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Natural Resources Management in the Lake Victoria Region of East Africa: A Study in Multi-Level Government

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ABSTRACT

This thesis explores the strengthening of multi-level government in the management of the Lake Victoria region's environment and natural resources. It observes that the historic problem of state-centralism continues to significantly contribute to environmental degradation in the Lake region, which has of late escalated to a level that requires urgent attention, if the already devastating consequences are to be mitigated and avoided in the future. It is particularly observed that while the issues of insufficient local participation and regional coordination standout prominently among the major underlying causes for resource degradation in the Region, the concept of multi-level government has not been given the attention that it deserves.

Owing to its local importance and trans-boundary status, the Lake region requires concerted management involving the local, national and regional levels. Unfortunately, the synergy among those levels of government is still weak despite the tremendous opportunities offered by several recent developments, including a significant review of local government and various environmental laws. Also, despite its potential and achievements so far, the recently revived East African Community (EAC), whose mandate includes natural resources management, is yet to position itself as an effective supra-national institution. Much as the current legal and institutional frameworks tend to suggest an increasing level of engagement with other levels of government, this development tends to be drawn back by several inhibitions, both in design and at a practical level. The thesis concludes that unless, the institutional structures for natural resources management are reviewed and strengthened in a manner that logically distributes powers and functions at the local, national and regional levels, the other positive measures so far in place are likely not to achieve their desired outcomes.

List of Abbreviations

AEC	African Economic Community
AU	African Union
BMU	Beach management Unit
CAACs	Catchment Area Advisory Committees
CAEA	Court of Appeal for East Africa
CAO	Chief Administrative Officer
CBD	Convention on Biological Diversity
CBNRM	Community Based Natural Resource Management
CBO	Community Based Organisation
CDF	Constituency Development Fund
CFA	Community Forest Associations
CFRs	Central Forests Reserves
CIFA	Committee for Inland Fisheries of Africa
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLA	Central Legislative Assembly
CMA	Common Monetary Area
CoM	Council of Ministers
COMESA	Common Market for East and Central Africa
COP	Conference of the Parties
DDT	Dichlorodiphenyltrichloroethane
DECs	District Environment Committees
DEOs	District Environment Officers
DFRD	District Focus for Rural Development
DFRD	District Focus for Rural Development
EAA	East African Authority
EAAFRC	East Africa Agriculture and Fisheries Research Council
EAC	East African Community
EACJ	East African Court of Justice
EACSA	East African Common Services Authority
EACSO	East African Common Services Organization
EAFRO	East Africa Fisheries Organisation
EAHC	East African High Commission
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECOVIC	East African Communities Organization for Management of Lake Victoria's Resources
ECOWAS	Economic Cooperation for West African States
EGZ	Economic Growth Zone
EIA	Environmental Impact Assessment

EMA	Environment Management Act 2004
EMCA	Environment Management and Coordination Act 1999
EMCs	Environment Management Committees
EMO	Environment Management Officer
ENRM	Environment and Natural Resources Management
ERSWEC	The Economic Recovery Strategy for Wealth and Employment Creation
FAO	Food and Agriculture Organisation
FCA	Forest Conservancy Areas
FCCs	Forest Conservation Committees
FDS	Fiscal Decentralisation Strategy
FMA	Forest Management Area
GDP	Gross Domestic Product
GLK	German Land Kommission
GN	General Notice
HIPC	Heavily Indebted Poor Country
HIV/AIDS	Human immunodeficiency virus/Acquired Immunodeficiency syndrome
HLGs	Higher Local Governments
IBAs	Important Bird Areas
IFAD	International Fund for Agricultural Development
IFIs	International Financial Institutions
IGAD	Inter-Governmental Agency on Development
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
ISI	Import Substitution Industrialisation
IUCN	International Union for Conservation of Nature
IULA	International Union of Local Authorities
KANU	Kenya African National Union
KFS	Kenya Forestry Services
LAPEDA	Lagos Action Plan for the Economic Development of Africa
LATF	Local Authority Transfer Fund
LECs	Local Environmental Committees
LEGCO	Legislative Council
LFC	Local Forestry Committee
LFRs	Local Forests Reserves
LGA	Local Governments Act 1997
LGRP	Local Government Reform Programme
LGRP	Local Government Review Programme
LGWC	UWA Local Government Wildlife Committees
LLGs	Lower Local Governments
LN	Legal Notice
LPIANF	Lead Partners Interagency Network Forum
LVB	Lake Victoria Basin

