Publishing, 2002).

ii). Local code of practice

The statutory duty of care, by creating responsibilities for land owners to integrate environmental protection with their socio-economic activities, implicitly seeks to convert each land owner or occupier into a land steward. These land owners however have a right to know what their legal responsibilities allow, and do not allow, and this information should be clear and pre-stated.¹⁵⁶ This suggests that preparation and development of local codes of practice, as the standard of care for specific land use sectors, should be a collaborative effort between public officials and the local community including land owners or occupiers -

Local community participation

This participation by land owners/occupiers or forest communities ensures that the responsibilities and activities that are set out as the standard of conduct reflect a consensus that is ordinarily acceptable as ‘reasonable’ measures. The collaborative and participatory approach means the responsibilities truly represent local knowledge, values, culture and any scientific knowledge that may be available to facilitate stewardship activities. The appropriate forum for engagement with local land owners varies: it could be based on the administrative structure of government, or derived from local institutional arrangements. We have two illustrations from agriculture and forestry land use in Kenya. The first are the administrative and ad-hoc ‘Common Interest Groups’ that are set up by agriculture extension officers in a specific focal area. These comprise of local residents and public officers, who collaboratively determine sustainable land use priorities that the extension programme

¹⁵⁶ Shephard, —Egal and Social Expectations for a farmer’s duty of care,” *supra* note 44 at 16.

should focus on.¹⁵⁷ The second are the Community Forest Associations (CFA) identified by the 2005 *Forest Act* as the only legal mechanism that local communities can utilize to participate in sustainable management of state forests.¹⁵⁸ The law requires these CFAs to collaborate with the Forest Service and develop community forest management plans that set out the sustainable forestry priorities, and approve activities for the forest community.¹⁵⁹ Authors Earl, Curtis et al., refer to these local level bodies as a “committee of reasonable persons”¹⁶⁰ drawn not only from the local community, but also more broadly from the community of interest that operates at the very local level. The communities should use the local code of practice to set out specific responsibilities and measures that are tied to specific desired sustainability outcomes for their area.

Binding and voluntary sustainability expectations

The local code of practice should set out definitive responsibilities and land use practices, using the collective body of knowledge from culture, local knowledge and the scientific advice provided by extension workers. It is important for the code of practice to be clear about the responsibilities or practices that are legally binding, as the minimum standard to ensure every land owner or occupier safeguards the environmental quality of their land. It is equally important for the code of practice to be specific on the sustainable land use practices that are over and above the duty of care, and are voluntary. A classification similar to the

¹⁵⁷ See the discussion and analysis on agriculture extension in chapter 3, section 7.

¹⁵⁸ Section 46.

¹⁵⁹ See the discussion and analysis in chapter 4, section 5.2.3.

¹⁶⁰ G. Earl, A Curtis, & C. Allan., “Towards a duty of care for biodiversity” (2010) 45 *Environmental Management* 682–696, at 691.

Tasmanian Forest practices code of ‘_Will’ and ‘_Should’ responsibilities is therefore very appropriate. In our categorization, the ‘_Will’ responsibilities represent the minimum positive sustainable land management standards that every land owner or occupier is required to implement. The ‘_Should’ responsibilities represent the voluntary sustainability practices that a landowner or occupier, who has complied with the ‘_Will’ standards, should implement in order to qualify for any incentive payments or benefits.

a) The ‘_Will’ responsibilities - administrative action and penalties

If a land owner or occupier does not fulfil the minimum positive action responsibilities, they would be in breach of the duty of care. In this case, the relevant public agency can take administrative action, and prescribe remedial measures. The remedial measures could be in the form of a prescribed sustainability restoration order that should be prescriptive, and sets out specific sustainable land use measures and the compliance time frame.

A general illustration that reflects a restoration order is evident from *EMCA*. Section 108 empowers the National Environment Management Authority (NEMA) to issue an ‘_environmental restoration order’ to any person with respect to anything concerning environmental management. Such an order requires the concerned person to restore the environment to the earlier status before the harm occurred. It may also involve preventing a person from doing something that is ‘_reasonably likely to cause harm to the environment.’ This *EMCA* illustration is sufficiently instructive but suffers two operational shortcomings. First, the power of imposing the restoration order is vested on NEMA, further propagating the *EMCA* approach whereby NEMA as a central agency holds most functions, with

inadequate vertical integration with other sectoral institutions or laws.¹⁶¹ Secondly and closely affiliated with the first, the restoration order broadly refers to damage caused to the environment, while the specific obligations to practice sustainable land use require unequivocal indication that sustainability restoration orders will be available to ensure compliance with the statutory duty of care, enforceable through clearly identifiable sectoral legal provisions and institutions.

Nonetheless, we propose that if there is further non-compliance under the proposed statutory duty subsequent to the sustainability restoration order being issued, and the public officer is satisfied the land owner is refusing to comply, the land owner could be prosecuted and subjected to monetary fines.

The question of fines has been a challenge, especially for agriculture, because the amounts have not been reviewed for a long time, and therefore are very minimal. Yet fines are required for enforcement at the point when prescriptive tools must be used. Therefore when the amount of penalties and fines remain too low, their utility is greatly undermined by the ease and ability of offenders to pay. Australia provides a comparative example of a legal mechanism to keep fines at an effective level. The *Crimes Act*¹⁶² sets up a system of penalty units attached to prescribed offences. A dollar value is attached to each penalty unit, while a specific offence may be subject to a fine of X penalty units. Thus, assuming the value of one penalty unit is \$ 110,¹⁶³ and the offence is subject to 2000 penalty units, the overall fine is \$

¹⁶¹ See the extensive analysis of horizontal and vertical integration under *EMCA* in Chapter 2, section 5.3.1.2.

¹⁶² *Crimes Act*, 1914 (As amended 2010).

¹⁶³ Current value in 2010, section 4AA.

220,000.¹⁶⁴ Many statutes, such as the extensive *Great Barrier Reef National Park Act*¹⁶⁵ apply this system to prescribe fines and other penalties.¹⁶⁶ Each year, the Australian treasury determines, through a parliamentary bill, the dollar value of the penalty units¹⁶⁷ to keep the criminal sanctions at par with inflation. This is a model that could be adapted for application in Kenya.

b) The ‘Should’ responsibilities – qualification for incentives

Land owners should not be rewarded with incentives for fulfilling their statutory duty of care; they should only be rewarded for exceeding the minimum threshold and adding certain defined benefits to the ecosystem, and to the general human community. This suggests the need to establish a “beneficiary pays” or incentives concept. Such a concept marks the line where observance of the duty of care surpasses the minimum action point and, the subsequent application of the ‘Should’ responsibilities marks where land stewardship begins to yield incentives by providing services to the ecosystem and the general public. It also provides explicit clarification that qualification for incentives is conditional to stewardship that is above and beyond the mandated statutory responsibilities.

A system of incentives requires legal mechanisms for reporting, verification and certification. A useful analogy can be derived from the Clean Development Mechanism

¹⁶⁴ The formula to convert the penalty units is set out in section 4AB.

¹⁶⁵ The *Great Barrier Reef Marine Park Act, 1975* (as Amended 2007).

¹⁶⁶ *Ibid.*, See for instance, section 38C which specifies that contravening conditions of permit or authority into zoned area is an offence, with a penalty of 200 penalty units.

¹⁶⁷ The value is also determined with respect to States, Territories. An example is the *Penalty Units Act, 2009* of the Northern Territories, which set the value at \$130. It specifies that the Minister for Finance is required to bring a Bill to Parliament every year to set the value of the penalty units.

