RETRACING OUR ECOLOGICAL FOOTSTEPS: CUSTOMARY FOUNDATIONS FOR SUSTAINABLE DEVELOPMENT AND IMPLICATIONS FOR HIGHER EDUCATION IN KENYA

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Paper Prepared for the 7th Annual Strathmore Conference under the theme "*The Ethics of Sustainable Development in Higher Education*"

28th -29th October 2010

A: Introduction

The discourse on property rights has been intractable and part of Kenya's socio-political history since the advent of colonialism. At the heart of the debate lies the relationship between western approaches and views on property and African traditional approaches. Colonialism brought with it, British legal order. African customary practices and rules were largely replaced with these new western rules, based on the underlying philosophy that traditional modes of property and natural resource management were inimical to sustainability. This conclusion was arrived at as a result of the assessment that African customary modes of property regulation was based on open access, a regime without any protection of property rights, one that led to what Garret Hardin famously referred to as the Tragedy of the Commons.[1]

Colonial property theory, therefore, sought to replace African property rights and customary basis for holding property, especially as relates to land. Despite land having been at the centre of the fight for independence, the incoming leaders of independent Kenya did not attempt to address the lopsided view of customary property holding or the complaints with the European approach to property rights, an approach that favoured private tenure arguing that it was the most efficient, economical and stable property rights regime. [2]

Several years after independence, evidence abound about the fallacy of the approach on property and land adopted during the colonial period and continued in post-independence Kenya. The recent legal and policy reforms in the land sector confirm the desire by the

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1 Hardin, G. "The Tragedy of the Commons", *Science* 162(1968): 1243-1248

2 See Demsetz, H. "Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership,"31 Journal of Legal Studies, Special issue 653(2002). See also Migai, J.M. *Rescuing Indigenous Tenure From The Ghetto of Neglect: Inalienability and the Protection of Customary Land Rights I Kenya* (Nairobi, Acts Press, 2001) page 1.

country to give recognition and equal protection to customary tenurial arrangements. This paper discusses the importance of this decision, arguing that it is a step towards retracing the country's ecological footsteps, footsteps that began to be lost with the advent of colonialism. To make this case the paper seeks to create the nexus between the envisaged reforms to the property regimes and their regulation and sustainable development in Kenya. Drawing on lessons from wetlands management, the paper argues that to ensure that sustainable development becomes a key consideration for the country, it is necessary to borrow from customary practices and rules. This requires refocusing the debate away from the distinction between modern and customary tenure within the property rights realm and instead seeking to incorporate an ecological/ conservation ethic into all property regulations and rules. The paper argues that this was ably done within customary systems, where property was not only communal but focused on access, use and sustainability.

The incorporation of an ecological ethic in all property regimes and their regulation and learning from ancient customary approaches, requires not just a change in laws and policies, but a critical restructuring of our education system and philosophy. The paper, therefore, urges for a philosophical shift in the design and approach to legal education in Kenya as a *condition sine qua non* of enhancing the sustainable management of Kenya's natural resources.

B: Land, Property Rights and Sustainable Development in Kenya

Land is a critical resource for Kenya. The country, despite its stated intention of being a newly industrialising and middle income economy by 2030[3] is still an agro-based economy. What with over 70% of the population relying on agriculture for their sustenance. The Agricultural Development Strategy for 2010-2020 reaffirms this fact, pointing out that

[3] Republic of Kenya, *Kenya Vision 2030* (2007)

"agricultural development sector is not only the driver of Kenya's economy but also the means of livelihood for the majority of the Kenyan People."[4] The manner in which land is owned and used, otherwise referred to as land tenure, is thus of critical importance in ensuring growth of the economy and enhancement of the livelihoods of the Kenyan people.

Starting from the Brundtland report, *Our Common Future,*[5] there has emerged in development and environmental literature the concept of sustainable development as an approach to ensuring that as a country develops, it does so in a manner that ensures ecological integrity and sustainability. The concept of sustainable development is, thus, central to the discourse for ensuring ecological integrity and sustainability. However, debate continues to rage, both on the necessity for striking a balance between development needs of a society but also ecological imperatives. This debate takes a critical path when the interest of property right holders is factored in. Since the colonial period, there has been a dominant jurisprudence that seeks to focus on private property rights and views property rights to land as an economic issue. An array of legal tools and regulations has consequently developed to provide security to private property holders to land.