LVBC	Lake Victoria Basin Commission
LVBC	Lake Victoria Basin Commission
LVDP	Lake Victoria Protocol (LVP) Lake Victoria Development Project
LVEMP	Lake Victoria Environmental Management Programme
LVEMP	Lake Victoria Environmental Management Project
LVFB	Lake Victoria Fisheries Board
LVFO	Lake Victoria Fisheries Organisation
LVFRP	Lake Victoria Fisheries Research Project
LVFS	Lake Victoria Fisheries Services
LVRLAC	Lake Victoria Region Local Authorities Cooperation
MEAs	Multi-national Environmental Agreements
MLG	Multi-level Government
NAFTA	North American Free Trade Agreement
NBI	Nile Basin Initiative
NCAA	Ngorongoro Conservation Area Authority
NEA	National Environment Act, 1995
NEMA	National Environment Management Authority
NES	National Environment Secretariat
NFA	National Forestry Authority
NFA	Uganda's National Forestry Authority
NFSPSS	National Fisheries Sector Policy and Strategy Statement
NGO	Non-Governmental Organisation
NSGRP	National Strategy for Growth and Reduction of Poverty
OAU	Organisation of African Unity
P/DDAC	Provincial and District Development Advisory Committees
PEAP	Poverty Eradication Action Plan
PEOs	Principle Executive Officers
PMC	Permanent Mandate Commission
PRSP	Poverty Reduction Strategy Papers
PTA	Preferential Treatment Area
PTC	Permanent Tripartite Commission
PTC	Permanent Tripartite Commission
RDF	Rural Development Fund
REC(s)	Regional Economic Cooperation(s)
SACU	Southern African Customs Union
SADC	South Africa Development Cooperation
SADC	Southern Africa Development Community
SAPs	Structural Adjustment Programmes
SIDA	Swedish International Development Programme
SPWFE	Society for the Preservation of the Wild Fauna of the Empire
TANU	Tanzania African National Union
TNRM	Traditional Natural Resource Management

UCSD	Uganda Coalition for Sustainable Development
UDEAC	Union Douanière et Économique de l'Afrique Centrale
UDEAO	Union Douaniere des Etats de l'Afrique et l'Ouest
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNHABITAT	United Nations Human Settlements Programme
UPC	Uganda People's Congress
ViCRES	Lake Victoria Research Initiative
WCMS	Wildlife Conservation and Management Service
WMAs	Water Management Areas
WPA	Wildlife Protection Areas
WRM	Water Resource Management
WWII	World War II

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Organisation of African Unity (OAU) Charter 1963

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List of Tables, Maps and Figures

Tables

Maps

Figures

Table of Contents

INTRODUCTION

This thesis explores the strengthening of multi-level government in natural resource management. It is focused on the Lake Victoria region, which is a shared ecosystem; shared in the sense that it is not only shared among the three East Africa countries of Uganda, Kenya and Tanzania, but also among several of their sub-national units, in this case the local governments. The thesis examines the extent to which the concept of multi-level government has been incorporated into East Africa's natural resources management regimes, and most specifically those that are applicable to the Lake Victoria region. Of particular interest are the recent national and regional legal and institutional reforms in the public governance and natural resource management sectors, both at the national and regional levels.

The two issues of local participation and regional cooperation prominently feature in literature that attempts to identify problems or seek for solutions in the management of trans-boundary natural resources.[1] The management of trans-boundary natural resources is, in that regard, seen as issue that calls for multi-level participation. In the management of the Lake Victoria region, however, there appears to be little specific attention focused on the argument for a multi-level government institutional framework based on the current decentralisation and regionalism arrangements among the three East African countries sharing the Lake region. Much as this structural deficit is recognised by various government documents[2] and was

[1] See, for example, Alan Rodgers, John Mugabe and Christine Mathenge, *Beyond Boundaries: Regional Overview of Transboundary Natural Resource Management in Eastern Africa* (Biodiversity Support Program, Washington, D.C., U.S.A 2001); and Y.Katerere, R. Hill and S. Moyo, *A Critique of Transboundary Natural Resource Management in Southern Africa* (Paper No.1, Transboundary Natural Resource Management Series, IUCN-ROSA 2001). For a detailed bibliography on TBNRM in Sub-Saharan Africa, see Van der Linde, H. D. Zbicz and J. Stevens, *Beyond Boundaries: A Bibliography on Transboundary Natural Resource Management in Sub- Saharan Africa* (Biodiversity Support Program, Washington, D.C., U.S.A 2001).