(CDM),¹⁶⁸ which features similar mechanisms. The CDM is a United Nations climate change programme that allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of carbon dioxide.¹⁶⁹ These CERs can be traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the *Kyoto Protocol*.¹⁷⁰ The integrity of the CDM mechanism is guaranteed by the verification and certification procedures. Decision 3/CMP.1 of the 2005 Meeting of Parties to the Kyoto Protocol authorized the modalities and procedures for a clean development mechanism as defined in Article 12 of the *Kyoto Protocol*.¹⁷¹

The modalities and procedures provide for, *inter alia*, the definition of ‘verification’ and ‘certification.’ Verification is defined as ‘the periodic independent review and *ex post* determination by the designated operational entity of the monitored reductions in anthropogenic emissions by sources of greenhouse gases that have occurred as a result of a registered CDM project activity during the verification period.’¹⁷² Certification is explained as ‘the written assurance by the designated operational entity that, during a specified time

¹⁶⁸ “What is the Clean Development Mechanism?” online: <http://cdm.unfccc.int/about/index.html>

¹⁶⁹ *Ibid.*

¹⁷⁰ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, United Nations, 37 I.L.M. 22.

¹⁷¹ United Nations, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005: Addendum* (United Nations, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006)

Online: <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf#page=6> p.6.

¹⁷² *Ibid.*, see the modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, at para 61- page 18.

period, a project activity achieved the reductions in anthropogenic emissions by sources of greenhouse gases as verified.¹⁷³

The verification and certification processes proposed for the statutory duty of care should perform a similar role of guaranteeing the integrity of the incentives system. It should be undertaken by an independent public agency that has no role in formulating or implementing any land use policies to avoid a conflict of interests. Similarly, it may be difficult to assure the legitimacy, credibility or integrity of the verification process if land owners were required to hire and pay experts to carry out the verification. The certificate issued to a landowner can be presented as qualification or eligibility to receive incentive or benefit payments. The development, and proposal of a complete incentives structure, including the verification and certification mechanisms, is however a more complex task that is beyond the scope of the current research.

4.5 MECHANISMS TO IMPLEMENT THE STATUTORY DUTY OF CARE FOR SUSTAINABLE AGRICULTURE

In chapter 3, we argued that it is the quantum of rights that comprises land tenure which legally entitles and empowers land owners or occupiers to make decisions over land use choices. The discussion established that land tenure law does not create a responsibility on tenure rights holders to integrate environmental protection with their socio-economic activities such as farming. As a consequence, there is evidence of vast agricultural land degradation, fertility loss, soil erosion and significant decline in agricultural productivity.

¹⁷³ *Ibid.*

The *Agriculture Act*¹⁷⁴ is the legislation with the role of regulating agricultural land use. Its objectives include the preservation of soil fertility, a goal which is crucial to sustainability. The agriculture law has set out extensive legal mechanisms intended to secure soil conservation, retain soil fertility, and increase agricultural productivity. Other mechanisms include land development orders or rules for enforcing land husbandry, where the land is degraded.

In the chapter 3 analysis, it was evident that the *Agriculture Act* does not create positive management responsibilities or any structure of minimum sustainable land use standards for land owners or occupiers. Instead, there is significant discretion and authority that is vested on public officers to inspect agricultural land, and if the quality of land care is insufficient, prescribe ‘orders’ to ensure good land husbandry for agricultural purposes. The tone of these orders suggests they are *ad-hoc* and are only issued after the fact, when the degradation has already occurred. The *Land (Basic Usage) Rules*, attempted to set out specific land use standards, but instead of setting out positive responsibilities for farmers, they either prescribe an offence or a threat of sanction or penalty.¹⁷⁵ In order to implement the statutory duty of care on land owners or occupiers who are involved in land decision making, and ensure they pursue sustainable agriculture, we propose a three tier administrative system –

4.5.1 TIER 1 – THE STATUTORY DUTY OF CARE

The statutory duty of care requires land owners or occupiers to take reasonable measures to remedy past degradation, and prevent foreseeable degradation that adversely affects the

¹⁷⁴ *Agriculture Act*, Capt 318 Laws of Kenya.

¹⁷⁵ See the general discussion in Chapter 3, section 6.1.

sustainability of their land, or that of another land owner. In the first instance, this duty is incorporated as part of the tenure rights, and operates as a duty on the land owner or assigned occupier. The duty of care is similarly set out as a primary mechanism of agriculture legislation, to facilitate fulfilment of sustainability objectives. It is the agricultural land use legislation that specifies the standard of care, and sets out the powers and procedure for developing and enacting the agriculture sector code of practice. The same legislation would determine the power and procedure for developing local codes of practice including the manner of public participation, and local committees of reasonable persons.’

In this sense, the statutory duty of care becomes the first tier mechanism, and default legal or policy mechanism for implementing sustainable agriculture land use. It would replace the current framework of command and control orders and rules that have been proven ineffective by the widespread land degradation, and decline in agricultural productivity. This implies that when the local codes of practices are prepared with collaboration between public officials and local community or committee of reasonable persons’, the specific responsibilities in the code become the expected conduct of every land owner, hence reasonable measures.’ The measures would be pre-stated rather than *ex post facto*, contrary to the current system of *ad-hoc* orders and rules. These pre-stated positive management responsibilities will guide farmers in practising good land husbandry, and should clearly distinguish the ‘Will’ responsibilities from the voluntary ‘Should’ responsibilities. An illustration of ‘Will’ responsibilities that should be set out by the code of practice, with respect to sustainable agriculture land use includes –

- Maintaining a minimum 10% average tree cover on agricultural land

- Specification whether the trees should be indigenous or exotic, including accompanying biodiversity cover
- Protection of riverfronts from siltation by planting dense ground covering biodiversity to trap soil
- Other specific details for instance on how to avoid soil erosion, or where applicable, measures how to rotate between crops and livestock grazing

In chapter 3, we cited arguments by authors Shaxson, Tiffon, Wood & Turton that farmers are the main ‘husbanders’ of land and usually decide when to reject or integrate land husbandry options.¹⁷⁶ We suggest that it is likely that when land owners or occupiers have contributed to the determination of their land use responsibilities, and are assisted to clearly understand what they are expected to do, they will fulfil their stewardship duties. This suggests that there is a certain role, and need for extension services that are focused on reconciling the need for higher agriculture production, with a similar (if not more urgent) need for sustainable land use. We discuss the role of sustainability extension in implementation of the statutory duty of care in section 5 of this chapter.

4.5.2 TIER 2 – ADMINISTRATIVE ACTION AND PENALTIES

Where a land owner or occupier has not fulfilled their duty of care, particularly the ‘Will’ responsibilities, we propose a system of sustainable land management orders that would be prescribed by public officials. The incidence of these orders could be provoked by failure of a land owner to carry out sustainable land management responsibilities resulting in adverse effects on the sustainability of their own land, another land owner’s property, or a public resource such as river. In line with the constitutional environmental duty on people to

¹⁷⁶ See analysis and discussion in chapter 3, section 6.1.3. See also Francis Shaxson, Mary Tiffen, Adrian Wood, & Cate Turton —“Better land husbandry: rethinking approaches to land improvement and the conservation of water and soil” (Overseas development institute, Natural resource perspectives no. 19 June 1997) at 6, online: <http://www.odi.org.uk/resources/download/2150.pdf>

cooperate¹⁷⁷ the administrative action could be commenced in two ways: (1) upon inspection of land in question by a public official, or where degradation or foreseeable degradation of a public resource is traced to a particular parcel of land; and (2) when a formal complaint is made to a relevant public officer by another land owner that their land is being degraded, or there is a foreseeable degradation that will adversely affect the sustainability of their land.