On the other hand, the discourse on sustainable development has emerged from the middle of the last century, as a critical organizing concept for creating the balance between the need for development and that for environmental conservation. Despite its development, challenges of how to ensure that maintenance of ecological integrity becomes infused into property regulation frameworks and discourse still exist and efforts faces opposition. The opposition is largely as a result of increased efforts at recognizing private property rights and viewing such rights as sacrosanct, disregarding the public interest in conservation. This challenge, however, is not just limited to private property but has hitherto extended to

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4 Republic of Kenya, *Agricultural Sector Development Strategy: 2010-2020 (Government of Kenya, 2010)* page VII

5 The Commission produced a report Officially known as The Report of the World Commission on Environment and Development (WCED), *Our Common Future*, (New York, Oxford University Press, 1987).

all property regimes in Kenya. In the context of public property for example, the same have been used in a manner inimical to the interests of the public.

C: Customary Rules and Sustainability in Kenya

Customary tenure refers to the tenure regime in which land is held according to the customs of communities. In most African societies, their tenure regime guarantees rights to land on the basis of the status of the right holder and that status can be either political or social. Indeed, in most African customary traditions, rights are established to land by birth, kinship, and the investment of sweat and toil, as well as by social contract.[6] The essential characteristic of customary land tenure was that land was held by the community with members of that community having clearly defined spatial and temporal use rights. There was also intergenerational transfer of such family rights in accordance with clearly established rules.

In Kenya, since the 1954 Government policy[7] that sought to promote private tenure in land as the most suitable tenure regime to ensure agricultural productivity, there has been a systematic effort to eradicate customary tenure in land by converting it to private tenure regime. Despite this, however, customary land tenure has remained resilient[8] and is the most widespread and dominant tenure system.[9]

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6 Toulmin, C. and Julian Quan (Eds) *Evolving Land Rights, Policy and Tenure in Africa* (London, DFID/IIED/NRI, 2000) p.3

7 This policy was developed by R.J.M., Swynnerton. For a more in-depth discussion of the evolution of agrarian policies in Kenya including the Swynnerton plan see Okoth-Ogendo, H.W.O., *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Acts Press, Nairobi, 1991). See also Mweseli, T.O.A, "The Centrality of land In Kenya: Historical Background and Legal Perspective," in Wanjala, S.C. *Essays on Land Law: The Reform Debate in Kenya* (Faculty of Law, University of Nairobi, 2000), pages 3-24.

8 For a discussion on the resilience of customary land tenure See Okoth-Ogendo, H.W.O. "The Tragic African Commons: A Century of Expropriation, Suppression, and Subversion," Keynote Address at the African Public Interest Law and Community-Based Property Rights, Arusha, Tanzania, 2000 published in CIEL, *Amplifying Local Voices, Striving for Environmental Justice: Proceedings of the African public Interest Law and Community-Based Property Rights Workshop* (CIEL,Washington D.C., 2002) 17-31.

9 Ogolla, D.B. and Mugabe, J. "Land Tenure Systems and Natural Resource Management" in Juma,

Although several communities exist in Kenya, each with its own distinct rules and customs, there are common threads that run through a system of African customary land tenure. These have been discussed by Bondi Ogolla and John Mugabe.[10] According to these authors, the first rule regards the right of access. This is granted to individuals or groups due to their membership in some social unit or political community. The right was thus an incident of membership to the particular unit. Bondi and Mugabe state that "Individuals or families thus claim property rights from political entities (chiefs, clan-heads, and family-heads) by virtue of their affiliation to the group. The content of these rights are determined by status within the group and the performance of multifarious reciprocal obligations."[11]

Secondly, although individuals have right of access, the right of control is vested in the political authority within the community. This control is an incident of sovereignty of that authority over resources within the unit. This power includes the power to allocate land and other resources within the group, allocate their use and defend them against outsiders.[12]