[2] See discussion in Chapter Eight on some of national policies that concern environmental management.

indeed alluded to by several government officials when interviewed,[3] it generally remains poorly represented in the current legal and institutional frameworks.

While East Africa is generally known for its rich diversity in natural resources, the Lake Victoria region is among the areas that are richly endowed with resources including the largest freshwater lake in Africa, extensive wetland systems, tropical rain forests, a wide range of wildlife species and arable land. As shall be demonstrated in Chapter Three, these resources are of immerse ecological and socio-economic importance to the lacustrine communities and countries and even beyond. The thriving and abundance of most of these resources are attributed *inter alia* to the enabling climatic and other geographical conditions of the Region. That notwithstanding, however, the Lake region has been experiencing in the past few decades different forms of environmental degradation, the intensity of which is increasing. As a result, some natural resources have been depleted while others have been severely degraded. Aside from the environmental effects, the degradation has gravely impacted on the socio-economic stature of various interested parties, with devastating effects in some circumstances.[4]

Although environmental degradation is attributable to both human and natural causes, a lot of evidence has been adduced to prove that the former is largely to blame. The immediate causes generated by unsustainable human activity include: deforestation; various forms of pollution; overfishing; soil erosion; over-abstraction of water; and the introduction of unfavourable exotic species. In a broader sense, these causes are believed to be the result of several underlying causes including: population pressure; poverty; distortions in the allocation of property rights; conflicts of interest with economic development objectives; and, most generally, the

[3] This can clearly be derived from appendix 2.
[4] Chapter Three explores, in greater detail, the major natural resources found in the Lake region, their socio-economic and ecological importance and the impact arising from their unsustainable use.

inefficiencies brought about by the natural resource management regimes.[5] While there is no claim that it is a panacea to the entire degradation problem, it will be argued that the strengthening of multi-level government presents a pivotal framework through which several of the other underlying factors can be appropriately considered.

On an encouraging note, there have been several legal and institutional developments of late that present enormous opportunities towards the improvement of the Lake region's Environment and Natural Resource Management (ENRM) regimes. On the one hand, several environmental laws have been reviewed in an attempt to re-align them with the contemporary environmental management practices and, on the other, new decentralisation programmes have been embraced along with the revival of a regional cooperation block – the East African Community. Unfortunately, these developments are yet to be optimally utilised to address the historic problem of state-centrism that has proved to be a major inhibitor in the improvement of natural resource management. The participation, coordination and implementation of natural resource management at various levels remains a problem, as the central governments appear to be reluctant to disperse reasonable authority and functions to the local and regional levels. Although decentralisation and co-management seem to be significant features of the current natural resource management regimes, the manner in which they are implemented defeats the purpose of mitigating the centralist paradigm.[6] On the other hand, the efforts towards regionalism in environmental management also appear to be over-shadowed by the continued dominance of national governments in the institutional arrangement and decision making processes at the regional level.[7]

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[5] See Chapter Four for a more detailed discussion on the underlying causes of environmental degradation in the Lake region.

[6] See, generally, the discussion in Chapters Eight and Nine, whose focus is on the concept decentralised natural resource management, as provided for under the national legal and institutional regimes of the three states.

[7] See discussion in Chapters Ten and Eleven, whose focus in on legal and institutional framework relevant in the management of the Lake region's natural resources.

Focusing on decentralisation and regionalism, this thesis examines the national and regional legal and institutional frameworks with a view of ascertaining the extent to which the recent reforms have incorporated and operationalised the concept of multi-level government in ENRM. Particular interest is focused on the management of the wildlife, water, forestry and fisheries resources. As for decentralisation, the thesis is focussed on the local government systems. While as in regard to regionalism, it is focussed on the East African Community. In sum, the underlying argument is that unless reasonable natural resource management powers, functions and capacity are effectively dispersed from the national level downward to the sub-national level and also upward to the regional level, natural resources management will remain a problem despite the good attributes in the recent reforms.

Inspirations for the study

Although I had, for some time, harboured the intentions of studying for a doctorate, it was upon completion of my Masters degree that this interest was ultimately reenergised. In addition to further exposure in the academic world, especially in the field of research, the master's degree programme introduced me to various personalities whose words and work were inspirational. Upon the decision that it was time to further my career, I embarked on the challenging task of choosing the topic and scope. My conscience guided me towards narrowing down to a study area that would in addition to advancing my educational and career path, be of value to my job and everyday life, which aspects would on the other hand, also offer invaluable input into the study. I found no better place than the Lake Victoria region where I have lived and worked for the greatest part of my life. It is my conviction that, as a civil servant and resident of the Lake region, my concern with the state of the local environment should be taken a step further by making a research contribution of much wider relevance.