The failure to comply with administrative orders to implement sustainable land management practices may thereafter justify possible prosecution and imposition of monetary fines. It is important to highlight that the duty of care and sustainability responsibilities will require significant behaviour change by some land owners, including correction of past degradation. In the initial period of implementing the duty, and considering the extent of degradation nationally, land owners should first be provided with technical assistance through extension to assist with compliance.

4.5.3 TIER 3 – INCENTIVES

Land owners or occupiers that have fulfilled their minimum sustainable land use responsibilities, in the scheme of the proposed standard of care, would be implementing the voluntary ‘_Should’ standards. At this point, the land owners’ qualify to have their land inspected and the environmental benefits verified and certified by an independent expert, then certified so that they can receive the applicable incentive payments and benefits.

¹⁷⁷ Constitution of Kenya, 2010, at article 69(2).

4.6 SYNCHRONIZING ELEMENTS OF SUSTAINABLE COMMUNITY FORESTRY WITH THE DUTY OF CARE

In our analysis of community forestry in chapter 4, we established that about 94.5% of all forests in Kenya are public forests vested in the state, and managed by the Kenya Forest Service as protected forests. We also established there has been a history of community exclusion from state forests, even though an average 3-4 million people inhabit agricultural land that is adjacent to the state forests. The 2009 Mau Forest Task Force report¹⁷⁸ found that most of these forest adjacent communities use the protected forests, legally or illegally, for a vast number of socio-economic or cultural activities including grazing, water and food. The Task force recommended that local communities should be involved in forest rehabilitation and reforestation activities, and urged that the creation and operationalisation of community forest associations (CFAs) should be fast-tracked.¹⁷⁹

In that discussion, we further established that the *Forest Act* requires mandatory preparation of management plans with respect to every state forest.¹⁸⁰ The Forest rules require that the Forest Service and CFAs collaborate to prepare a community forest management plan, with respect to each forest management unit assigned to a CFA under a community forest management agreement that sets the operational terms for each CFA engaging in the *shamba* system.¹⁸¹ The analysis further established that the *Forest Act* clearly stipulates its objectives of facilitating sustainable forest management, which demonstrates a primary attempt at

¹⁷⁸ RoK, “Mau Task Force Report,” *supra* note 2 at 64; See also The World Bank, *Strategic Environmental Assessment of the Kenya Forest Act 2005* (Washington D.C., The World Bank, 2007) at xii.

¹⁷⁹ RoK, “Mau Task Force Report,” *supra* note 2 at 64.

¹⁸⁰ See *Forest Act*, 2005, Section 35.

¹⁸¹ See analysis in chapter 4, section 5.2.3.

integrating forest vitality with socio-economic activities, and implicit vertical integration with *EMCA*. However, we argued that the statutory definition of a management plan, the only legal tool that should set out sustainability responsibilities, and priorities for forest management, does not explicitly refer to sustainability as a primary goal. The definition highlights a management plan simply as a programme of activities for a state forest including conservation, silviculture, or infrastructure development.¹⁸² There is absence of a primary focus on sustainability, in the sense of an explicit legal requirement that management plans must demonstrate how integration of environmental protection with socio-economic activities will be undertaken, safeguarded and enforced. This is evident when the *Forest Act* definition or functions of a management plan is for instance contrasted with the function of management plans set out by the Ontario *Crown Forest Sustainability Act* which is clear that a management plan will not be approved unless it provides for the sustainability of a forest.¹⁸³

The sustainability objective of community forest management plans is equally not explicitly set out, but an inference could be drawn from section 47 of the *Forest Act* which sets the functions of CFAs being to protect, conserve and manage forests. The Forest rules, which comprise the operational guide available to frontline forest workers and communities, are also silent on the sustainability objective of the plans. The process of community forestry was properly anchored in law in 2005, and provides a useful avenue for the country to fulfil the constitutional obligation to enhance and maintain a minimum 10% forest tree cover over

¹⁸² See *Forest Act*, 2005, section 3.

¹⁸³ See, section 9(2), Ontario *Crown Forest Sustainability Act*, R.S.O. 1994, Chapter 25.

the total land area of Kenya.¹⁸⁴ Such a process of forest rehabilitation will provide local communities with further opportunities to fulfil socio-economic needs, in addition to playing a role in sustainable forestry. This is consistent with the proposed statutory duty of care that aims to set out responsibilities for land owners or occupiers to take reasonable measures to remedy past degradation, and prevent foreseeable degradation that adversely affects land sustainability.

In state forests, under current law, the duty of care would primarily be held by the Forest Service. The CFAs and their members would also hold a duty of care as occupiers or assignees that hold limited tenure rights from the Forest Service. We suggest that state forest management plans, even though developed for specific forest ecosystems, resonate with the role of the proposed national codes of practice because forests ecosystems tend to be geographically or ecologically unique. The community forest management plans, drawing from the principles of the state forest management plans and prepared as a collaborative effort between the Forest Service and the CFA, similarly resonate with the local codes of practice.

While the current system of granting restricted user rights to CFAs through community forest management agreements is certainly important, we suggest that dealing with the massive forest degradation and deforestation requires a change in policy approaches. In order to fulfil the constitutional obligation to raise and maintain the forest tree cover at 10%, there is conceptual justification to increase the breadth of tenure rights, and decision making

¹⁸⁴ Constitution of Kenya, 2010, see article 69(1)(b).

responsibilities of communities (and incentives). It is however important to ensure that the sustainability responsibilities of communities are unequivocally stipulated by the management plan. We propose two modifications -

4.6.1 THE ROLE OF MANAGEMENT PLANS AS FOREST CODES OF PRACTICE

Management plans are mandatory for state forests, while community forest management plans are mandatory for each management unit administered by a CFA. Both categories of management plans should clearly set out their objective of ‘providing for the sustainability of the forest.’ The specific responsibilities, especially the ‘Will’ responsibilities should specify minimum standards that are fundamental to ensure that forest socio-economic or cultural activities safeguard the vitality of the trees and forest biodiversity. We propose that management plans for a complete state forest ecosystem should set out general principles of sustainable forestry, in the same sense as national codes of practice. The community forest management plans, prepared jointly by the CFA and Forest Service, should specify the responsibilities for each forest community, and specific sustainability measures that are required for a management unit.

It is conceivable that the required sustainable land use practices for a community that is rehabilitating a degraded indigenous forest would differ from a community involved in plantation forests. Similarly, the sustainability responsibilities and strategies would be different if a forest ecosystem includes significant wild fauna as part of the biodiversity. While forest vitality and sustainability is the fundamental objective of community forestry, management plans should respond to socio-economic and cultural needs, and determine

local measures necessary for effective integration in decision making by the forest community.

The community forest management plans, and the forest management agreements that form the basis of community forests need to be signed to ensure they are binding and enforceable *inter partes*. This will avoid a scenario that occurred in October 2010 whereby the Kenya Forest Service abruptly and without formal notice terminated the grazing rights of thousands of communities, in every state forest in Kenya.¹⁸⁵ In submissions before the National Environment Tribunal (NET), on an appeal by forest associations in November 2010, the Forest Service conceded that while 31 forest management plans had been prepared with CFAs, none of them had been signed. Similarly, while 16 community forest management agreements had been prepared, only one had been signed.¹⁸⁶ The Forest Service contended there was no binding agreement hence there was no need to provide the forest communities with any notice period. This is unfair because communities were expecting to meet their socio-economic needs by grazing livestock in the forest, and were paying a monthly fee.