Thirdly, rights analogous to private property accrue to individuals who invest labour in harnessing, utilizing and maintaining the resource. Such rights can be transferred. Lastly, resources which do not require extensive investment of labour or which by their nature have to be shared are controlled and managed by the political unit. Generally, however, land is inalienable under African customary land tenure.[13]

C. and Ojwang, J.B. (Eds), *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers and Zen Books, Nairobi and London, 1996) 85—116.
at page 97. See also Akech, J.M., *Rescuing Indigenous Tenure From the Ghetto of Neglect: Inalienability and the Protection of Customary Land Rights in Kenya,* Ecopolicy Series 11(ActsPress,Nairobi,2001)

10 Ogolla and Mugabe, Ibid.
11 , Supra, note 4 at p.97.
12 Ibid.
13 See Migai-Akech, J.M. *Rescuing Indigenous Tenure from the Gheto of Neglect* (Acts press,

African customary land tenure belongs to the category of property referred to as common property. This has been confused in some literature with open access regime. However, they differ very fundamentally. An open access regime is where nobody has the right to exclude others from the use and enjoyment of the property. Common property regime refers to the situation where an identified group of persons like a community have exclusive rights of use, exclusion and transfer. All members of the group share this right but non-members do not and can be excluded from enjoying the rights that inhere in the property.

Common property is viewed by proponents of private property rights as being inimical to efficiency and rational use of resources. According to Hardin and those who ascribe to this school of thought, people were prone to overuse common resources because of lack of an incentive to conserve. The solution to this was private property as it enabled the owners to avoid the short term benefits and instead focus on internalizing all future benefits and costs.[14]

Hardin's postulation has largely been discounted in subsequent years by scholars. Elinor Ostrom, for instance, argued that Hardin incorrectly classified the property regime he was assessing as common property yet what he was referring to was open access, where

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Nairobi,2001)

14 See Rose, C. "The Comedy of the Commons: Customs, Commerce and Inherently Public Property," 53(3) University of Chicago Law Review 711-786(Summer 1986) at 711-3 summarizing the arguments in favour of private property and against common property stipulating that such arguments hold that common/public property is an oxymoron since things left open to the public are not property at all, but its antithesis. Private property, on the other hand, its proponents argue, enables resources to be better used, conserved and exchanged.

everybody has access rights and use privileges.[15] Ostrom then pointed out that there existed several examples of common property regimes and documented some of these.[16]

Under this regime of tenure holding, rights over land and land-based resources are held by a clearly defined group of users. They hold a clearly defined set of rights and obligations. Rights to use the resources are distributed equitably amongst members of the group and regulated through use of guidelines which traditionally were handed over from generation to generation.

In Kenya customary tenure continues to govern the management and use of land and land-based resources even despite spirited attempts to convert it to other tenure regimes. What is clear from customary practices is the focus on ecology and conservation. Many traditional rules were developed to ensure that resources were used in a sustainable manner and with regard to the interests of all members of the society but also those members yet un-born. In essence traditional societies respected rules of inter-generational equity and intra-generational equity.

D. Lessons from Wetlands Management

Wetlands are one of the two most important yet threatened ecosystems in the world currently.[17] However, the degradation and loss of wetlands is more rapid than that of forests and of any other ecosystem.[18] The reason could be that forests have always been

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15 Ostrom, E. *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990).

16 Ibid. See also Bromley, D.W. and M. Cernia, "The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies." World Bank Paper*, no. 57, 1989.*

17 For a discussion of the importance of wetlands and the challenges it faces in the Kenyan context and responses of the law in addressing this See Generally, Oloo, C.O, " Regulating Property Rights To Ensure Sustainable Management of Wetlands in Kenya, (Unpublished PHD Thesis, 2010, University of Nairobi)