4.6.2 LONG-TERM FOREST LEASE AND TREE TENURE OVER DEGRADED FORESTS

The significantly low forest cover in Kenya suggests that there are lands which, although administratively classified as forests, have lost their tree canopy and biodiversity cover and are extensively degraded. The 2009 Mau Forest Task Force report, for instance points to this

¹⁸⁵ –NEMA advises KFS to conserve government forests,”

Online: http://www.nema.go.ke/index.php?option=com_content&task=view&id=213&Itemid=37

¹⁸⁶ See decision by National Environment Tribunal in *National Alliance of Community Forest Associations (NACOFA) v. NEMA & Kenya Forest Service* (Tribunal Appeal No. NET 62 of 2010) at 5 (para 19) (unreported).

degradation and deforestation in the nationally important and mainly indigenous Mau Forest Complex.¹⁸⁷ Indigenous forests and biodiversity take particularly long periods to grow and mature, and while she does not support the *shamba* system, Wangari Maathai notes that these indigenous forests play a crucial role in native biodiversity retention and water catchment, hence losing them is unacceptable.¹⁸⁸ At the current rate of deforestation and degradation (with 1.7% national tree cover), restoration of indigenous forests will likely require extensive human and financial resources. Authors Montalembert and Schmithusen¹⁸⁹ acknowledge that achieving sustainability in forest management, especially where there is significant degradation, is not necessarily quickly achieved and requires legal and policy frameworks for long term management. This is an argument supported by Dovers & Connor who reiterate that sustainability policy goals are difficult to achieve in the short-term and are often generational tasks to be pursued persistently over decades through concerted policy and institutional changes.¹⁹⁰ This suggests that the involvement of forest adjacent communities in rehabilitation of degraded indigenous forests, and replanting plantations forests would provide the human capacity, while extending certain benefits to communities. This is an important pre-emptive step too, because with increasing population coupled with diminishing productive capacity and sizes of agricultural land, communities could eventually

¹⁸⁷ RoK, “Mau Task Force Report,” at 12.

¹⁸⁸ Wangari Maathai, *The Challenge for Africa: A New Vision* (London: William Heinemann, 2009) at 241. [Maathai, “The Challenge for Africa”] Prof Maathai eloquently argues that the loss of the forests also means that no vegetation remains to hold the soil in its place. As a result, enormous amounts of valuable topsoil are swept or blown away.‘

¹⁸⁹ R. de Montalembert and F. Schmithusen, “Policy and Legal Aspects of Sustainable Forest Management” 1993 44(3) *Unasylva*, online: <http://www.fao.org/docrep/v1500E/v1500e03.htm>

¹⁹⁰ Stephen Dovers & Robin Connor, “Institutional and Policy Change for Sustainability” in Benjamin Richardson & Stepan Wood (eds) *Environmental Law for Sustainability* (Portland: Hart Publishing, 2006) at 31.[Dovers & Connor, “Institutional and Policy Change for Sustainability”]

create unbearable ecological pressure on state forests. We therefore propose that CFAs can be granted long-term leases over specific degraded forest management units with the community forest management plans clearly establishing the sustainability obligations, priorities and permitted forestry activities.

The instant reform proposal will involve long-term investment of time, skills and money by communities. This provides justification that some strictly regulated agroforestry activities, or forest harvesting may be permitted, but only if the forest ecosystem will not be harmed. Where permitted, these activities will enable communities to grow food crops, alongside trees in the formative period as the trees mature. Simultaneously, it is important to introduce an incentive that will ensure that agricultural crops are not more favoured than trees. This was a problem in previous models of the *shamba* system, as communities would uproot maturing trees in order to justify the trees taking more years, which in turn provided more years for agricultural crops. In order to anchor this in legal principle, we propose that the tenure rights granted to communities should confirm an element of tree tenure.

Resource economist Tony Scott defines tree tenure as an arrangement whereby one party can own rights to plant and harvest an orchard, a small plantation or a stand of trees over land which another person has ownership rights.¹⁹¹ Gregersen, Draper, & Elz¹⁹² argue that tree tenure sums up the bundle of rights and duties regarding the planted trees, such as:

¹⁹¹ Anthony Scott, *The Evolution of Resource Property Rights* (New York, Oxford University Press, 2008) at 446-447.

¹⁹² Hans Gregersen, Sydney Draper, & Dieter Elz, *People and Trees: The Role of Social Forestry in Sustainable Development* (Washington, D.C.: Economic Development Institute of the World Bank, 1989) at 147.

- i). The right of creation, in this case, to plant trees, and the simultaneous duty to care for the trees, as part of the forest, to ensure sustainable forest management
- ii). Clearly defined rights to use the trees including gathering, using live trees for instance hanging bee hives; cutting down trees; and harvesting tree produce
- iii). The clearly defined right of disposal including cutting down trees or clearing sections of forest or the right to sell trees.

The bundle of rights and duties set out here provide an effective means to balance the interests of forest adjacent communities in obtaining socio-economic benefits, and the need to uphold sustainable forest management.

Tree tenure is also instrumental to the component of the *shamba* system that focuses on non-resident cultivation specifically for plantation forests. In its current form the programme involves a form of agroforestry whereby communities plant food crops alongside trees in erstwhile degraded forests, or established commercial plantations. In chapter 4, we explained that communities are allocated a plot for a maximum period of three years, within which they should have planted and tended tree seedlings while growing specified annual food crops. Therefore, the actual planting, tending and caring for seedlings as they mature to trees is central to non-residential cultivation. The concept of tree tenure thus has direct implications to this aspect of community forestry.

While the maximum period for each *shamba* is three years, trees take longer to mature, and the state eventually assumes the overall financial and human capacity cost of growing these trees. When the scope of tree tenure is incorporated into the non-residential cultivation programme, it becomes conceivable that the range of rights and duties set out above as constituting tree tenure are allowable. The community retains the primary duty to ensure these agroforestry activities do not undermine sustainable forest management, and there is residual monitoring by the Forest Service.

These changes to the community forestry structure, while desirable to strengthen Kenya's constitutionally mandated reforestation goals, forest sustainability, and provide socio-economic benefits for communities are drastic and require significant modification of behaviour and attitudes by forest communities. This suggests that collaboration between forest communities and forest officers, and especially the exchange of scientific knowledge and local knowledge or cultural values through extension services is imperative. In the next section, we review the potential role of extension in modification of behaviour and attitudes by transmission of collective ethical, cultural and scientific knowledge to assist communities to implement the statutory duty of care, both in forestry and agricultural land use.

5 SUSTAINABILITY EXTENSION AND IMPLEMENTATION OF THE DUTY OF CARE

The sustainability objects and tools of tenure rights, land use and environmental law come into focus when evaluating means to reverse environmental degradation, poverty and food insecurity, such as the statutory duty of care. The principal land use legislation, on agriculture or forestry, incorporate some sustainability objectives captured as conservation of soil and its fertility,⁶ or sustainable forest management.⁶ Agriculture law however has continued to embed command and control approaches, prescribing orders to farmers on land use measures instead of providing positive management responsibilities. From the information reviewed in chapter 2, and 3, the current state of land use, soil fertility loss, and poor agriculture productivity do not support any suggestion that mandatory orders are effective in modifying attitudes of farmers toward land stewardship.