18 The Millennium Ecosystem Assessment points out that wetlands are the ecosystem that is

viewed as a useful ecosystem, the source of trees and related products and serving important functions in society.[19] In contrast, the utility of wetlands to society has not always been accepted and appreciated. Indeed, for a long time wetlands were viewed as useless areas[20] and their utility could only occur as a result of conversion to more productive uses like agriculture. This resulted to wetlands being referred to in certain quarters as "wastelands."[21] Modern efforts have been made to ensure conservation of wetlands. Internationally these efforts revolve around the adoption and implementation of the Convention on Wetlands of International Importance especially as Waterfowl habitat (also Known as the Ramsar Convention).[22] The Convention seeks to "stem progressive encroachment and loss of wetlands," ensure wetlands conservation through "combining-far-sighted national policies with co-ordinated international action."[23] Kenya has taken several actions as required by the Ramsar Convention including designating of wetlands onto the List of Wetlands of International importance and adoption of laws.[24]

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degraded at the fastest rate. See World Resources Institute, *Millennium Ecosystem Assessment: Ecosystems and Human Well-Being: Wetlands and Water*, 2005. Available fromhttp://www.millenniumassessment.org/documents/document.358.aspx.pdf. (accessed on)

19 The comparison and differences between wetlands and forests is beyond the scope of this study. So is an exhaustive discussion of forest management and uses. For relevant literature on forest management in Kenya see, for example, Okowa-Bennum,P. and Mwangi, A.M. "Land Tenure and Forest Resource Management" in Juma, C. and Ojwang, J.B. (Eds), *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers and Zen Books, Nairobi and London, 1996) pp. 175-197;Situma, F.D.P., " Forestry Law and the Environment in Kenya," in Okidi, C.O., *et al* (Eds) *Environmental Governance in Kenya: Implementing the Framework Law*(East African Educational Publishers Ltd, Nairobi, 2008) pp 235-259.

20 See Mathews, G.V.T., *The Ramsar Convention on Wetlands: Its History and Development* (Ramsar Convention Bureau, Gland, 1993) page 6 discussing general perceptions of wetlands as waste areas not fit for any use.

21 See *Wetlands are not Dangerous Swamps; They're Worth Saving*, Reuters Library Report, May 31, 1990(BC Cycle) which reports that historically most people considered wetlands to be nothing more than swamps and wastelands, the breeding grounds for insects and diseases. See also Gardner, R.C. "Banking on Entrepreneurs: Wetlands Mitigation Banking and Takings" 81 Iowa Law Review 529 (1996) which points out that at one time wetlands were considered little more than mosquito-breeding nuisances.

22 996 UNTS 245(1976) reprinted in 11 ILM 97(adopted in 1971, entered in force on 21 December 1975)

23 Ibid. Preamble.

24 See Odote, Collins " Wise Use and Sustainable Management of Wetlands in Kenya, in Okidi, C.O., *Environmental Governance in Kenya: Implementing the Framework Law (Nairobi, East African Educational Publishers, 2008) 335-354*

Despite the oft-held view that wetlands were mostly viewed as useless grounds, traditional Kenyan communities regarded wetlands as useful areas and just like general land tenure and use rules, had rules for their conservation. These rules as seen from the example of the Bukusu saw wetlands as sources of important materials and also as sacred sites.

In traditional Kenyan society, wetlands were treated as valuable resources. Many communities used to draw food, medicinal products, fuel wood and materials for building and handicraft from wetlands. Certain communities developed cultural practices to promote conservation of wetlands. Amongst the Bukusu, for example, circumcision used to take place in sacred places in wetlands. The criteria adopted in the choice of a site include privacy and presence of ample water and mud.[25] The wetlands were important sacred sites because of what they symbolized. By having the young people smear themselves with the mud and walk back home naked, it was meant to symbolize that, firstly, the protection given by the soil is similar to that of the mother's womb, thus keeping the young people warm as they undergo the ceremony and secondly, it was a rite of passage into manhood, marking the last time they were allowed to walk naked in public. The mud was only available in some places in the wetlands. Traditional beliefs held that these should never dry, for to do so would signify that "the generation of young men who bathed at that site would not survive and fulfill their biological and societal duties of child-bearing and development of a family unit"[26]. These cultural beliefs and practices contributed to the conservation of wetlands amongst communities.

The turning point in protecting wetlands is associated with the imposition of colonial rule and introduction of colonial policies and laws, especially those relating to land tenure and land use.[27] Western religions, education and health facilities have contributed much to

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25 Kareri, R.W., "The Sociological and Economic Values of Kenya's Wetlands," in Crafter, S.A. et al, *Supra note 9* Pp. 99-107 at 100.

26 Ibid. Page. 102.

27 For a discussion of the imposition of colonial rule and laws relating to land see generally, Ghai,

changing the traditional beliefs and their inherent resource conservation traits. These have been exacerbated by modern farming methods and the increase in population. This has happened against the backdrop of lack of sufficient awareness on the need to conserve wetlands and supportive laws and policies. Kenya has, however, since independence made some effort in addressing the policy and legislative landscape for wetlands management.

The importance of wetlands was first recognized by the Kenya Government in the 1963 Manifesto on conservation of natural resources.[28] In 1969, at the first Wildlife Conference for Eastern Africa, the need to conserve and protect natural resources, including wetlands, was noted. [29] Following the coming into force of the Ramsar Convention in 1975, Kenya sent representation to the Conference of the Parties at the meeting in Regina Canada in 1987. Kenya emphasized her commitment to conserve water catchment areas and wetlands.[30] Kenya's wetlands were noted for their importance as migratory routes, as well as wintering areas for birds.[31] Subsequently, Kenya ratified the Ramsar Convention in 1990 and designated Kenya Wildlife Services (KWS) as the focal point in Kenya for the Convention. It also designated Lake Nakuru National park as the first Ramsar site in accordance with the requirements of the Ramsar Convention.[32] Other efforts include the passage of laws.[33] However despite these efforts, wetlands resources continue to be degraded. At the heart of these degradation lies the failure to regulate property rights in land an incorporate a conservation ethic into property regulation and resource use and management in Kenya.

Y.P. and J.P.W.B., McAuslan, *Political Law and Public Change in Kenya: A Study of The Legal Framework of Government From Colonial Times to Present (* Nairobi, Oxford University Press, 1970*)* and Okoth-Ogendo*, H.W.O., Tenants of the Crown: Evolution of Agrarian Law and institutions in Kenya* (Acts press, Nairobi, 1991)

28 Nkako, F.M., "Wetland Conservation in Kenya: KWS and Ramsar" in Crafter, S.A., *Wetlands of Kenya: Proceedings of a Seminar on Wetlands of Kenya,* Supra note 9. Pages. 91-98 at P. 91.

29 Ibid. page 92.

30 Ibid.

31 Ibid

32 Article 2 of the Ramsar Convention requires Parties to the Convention to designate at least one wetland onto the list of Wetlands of International Importance.

33 The laws passed and the extent to which they contribute to sustainable management of wetlands is discussed in section 6.3 below.

E. Reforming The Property Institution: Towards an Ecological Jurisprudence

On 4th August, 2010 Kenyans held a second referendum on its constitution. This followed the vote in November 2005 at which the first attempts to adopt a new constitution failed. The referendum resulted in the adoption of a new constitution, marking the end of a search that had gone on for over twenty years. The new constitution proposed key changes to the country's socio-economic and political governance framework.

One of the areas that have been part of the country's constitutional reform agitation and that the new constitution addresses in detail relates to property rights and their regulation. The old constitutional order did not define the term constitution. however, the term was contained in section 75(1), which provided that" No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired." This section related to protection against compulsory acquisition of private property without compensation. However, the constitutional protection of property largely focused on private property and not other tenure holdings, a feature carried over from the colonial heritage.[34] This focus on private property and disregard for conservation aspects was at the core of the clamour for land reforms both in the constitutional and policy contexts. Bhalla summarized the restrictive nature of the concept of property under the old constitution thus:

> "As already noted, the institution of property arose in answer to the society's economic needs. Such a development took place when the pressures on the environment were still relatively low, and at a time when the fundamental links between economics and environment, under the notion of sustainable development, had not yet been sufficiently clarified. The constructive burdens of legal doctrine have, unfortunately, been carried over into the modern constitution, which now

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[34] See Generally, Juma, C. and J.B. Ojwang, (Eds), *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers and Zen Books, Nairobi and London, 1996)

sanctifies individualistic principles that are in sharp conflict with collectivist goals of environmental conservation."[35]