The Kenyan forest law, enacted in 2005 is more recent and states its sustainability objectives more succinctly, and even embeds a role for extension. However, this law has to contend

with massively degraded forests, and an adversarial relationship with communities resulting from decades of exclusion from forests, and poor implementation of the *shamba* system. Recognition of extension as a key tool to achieve sustainable forestry management, and incorporation of local communities through *shamba* system, is perhaps a first step towards shifting the attitudes of these communities to appreciating the need to maintain a healthy forest ecosystem. It is also crucial to the fulfilment of the socio-economic and cultural needs of these communities.

The participation of people in land use decision making is at the heart of legal concerns on integration of the right to development with the environmental right and duty. The conceptual integration of these rights facilitates a legal basis to require that environmental and development considerations become factors in land use decision making. The visible but limited ability of current agriculture and forestry extension models, highlighted in chapter 3 and 4, to realize some measure of attitude change, and better land husbandry is indicative of the direction law and policy should follow in the search for sustainable land use. The statutory duty of care, on land owners or occupiers, which requires them to take reasonable measures to remedy past degradation or prevent foreseeable degradation that adversely affects land sustainability, provides the practical legal step to underpin integration in policy and decision making.

Agriculture, the main economic activity for significant rural populations in Kenya, is closely linked to poverty. Most small scale farmers are farming degraded soils and rainwater is

scarce due to massively degraded forests.¹⁹³ A loose causal link suggests that if no corrective action is taken even the current version of the *shamba* system will fail pushing participating farmers deeper into poverty and resulting in even further forest degradation. Extension therefore offers a tool to nudge land use towards sustainability and an ethos of stewardship, avoiding a situation as illustrated above. Extension can play a major role in influencing the behaviour and attitudes of farmers, by transferring values and knowledge to facilitate realization by farmers that environmental quality of land is irreversibly linked to sustaining (higher) socio-economic benefits from agriculture and/or forestry activities. This would help to reverse Aldo Leopold's view that a major obstacle to a land ethic culture (and land vitality) is the attitude of the farmer for whom the land is still an adversary.¹⁹⁴

Pursuing an extension programme focused on stewardship and sustainability provides an important tool for meeting the objectives of land use law and policy. In practical terms, farmers will understand they have a statutory duty to safeguard environmental quality of land, and also that unless the health and fertility of the land are upheld, productivity will decline, and poverty will increase. In this sense, extension is critical to reversing land use damage; however, implementing the statutory duty of care will require new methods and information content for changing the attitude of the land users, through education and building their capacity. This implies that embedding the values of stewardship from the land ethic, culture and scientific know-how, with legal mechanisms in order to frame a human duty to care for the earth, is a conceptual basis to change human attitude towards sustainable

¹⁹³ Maathai, "The Challenge for Africa," *supra* note 188 at 241.

¹⁹⁴ Leopold, "A Sand County Almanac," *supra* note 5 at 223.

land use. This argument suggests that the legal tools and institutions responsible for sustainable land use/forestry need to embrace extension, and upgrade it from a mere policy tool (as with agriculture extension), into a complete legal mechanism that is available to advance realization of their sustainability objectives. It is this step that will shift extension and extension institutions from a focus on production and yield to a focus on achieving sustainable land use and higher productivity at the same time.

5.1 LEGAL AND CONCEPTUAL BASIS FOR SUSTAINABILITY EXTENSION

One of the article 69(1) constitutional obligations on the Kenyan state, to give effect to the environmental right, is to ‘encourage public participation in the management, protection and conservation of the environment.’ The 2006 *East African Protocol on Environment and Natural Resources Management* amplifies the central role of public participation. It underscores the key principle of ‘public participation in the development of policies, plans, processes and activities.’¹⁹⁵ The Protocol requires state parties, in order to contribute to the protection of the rights of the present and future generations to live in an environment adequate for their health and well-being, to¹⁹⁶ -

- ensure that officials and public authorities assist the public, and facilitate their participation in environmental management.
- promote environmental education and environmental awareness among the public; (Emphasis added)

The outlining of the import of public participation to sustainability, as well as the methodological approaches set out in the EAC Environment Protocol reflects a similar

¹⁹⁵ *East African Protocol on Environment and Natural Resources Management, 2006*, at article 4(2)(e). [EAC Protocol on Environment and Natural Resources”]

¹⁹⁶ *Ibid* at article 34(d).

provision that captures the objective of the *1998 Aarhus Convention* for European countries.¹⁹⁷ The 2003 *Revised African Convention* reiterates the importance of having a definitive role for the public by outlining procedural rights.¹⁹⁸ It requires state parties to adopt legislative and regulatory measures necessary to ensure timely and appropriate dissemination of environmental information; and participation of the public in decision-making with a potentially significant environmental impact.’

At the same 2003 African Union Summit that adopted the Revised Convention, the assembled African leaders adopted the *Maputo Declaration on Agriculture and Food Security in Africa*.¹⁹⁹ Implicitly, the Maputo declaration stands out like the accompanying policy statement to the continental treaty law on environment. It focused on the important linkage between land health, biodiversity, food security and human survival. The declaration discloses an Africa-wide agenda on agriculture and food security. It expresses a concern that 30 per cent of the African population is chronically and severely undernourished, and that the Continent has become a net importer of food and the largest recipient of food aid in the world. The African leaders were convinced of the need for Africa to utilize its potential to increase food and agricultural production.

¹⁹⁷ See, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, United Nations Economic Commission for Europe, 25 June 1998, 2161 UNTS 447, article 1, *in extenso*, ‘in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.’

¹⁹⁸ Article XVI.

¹⁹⁹ See, African Union, *Declaration on Agriculture and Food Security in Africa* (Maputo, Mozambique: Assembly of the African Union, Second Ordinary Session, Assembly/AU/Decl.7(II), 2003).

Two resolutions from the Maputo Declaration are directly relevant to this research. The first involves revitalizing the agricultural sector through policies and strategies targeted at small scale and traditional farmers. The strategies developed emphasise human capacity development, and removal of constraints to agricultural production and marketing, including poor soil fertility and water management. The second involves the active participation of small scale and traditional farmers, women and youth associations in all aspects of agriculture and food production. The resolutions resonate with the treaty, and reiterate connectivity between quality of land health and husbandry, needs of local communities, and role of extension in building human capacity and modifying attitudes to favour land stewardship. We highlight this connectivity as imperative for realizing sustainability objectives envisaged by law and policy.

Through the Maputo Declaration, the African Union committed to implement as a matter of urgency, the Comprehensive Africa Agriculture Development Programme (CAADP), which is an African sustainable land management policy. The CAADP is organized into four pillars, each targeting a core aspect necessary for successful implementation²⁰⁰ -

- Pillar 1 - to extend the area under sustainable land management and reliable water control systems
- Pillar 2 - to improve rural infrastructure and trade related capacities for market access
- Pillar 3- increase food supply, reduce hunger, and improve responses to food emergency crises; and
- Pillar 4 - to improve agricultural research, technology dissemination and adoption

²⁰⁰ African Union, NEPAD, *Implementing the Comprehensive Africa Agriculture Development Programme and Restoring Food Security in Africa "The Roadmap"*, (Midrand, South Africa: New Partnership for African Development (NEPAD) Secretariat, undated). Online:

<ftp://ftp.fao.org/TC/TCA/CAADP%20TT/Background%20%20documents/Main%20document/Roadmap%20of%20implementing%20CAADP.pdf>

The first and fourth pillars are especially relevant to this chapter as they embody the potential of extension to bring about change toward sustainable land use across the African continent, naturally including Kenya.