Reforms to the property institution have been based on the need to ensure efficiency, equity and sustainability.[36] The new constitution and the national land Policy proposes several changes to the property institution. These include recognition of the right to property in the constitution, formation of a National Land Policy to manage all public land on behalf of the state, constitutional treatment of land and property, tenure reform involving categorization of land into three tenure categories of private, public and communal; vesting radical title on the people collectively as a nation, communities and individuals; reform of the regulatory power of the state over property rights and recognition of the right to a clean and healthy environment as a constitutional right.[37]

A critical component of rules on property that has implications for sustainable development is the rules on the content of the property rights, what in property literature is referred to as the "bundle of rights." Also critical is the manner in which the rights in property are regulated by the law. Of key importance for environmental management are the rules for regulating property rights, especially by the state. The traditional powers of the state to regulate property rights are those of compulsory acquisition, or eminent domain and those of development control or police powers. These powers, although existing in the past constitution, were largely not applied in the interest of environmental conservation. Both the National Land Policy and the new constitution envisage reforms to the manner in which these powers are used. The National Land Policy provides that "the

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35 Bhalla, R.S., "Property Rights, Public Interest and The Environment," in Juma, C. and J.B. Ojwang, (Eds), *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers and Zen Books, Nairobi and London, 1996) pages 61-81 at page 79.

36 This is the Visions of the recently adopted National Land Policy. See Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy* (Nairobi, Government Printer, August, 2009) page 1.

37 For a summary of the changes to the property institution brought about by the constitution and the National Land Policy, See Odote, C., "The Impact of The New Constitution of Kenya and the National Land Policy on Community Conservation Objectives in Kenya: A case Study of the Northern Rangelands Trust," unpublished report prepared for Nature Conservancy, October 2010.

exercise of these powers shall be based on rationalized land use plans and agreed upon public needs established through democratic processes."[38]

On compulsory acquisition, the National Land Policy requires that its exercise be based on criteria, processes and procedures that are accountable, transparent and efficient. In our view such criteria should include ecological imperatives. In this vein the South African constitution which allows for limiting private property in the interests of environmental conservation without having to pay compensation is apt.[39] In reforming the state' police power, a power that exists to enable the state regulate the use of land so as to promote the public interest, the National Land Policy requires, amongst other things for zoning, establishment of efficient, transparent and accountable standards, procedures and processes and importantly that " the exercise of development control takes into account local practices and community values on land use and environmental management."[40]

The new constitution incorporates these provisions of the National Land policy. Firstly the Constitution contains principles of land policy which borrows from the National Land policy.[41] It provides that "land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable."[42] The principles detailed to ensure this include those of "sustainable and productive management of land resources,"[43] and "sound conservation and protection of ecological sensitive areas."[44] Secondly the Constitution provides that the principles shall be implemented through a National Land policy developed and reviewed regularly.[45] Thirdly the constitution, includes the categorization of land into three categories same as the National Land Policy. Thirdly, the constitution seeks to reform the exercises of the powers to regulate land use by adding as a new condition

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38 Supra, note 34 at page 13.

39 See David Takacs, " The Public Trust Doctrine, Environmental Human Rights, and The Future of Private Property," 16 New York University Environmental Law Journal 711 (2008).

40 Supra, note 34 at page 15.

41 See Article 60 of The Proposed Constitution of Kenya (Published by the Attorney General on 6th May 2010) adopted on 4ht August 2010 and promulgated into law on 27th August, 2010.

42 Ibid.

43 Ibid. Article 60 (1) (c)

44 Supra, note 39 at Article 60 (1) (e).

45 Supra, note 39, Article 60(2)

that the exercise of such power shall include "land use planning."[46] Also important is the provision for the establishment of a National Land Commission.[47]

Sustainable Development has been recognized by the new constitution as a principle to direct all governance processes in the country. This justifies its inclusion as one of the key national values and principles of governance in the new constitution.[48] Further the state has a duty as part of sustainability requirements to "ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits."[49] However, the duty of ensuring sustainable development is not for the state alone but for all actors. As noted in the Rio Declaration, it is a cooperative process.[50] As a result of this realization every person in Kenya is required to cooperate with the state, its organs and other person "to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."[51] The constitution recognises and provides protection to communal land rights and holding[52] as a recognition of the importance of customary practices and approaches to the ownership and use of land and natural resources.