The objective of Pillar 1 is to reverse resource degradation and ensure broad and rapid adoption of sustainable land and forestry management practices by the small-holder and commercial sectors. The activities include supporting national research and extension systems for conservation-friendly forestry and farming technologies. This entails community-based reforestation and conservation; including interventions in soil health, restoring soil fertility with mineral fertilizers or agroforestry. National governments are expected to implement these activities, including mainstreaming land management and conservation programmes into national research and extension systems. The objective of Pillar 4 is a flow of technologies to resolve the challenges facing African agriculture. This would be done through national agricultural technology systems such as national research and extension functions. According to the CAADP agenda the most effective way to reduce poverty and food insecurity sustainably is to raise the productivity of resources upon which poor people depend for livelihood. These resources include the agriculture and forestry land that provide a subsistence livelihood but face significant sustainability challenges.

The CAADP reflects the African agenda to infuse sustainability into agriculture and forestry land use, to increase productivity and food security for the long and short term. The forestry agenda includes sustainable forest management, strengthening community and other

participatory approaches, and enhancing research, education, training and extension.²⁰¹ The role of the extension function in achieving sustainable land use and constructive engagement between government and land users (such as farming and forest communities) stands out prominently. The challenge has persisted in identifying mechanisms to facilitate this sustainability in the regular land use choices made by small-scale farmer or forest communities facing a struggle to urgently meet unfulfilled socio-economic needs. Culture, local knowledge and scientific knowledge provide an informational and know-how basis for a sustainability extension function that may change the attitudes and behaviours of people, so they can behave as mandated by the constitutional objective of realizing ecologically sustainable development and use of natural resources.

Extension, as a manifestation of public participation in sustainability decision making, and as a tool of effecting behaviour change therefore has basis in law, and is consistent with African agricultural and forestry treaty law and policy approaches. With the projected role of extension in changing human attitudes and behaviour, sustainability extension fits the framework of the 'legislative and other measures'²⁰² required by the 2010 Constitution of Kenya to give effect to the environmental right. The role and importance of sustainability extension is further enhanced in light of the complexity of existing land degradation, poverty and the intricate duties and responsibilities on duty holders. It would be unfair and unrealistic to expect individual duty holders to have all the relevant information at their

²⁰¹ African Union & NEPAD, *Companion Document: Comprehensive Africa Agriculture Development Programme – Integrating Livestock, forestry and fisheries subsectors into the CAADP* (Rome, Italy: Food and Agriculture Organization, 2006) at 20-22.

²⁰² Constitution of Kenya, 2010 - see, article 42. See further, discussion and analysis, chapter 2, section 5.3.2.3.

finger tips or to know where it can be accessed, be able to access the information,²⁰³ and implement relevant guidance without assistance. Further, as argued by Bates, it may be inappropriate to require land managers to comply with the duty of care without technical and/or financial assistance, especially when the aim is to correct environmental damage resulting from actions that occurred prior to the introduction of the duty of care.²⁰⁴

5.2 FRAMING THE CONCEPT OF SUSTAINABILITY EXTENSION

Traditional extension has been concerned with the transfer of knowledge, technology and skills to land users from extension agents. The new knowledge is aimed at improving productivity for the farmer. Whether the extension function is rendered by a public agency, or a private sector player, adapting the technology is generally voluntary. Unless there is a distinct benefit to the farmer they may readily ignore any advice. This perspective heightens the concern that while extension primarily serves a positive function, the focus on short term private benefits may inadvertently enhance anthropocentric focused land use practices.

Frank Vanclay provides a justification for seeking to include a dominant imperative of sustainable land use in the objectives of extension.²⁰⁵ He suggests that in traditional extension, the decision to adopt new technologies was always an individual decision, with consequences restricted to the farmer. When it comes to land use like agriculture or forestry, the impacts of unsustainable practices affect people beyond the land users, including future

²⁰³ Industry Commission, —Full Repairing Lease,” *supra* note 68 at 151.

²⁰⁴ Bates, —Duty of care for protection of biodiversity on land,” *supra* note 25 at 32. It may also be environmental damage that the current land owner did not actually cause.

²⁰⁵ Frank Vanclay & Geoffrey Lawrence —Agriculture Extension in the Context of Environmental Degradation: Agricultural Extension as Social Welfare” 1994 5(1) *Rural Society*, at.4-5.

generations. Since land is non-replenishable, the resource declines through degradation. The community has a vested public interest in ensuring that legal, policy and administrative measures guarantee that sustainable land use. As opposed to entirely private benefits conferred by the traditional extension function, sustainability extension confers both private and public benefits to the land owner/user and the public. This would mark conversion from production extension, to sustainability (plus productivity) extension.

This reorientation of extension toward sustainable land use is crucial for developing countries such as Kenya. They are faced with a land use crisis, whereby the majority of the population depend on agriculture or forestry based activities, yet levels of degradation are high, and the prevalence of poverty and hunger is extremely high. Sustainability extension will be positioned as a key mechanism integrated with law to meet those sustainable land use/forestry objectives necessary to reverse environmental degradation, and address socio-economic requirements needed to mitigate poverty.

5.2.1 FRAMING THE PRINCIPLES

The negative effects of unsustainable land use affect the public and ecosystems. The execution of unharmonized sectoral land use objectives exacerbates the land use situation, with consequential effects on livelihoods. Integration of production extension with sustainability extension avails a useful opportunity. The following concerns are critical:

- a) In their use of land, land owners or occupiers should allow room for regeneration to sustain the environmental quality of land, which will in turn support human life and socio-economic advancement
- b) Developing countries such as Kenya are faced with a land use crisis. The majority of their populations depend on agriculture or forestry based activities, yet levels of degradation are high, and the prevalence of poverty and hunger is extremely high. The desire to fight poverty and hunger must not divert from the pursuit of sustainability in land use.

Land use, and environmental laws that set sustainability objectives should be guided by these concerns. They should also embed extension, like the 2005 forestry law, as a legal mechanism that is integral to realization of these sustainability objectives. When extension is clearly identified as a means to achieve sustainability objectives of land use law, it is conceptually transformed from production extension, to sustainability extension. The education and communication role of extension then focus on skills and knowledge pertinent to stewardship, including information on the close proximity of stewardship to any meaningful and sustained productivity of land.

While embedding sustainability extension as a mechanism for different land use laws such as agriculture or forestry reinforces the function of extension, land use frameworks are fragmented, with distinct sectoral implementation. This fragmentation of sectoral land use legal frameworks is antithetical to the idea of integration because, according to Bosselman, it results in a situation where sectoral land use decisions and choices only focus on specific aspects of the environment, rather than as an integrated whole.²⁰⁶ Ideally thus, even where there is a statutory duty of care that horizontally integrates human obligations to sustainability, absence of a holistic approach to extension will undermine the vertical integration that is necessary to offer guidance to small-scale farmers and forest users. This suggests it is essential to develop unified and common extension principles that can incorporate the sustainability agenda, and guide sectoral implementation by legal institutions. This will ensure that sectoral/institutional policies, planning and decisions are

²⁰⁶ Klaus Bosselman, “Using the Forest for the Trees: Environmental Reductionism in the Law” 2010 (2) Sustainability 242-2448 at 2432.

vertically integrated with the duty of care through the sustainability extension as an implementation mechanism.

5.2.1.1 A unified national sustainability extension policy

A unified policy will enable a holistic approach to extension, refocusing from simple technology transfer for enhanced land productivity, to building human capacity for, and providing guidelines and targets for land stewardship. The 1992 *UN Forest Principles*,²⁰⁷ although non-legally binding and only restricted to forest management, offer conceptual support to this proposal of a unified national policy. Principle 3 states that ‘national policies and strategies’ should ‘provide a framework for increased efforts, including the development and strengthening of institutions and programmes...’²⁰⁸ Dovers and Connor have written about ‘institutions and policy change for sustainability,’ an issue with a direct bearing on the instant discussion regarding an overarching institutional or policy framework for sustainability extension. In this regard, the two scholars acknowledge that policy integration is ‘...key to sustainability and the convergence of concerns...’ for socio-economic requirements and ecological integrity.²⁰⁹

The priorities for a unified sustainability extension policy should be set based on identified national land use challenges and opportunities. The declining land fertility, poor husbandry, falling food crop production, and forest degradation are some of the challenges we have

²⁰⁷ United Nations, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests* (UNGA, A/Conf.151/26(Vol.III), 14 August 1992). <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>

²⁰⁸ *Ibid* at Principle 3.

²⁰⁹ Dovers & Connor, ‘Institutional and Policy Change for Sustainability,’ *supra* note 190 at 48.

recorded in various sections of this research.²¹⁰ A sustainability extension policy should further highlight strategic opportunities such as implementing a goal of land stewardship through behaviour change, and engaging the local communities to achieve this goal. The policy should also address legal and institutional arrangements on common sustainability objectives, and institutional coordination amongst concerned agencies.

These institutional arrangements include those concerned with policy making roles and oversight for implementing sustainability extension. We suggest that the institutional role at this high-level should mainly be concerned with broad-based supervisory roles rather than direct involvement in the delivery of extension services. The other role would be to coordinate staff training to harmonize information and methods. It would also design policy and strategy to coordinate extension implementation by sectoral ministries, including providing legally mandated linkage between front-line extension agents, and research institutions. The unified sustainability extension law and policy that determines the policy objectives, and institutional arrangements, should be linked to a national sustainability law and policy framework such as a National Sustainable Development Strategy,²¹¹ whose development is beyond the scope of this research.

5.2.1.2 Common goals and objectives

Drawing from the unified sustainability extension policy, a common baseline objective is necessary to establish quantifiable targets for the outputs of the sustainability extension. This

²¹⁰ See, for instance, Chapter 2, section 4.

²¹¹ See, *supra* note 155, for a brief highlight on the role and function of a National Sustainable Development Strategies.

mainly entails having a common agreement between the sectoral authorities on the general land use responsibilities of land owners/users for sustainable land use, in order to avoid a fragmented approach to extension. Such an agreement should therefore inform the content of sustainability education or knowledge that is shared and exchanged with land owners or forest users. There should therefore be a legislative link and a policy of collaboration between sustainability extension and the development of national or local codes of practice, and forest management plans.

Other common objectives include the strategies for land user/owner participation in the extension including approaches such as training of farmers to be trainers of their peers,²¹² and local monitoring. This would be consistent with existing international environmental legal norms, such as the *East Africa Protocol on Environment and Natural Resources* that require state parties such as Kenya to create an environment conducive to the participation of ... local communities...in environmental and natural resources management.²¹³ As highlighted earlier in this chapter, the protocol further calls on the state parties to ...ensure

²¹² The active participation of farmers in extension, which builds their capacity to integrate sustainable land use choices into their regular decision making, and foster collaboration with public officials was well documented as a successful outcome from the “Intensified Social Forestry Project” in Semi-Arid Areas in Kenya. See the mid-term review report, FAO, JICA, *Kenya: Intensified Social Forestry Project in Arid Areas Impact Assessment Report*, (Rome: Food and Agriculture Organization & Japan International Cooperation Agency, 2007). At page 11-1, it is reported ...the ISFP project had commenced with enhancement of extension training, including capacity building for forestry officers, and training farmers. This was done through farmer field schools (FFS), and by the end of February 2007, a total of 140 FFSs had been set up and facilitated by district forest officers, and farmers trained as facilitators in the three project districts. About 2,130 farmers had been trained, and graduated from the FFS’s by March 2007.⁴ This demonstrates that training of farmers, including a system where farmers can collaborate amongst themselves to tap local knowledge to supplement the scientific advice from extension services, is a most important element of sustainability extension. With regard to the focus of a unified sustainability extension policy on participation, collaboration and training of land owners, it is such empirical evidence and legal principles that underpin the concept, role and objectives of a sustainability extension.

²¹³ See, *EAC Protocol on Environment and Natural Resources*, article 34.

that officials and public authorities assist the public to gain access to information and facilitate their participation in environmental management.²¹⁴ The practical implementation of the common objectives, in order to achieve tangible change in behaviour and attitudes toward land use decision making is however, in this case, left to the specific sectoral agencies/institutions.

5.2.1.3 Utility of knowledge

A major challenge facing extension involves the utility of extension advice about sustainable land use to land users. This requires shifting from basic knowledge on how to increase productivity, to broader knowledge on how to sustain land health and high productivity at the same time. It is a proposal that is closely affiliated with the call on governments, by Agenda 21, to work with appropriate sectoral institutions to ‘alert and educate people on the importance of integrated land and land resources management and the role that individuals and social groups can play in it,’ and to provide people with the means to adopt improved practices for land use and sustainable management.²¹⁵ Therefore in order to enhance contribution of extension to sustainable goals of land use laws, extension policy must create mechanisms of participation, information sharing and feedback between farmers, and with extension agents or researchers. When implemented properly, this could combine the breadth and quality of information from local knowledge with scientific research into knowledge that is useful to sustain a healthy and productive land base.

²¹⁴ *Ibid.* Kenya is a state party to this Protocol, which under article 2(6) of the 2010 Constitution, forms part of the laws of Kenya. With regard to the focus of a unified sustainability extension policy on participation, collaboration and training of land owners, it is such empirical evidence (*Ibid* at fn 212), and legal principles that underpin the concept, role and objectives of a sustainability extension.

²¹⁵ —Agenda 21,” online: http://www.un.org/esa/dsd/agenda21/res_agenda21_10.shtml

Traditionally, participation in the typical extension programme is voluntary for private land owners, and uptake of technical advice depends on the tangible benefits it brings to the farmer. With the specific standard of care responsibilities set out as minimum affirmative action obligations for land users, they will need extension services as they seek to implement the duty of care, and avoid the sanction based enforcement framework. Sustainability extension is therefore a useful mechanism to infuse values of stewardship into practices of land owners/users. If extension is anchored in land use law as a primary mechanism to meet sustainability objectives, it will become one of the basic and default legal tools accessible to public agencies implementing land use laws on a national scale.