E. The Place of Higher Education in Sustainable Development

Education plays a central role in the advancement of any society. It is the principal medium through which the society enlightens its citizens on knowledge and how to transmit and share that knowledge. Importantly, education also provides the foundation for development and progress in a country. Kenya's Vision 2030 recognizes this by identifying education as tone of the key social sectors to drive the country's march to a middle-income

46 Supra, note 39, Article 66(1).
47 Supra, note 39, Article 67.
48 Supra, note 39, Article 10.
49 Supra, note 39, Article 69(1)(a)
50 See article 10 of the Rio Declaration adopted at the UNCED in Rio De Ja neiro, Brazil, 1992.
51 Supra, note 39, Article 69(2).
52 See Supra note 39, Article 63.

economy. As a socializing, instructing and training medium, education is key to sustainable development. This has led to the evolution of the concept, internationally of education for sustainable development, with the period between 2005-2014 being declared to be the United Nations Decade for Sustainable Development[53] the purpose of this period is to "to integrate the principles, values, and practices of sustainable development into all aspects of education and learning, in order to address the social, economic, cultural and environmental problems we face in the 21st century."[54] Education for sustainable development aims to to help people to develop the attitudes, skills and knowledge to make informed decisions for the benefit of themselves and others, now and in the future, and to act upon these decisions.[55] The adoption of the decade is follow up to the commitments countries made at the UN Conference on Environment and Development in 1992. At that conference in Rio, parties adopted Agenda 21 as the programme of action to ensure sustainable development. Chapter 36 of Agenda 21 makes a case for reorienting education to support sustainable development. It follows therefore that education is indispensable in the quest for sustainable development.

Critically, therefore, Kenya to achieve the objectives of sustainable development must pay attention to education. The above call by United Nations decade on education for Sustainable development is one that Kenya has committed to and must implement. The National Environmental management Authority, towards this end spearheaded the process of development of an implementation strategy for education for Sustainable development.[56] The strategy, based on the global objectives of the decade of education for sustainable development has set out as the objectives in Kenya, the following issues:

- Improving quality of education
- Orienting education towards sustainable development
- Public understanding and awareness towards sustainability

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53 This was done by the UN General Assembly in December, 2002, UNGA resolution 57/254

54 See UNESCO website on education for sustainable development. http://www.unesco.org/en/esd/.

55 Ibid.

56 Republic of Kenya, *Education for Sustainable Development: Implementation Strategy(*Adopted by the National Environmental Council on 24th April, 2008. Available at http://www.nema.go.ke/index.php?option=com_docman&task=cat_view&gid=33&Itemid=35.

- Capacity building[57]

Importantly the implementation strategy proposes the:

> "Reorientation of teaching and learning processes to make them locally relevant, culturally appropriate, age and gender-sensitive, inclusive of all learners. In regard to teaching and learning, ESD should address needs in context (like geographical, location, socio-cultural and structural situation), perspectives and conditions in the pillar areas of ESD - society, environment and economy. It should be presented through action-inquiry strategies with a problem-solving orientation.ESD content should be interdisciplinary, holistic and embedded in the curriculum. It should be values-driven and promote critical and creative thinking. Research on emerging issues of concern to ESD should inform curriculum relevance, content and context."[58]

It follows, therefore that as part of promoting sustainable development, institutions of higher learning require reform to conform to the dictates of society and prerequisites of the UN decade for education for sustainable development. The question that this begs is the extent to which Kenyan Universities are already doing this.

While a critical assessment of the quality and relevance of higher education in Kenya is beyond the scope of this paper, a case can be made out for reform.[59] The call is based on history, modern changes in society and relevance. Historically, institutions of higher learning, especially universities, have curricula' whose theoretical underpinnings are based on the English system. This is especially true of our legal education curricula, but extends to most disciplines. Many changes have occurred in the country's socio-economic and political landscape. There are increasing demands for more innovation and relevant training from universities. These calls are made by society generally but specifically by industry and

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57 Ibid.

58 Ibid.

59 See also C. Nyaigotti-Chacha, "Reforming Higher Education in Kenya: Challenges, Lessons and Opportunities," paper presented at a SUNY Workshop with the Parliamentary Committee on education, science and Technology, August, 2004. Available at http://www.iucea.org/downloads/Reforming_HE.pdf making a case for reform.

lately even by government. It follows therefore that Universities require reform to meet the modern demands of society.

In the field of sustainable development, the one area in need of reform is the nature of training. University education needs to incorporate sustainable development in the syllabus for most disciplines due to the interdisciplinary nature of the imperatives for sustainability. It should move away from being a focus for environmental sciences and law. Secondly, the underlying rationale of the teaching should incorporate traditional values and ethics. The obtaining western-focus in our educational system and approach need to be infused with traditional practices too. In the field of land, the National Land Policy and the new constitution, is already providing the framework for this by changing the perceptions and treatment in law of customary practices and mechanisms for tenurial holdings and land use. It therefore behooves higher education to follow suit and provide supportive training.

The other area relates to research and development. The success of sustainable development imperatives will require greater investment in high quality, innovative and relevant research by institutions of higher learning.

F. Conclusion

Sustainable development is a critical requirement for all countries of the world. It has travelled a long way since its international recognition, popularization and acceptance by the World Commission and Development, chaired by Gro Harlem Brundtland.[60] It has

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60 The Commission produced a report Officially known as The Report of the World Commission on Environment and Development (WCED), *Our Common Future*, (New York, Oxford University Press, 1987). In it Sustainable development was defined as "development which satisfies the needs and interest of the present generation without jeopardizing the interest of future generations to enjoy the same."

moved from a concept to a principle and now reached the stage of being the key organizing principle for ensuring ecological sustainability and guide for the development of countries. Its incorporation in Kenya's constitution is a demonstrating of this journey. Ti is therefore imperative that all institutions and people in the country take steps to ensure they contribute towards its realization. This paper has made a case for the role that institutions of higher learning should play. These include researching into and giving local context to the meaning, application and realization of sustainable development in the country. In the process, the paper has argued that regulating property rights is a quintessential in ensuring ecological security and sustainability. While past discourse on property have overly focused on economic perspectives and ignored environmental restraints and limits, this paper argues for "an ecological perspective on property"[61], one that recognizes that "our laws and values cannot continue to ignore the restraints imposed on human activity by our natural environment."[62]

To ensure sustainable development, the approach in property regulation and protection which disregards customary practices is bound to fail for being out of touch with obtaining reality, and disregarding rules for ecological stewardship that are contained in these customary practices. As Justice Weeramantry correctly observed in the famous *Case Concerning Gabcikovo-Nagymaros Project*[63], sustainable development concerns have always been part of traditional societies in Africa. The Judge wrote that:

> "There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are especially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, The America, The Pacific, Australia-

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61 This conception has been proposed by David Hunter in article with the same title. See Hunter, D., " An Ecological Perspective on Property: A Call for Judicial Protection on the Public's Interest in Environmentally Critical Resources." 12 Harvard Environmental Law Review 311-384(1988)

62 Ibid. page 311.

63 ICJ, Rep., 1997, 7. Reprinted in UNEP, Judicial Decisions in Matters Related to the Environment, International Decisions, Volume 1 (1998)255-344. Separate judgment of Justice Weeramantry is reported on pages 296-312.

> in fact, the whole world. This is a rich source which modern environmental law has largely left untapped."[64]

It is not just modern environmental law that has failed to tap from these rich traditional practices. In the field of property, traditionally land was communally held, the principle of trusteeship and Public trust, so critical to sustainability were always recognized. However modernity has sought to disregard this traditional practices and values. Our education system and approach has contributed immensely to this desuetude. To ensure we retrace our ecological footprints, university education will have to be reformed so as to place not just education on and for sustainable development at a the centre but also to ensure that education curriculum focus on identifying and incorporating the very useful lessons and principles from our customary practices of the past into our present policies and laws. It is only by doing so that the country will make meaningful progress in its quest for mainstreaming sustainable development considerations into all its policies and developments.

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64 Ibid. page 301.