5.2.1.4 A Broad Legislative and Policy Mandate

The mandate of sustainability extension function could be extended beyond merely being repositories and transmitters of skills and knowledge. Farmers and other users of land should be tapped for information, since once the importance of stewardship is highlighted they may have on-the-ground knowledge on how best to practice it. The same channels of education and communication applied for extension can be used to address multiple law/policy objectives that affect sustainable land use. These include civic education and action in areas like gender rights, HIV/AIDs and other diseases, and illiteracy.²¹⁶

²¹⁶ For a discussion on the potential link between HIV/AIDS, and sustainability extension, see Daudu Shimayohol & B. M. Bauchi, "Expanding Agricultural and Rural Extension Roles for Sustainable Extension Practice in Nigeria" 2010 (14)1 *Journal of Agricultural Extension*, 62-68. They argue that that extension should address itself, for instance, to mitigating impacts of the HIV/AIDs pandemic, and "... give more emphasis to labour and capital saving technologies to compensate for labour shortage, gender appropriate agricultural practices, crop diversification..." Perhaps in an implicit reference to the importance of intergenerational equity to sustainability, the two authors urge that extension should pay special attention to the youth in order to mitigate the loss of skills, knowledge and experience brought about by the HIV pandemic.⁶

In order to address these broader environmental and socio-economic policy concerns that often impact sustainability of land use practices, there is need for public sector investment into a nation-wide programme. It is arguable that such a broad undertaking will result in large costs to the public sector. However, the failure to take such measures will result in further unsustainable land use, and undermine the activities on which the livelihoods of millions of Kenyans today and in the future will depend. In any case, the values of sustainability and extension are firmed up by the 2010 constitution of Kenya. Sustainability extension implies sustainable land use practices, and public participation, both of which are mandatory obligations of the Kenyan state under the constitution.²¹⁷ Further the preamble to the constitution declares the people of Kenya as being respectful of the environment, which is our heritage...²¹⁸ and ...determined to sustain it for the benefit of future generations.²¹⁸ This constitution was recently (4 August 2010) approved by 67% of the voting population,²¹⁹ and therefore is not only basic law but it also captures the aspirations of the Kenyan people. State policies and statute law should derive their design, objectives, validity and implementation from the constitution, and often are means to implement constitutional goals.

Making a case for sustainability extension as a mechanism to implement the integrated sustainability objectives of environmental protection and socio-economic development as recognized in the Kenyan constitutional commitment to ecologically sustainable development will contribute to this process. Sustainability extension will provide the means

²¹⁷ Constitution of Kenya, 2010, at article 69.

²¹⁸ *Ibid*, preamble.

²¹⁹ The constitution was approved at a referendum on 5 August 2010, and promulgated into law on 27 August 2010. The final results of the referendum are published in *Kenya Gazette notice* No. 10019, Vol. CXII-No. 84 of August 23rd, 2010.

to influence and change the attitudes of land owners, such that they observe the standard of care, thereby fulfilling the statutory duty to safeguard sustainability in agricultural or forestry land use activities.

6 FUTURE RESEARCH

This research has restricted the scope to examining the challenge of integrated decision making for sustainability, and proposing legal reform through a statutory duty of care to prevent land degradation that adversely affects land sustainability. In spite of this limited approach, the overall framework sets out a conceptual reconciliation of legal principles such that there is a clear legal and ethic responsibility on every land owner or occupier to practice sustainability. We suggest three areas of potential future research: (1) This framework can be instrumental in further research on how legal and ethical responsibilities to practice land stewardship can be applied in framing policy to implement mechanisms for adaptation to climate change by small-scale farmers and forest communities.²²⁰ (2) Similarly, this model of a statutory duty of care, and sustainability extension may play a crucial role in implementing models of agriculture practices that focus on safeguard environmental quality of land, such as conservation agriculture.²²¹ (3) In discussing community forestry and the important role of an unequivocal sustainability obligation on forest communities, we briefly explored the status of communities with historical claims to lands now classified as state

²²⁰ See for instance the complex arguments on the impact of climate change in Africa, and the search for adaptation mechanisms in Camilla Toulmin, *Climate Change in Africa* (London: Zed Books, 2009).

²²¹ See for instance, a guide on concepts and strategies of conservation agriculture in, Lamourdia Thiombiano & Malo Meshack, *Scaling-up Conservation Agriculture in Africa: Strategy and Approaches* (Addis Ababa: FAO, 2009). See also Pascal Kaumbutho, Josef Kienzle, *Conservation Agriculture as practiced in Kenya: Two case studies* (Nairobi. African Conservation Tillage Network, Centre de Coopération Internationale de Recherche Agronomique pour le Développement & FAO, 2007).

forests. With the 2010 Constitution of Kenya contemplating and authorizing creation of community forests,²²² the statutory duty of care framework may be helpful when determining the scope of tenure rights and duties, and the structures of internal governance and administration of community forests.

7 FINAL WORDS

This chapter has represented the legal reform proposal arising from the entire research. It has involved the search for a legal mechanism that will facilitate adoption of sustainability into land use practices, by guiding both sectoral law institutions and individuals to integrating environmental protection with socio-economic activities, policies, plans or decisions. The search was prompted by a finding that tenure rights, and regulatory law did not create a legal responsibility on land owners to integrate sustainability into land use decision making. Similarly, with a reintroduction of community forestry through the *shamba* system, there is an urgent need to facilitate a change in attitude and behaviour to ensure that forest communities integrate forest conservation into their socio-economic or cultural activities. We argued that Aldo Leopold's land ethic, which proposes a human responsibility to care for vitality of land alongside socio-economic activities, is a conceptually sound basis for behaviour change. It is consistent with a legal duty of care that can be applied to change the

²²² The Constitution of Kenya, 2010 provides for establishment of community forests. see for instance article 63(2)(d) which states that community land includes land (ii) ...lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and (iii) ...ancestral lands and lands traditionally occupied by hunter-gatherer communities.' The actual definition of a community forest in (ii) is unclear but could possibly include forest lands ceded to forest-adjacent communities. The community forests set out in (iii) could include forest lands historically claimed by certain communities such as the *Ogiek* and the *Endorois*. See the discussion in Chapter 4, section 4.2.

behaviours of people by reinforcing a certain standard of conduct that will ensure environmental protection.

We explored the common law duty of care, and determined it is unsuited for environmental protection, because the duty is primarily owed to individuals and would not enforce sustainability on a duty holder's land. Further, the common law duty of care is subject to judicial interpretation, which may limit applicability of the duty in certain circumstances. A duty of care that is founded on statutory provisions is however more specific both in setting out a duty holder, and the circumstances in which the duty of care applies. The statutory duty of care can also require a duty holder to take measures to prevent land degradation on their own land, but also the land of another land owner.

Importantly, a statutory duty of care can be modelled to encourage land owners or occupiers to remedy past land degradation, and prevent any foreseeable degradation that adversely affects sustainability of land. We have argued that the high prevalence of unsustainable land use practices suggests a need for a higher standard of care, one that will utilize existing ethical, cultural and scientific knowledge to provide clear pre-stated expectations of the reasonable conduct required of land owners or occupiers. The land owners or occupiers must also be involved in preparation of the positive action measures that will guide their implementation of the duty of care. The purpose of the statutory duty of care and the standard of care is to create affirmative responsibilities that will guard land owners/occupiers or forest communities into becoming land stewards. This will involve people adapting their land use or forestry activities to the basic requirements of integration, which implies finding a balance between socio-economic or cultural activities with conservation. The hallmark of

shifting peoples land use attitudes towards sustainability involves taking measures that, while facilitated by the law, are beyond the law. We have suggested that sustainability extension, which merges focus on higher productivity with stewardship, is a well suited policy mechanism to guide implementation of the sustainability expectations that mark the standard of care.

With the legal and policy reforms proposed in this chapter, there is conceptual integration of property (socio-economic) rights, with environmental protection, through the exercise of a duty of care to take reasonable measures to remedy past environmental harm, and prevent foreseeable harm. Since it is the 2010 Constitution of Kenya that has mandated the environmental duty aimed at achieving ecologically sustainable development, implementing the reform proposals would ensure the legal system undergoes both horizontal and vertical integration.

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