Justification of the study

As was mentioned in the introduction to this Chapter, this thesis' core discussion of multi-level government is focussed on the three distinctive study fields of decentralisation, regionalism and environmental management. As such, the literature base of relevancy to this study is vast and diverse. Especially from a bi-focal perspective, a lot has been written about decentralisation and natural resource management on the one hand,[8] and regionalism and natural resource management on the other.[9] Similarly, there is significant literature on the interface between regionalism and decentralisation.[10] There is increased scholarly interest in the convergence of decentralisation, regionalism and natural resource management. This scholarly effort has mostly been confined, however to North America, Europe and Australia where the issues of local and regional governance are relatively strong and more developed. The concepts of subsidiarity, multi-scalar governance and environmental federalism among others have been common terminologies in discussing various aspects relating this convergence in the European, Australian and American contexts, respectively.

While much scholarly work has been undertaken in Africa on decentralisation and natural resource management,[11] less attention has been paid to the incorporation of natural resource management in regional integration. Instead, much attention is drawn to the management of Africa's trans-boundary resources under loose forms of inter-governmental cooperation and not as integral parts of regional government

[8] For example, Jesse C. Ribot, Arun Agrawal, Elinor Ostrom and Anne Larson, whose work is variously cited in this thesis, have extensively written about decentralisation and natural resource management in the developing world. Also, as shall be seen in the main discussion, international and domestic environmental policy and law is increasingly incorporating the concept of decentralisation in natural resource management.

[9] The application of regionalism in natural resource management is basically the underlying argument in the concept of Transboundary Natural Resource Management (TBNRM), which of late, is increasingly being promoted as a core approach in the management of shared resources. For a list of some of the works in this regard, see footnote n. 1.

[10] This interface particularly underlies the concept of multi-level government and, in general, the broader theory of multi-level governance, which has been greatly contributed by, amongst others, Liesbet Hooghe and Marks Gary, some of whose work is cited in this thesis.

[11] See footnote n. 8.

systems.[12] Most of the countries sharing such resources are not bound, however under the wider mandate of regional organisations.[13]

As for the Lake Victoria region which is our geographical area of interest, much has been written about its deteriorating environmental state.[14] A significant part of this material is focussed, however, on ecological issues most especially the Lake and its fisheries.[15] Although there has been some interest in the broader or holistic management approaches to Environment and Natural Resources Management (ENRM), this is yet to be vividly captured in the Lake region's literature base.[16] Most of the current literature tends to centre on the environmental problems and their causes, with little attention being paid towards the conceptualisation of a framework that supports the effective participation and coordination among potentially competing interests at various levels. None of the literature found brings out the concept of managing the Lake region through a systematic multi-level government arrangement.

Also, while the issues of local participation and regional cooperation are mentioned in several studies,[17] none of them critically reviews the current national and regional legal and institutional frameworks with a view ascertaining the extent to which the management challenge to multi-level government is legally and institutionally founded. Instead, they tend to focus on the piecemeal approach of strengthening national frameworks to be eventually harmonised at regional level. While these two perceptions are important in the reinforcement or rather redefinition of a new

[12] See, for example, the core approach of the in the literature cited in footnote n. 1.
[13] In Africa, examples of inter-state bodies responsible for the management of major shared watersheds include: The Lake Chad Basin Commission and the Nile Basin Initiative, whose respective contracting parties are not bound under any regional integration arrangement of broader competence.
[14] See, generally, the discussion in Chapter Three.
[15] For a detailed search on the literature concerning Lake Victoria and its environs, see the Lake Victoria Bibliographical databases available at <http://www.eac.int/lvdp/index.php?action=main>; and <http://www.lvrlac.net/database/titleindex.htm> accessed 14September 2010.
[16] ibid.
[17] See, for instance, the material cited in footnote n. 1.

regime, they fall short of recognising that such ideals can best be implemented after sorting out the structural problems.

It is against this background that this thesis seeks to contribute to the available knowledge, by arguing that first, since the Lake Victoria region is shared among both local and national governments, the concept multi-level government is crucial in the success of the Lake region's environmental and natural resources management (ENRM) regime. Secondly, the application of this concept remains weak as the ENRM regimes continue to be dominated by state-centric regimes. Thirdly, the ongoing reforms in natural resources management, local government and regional integration present tremendous opportunity for the strengthening of multi-level government in the management of the Lake region. It is, however, noted that political will remains crucial if such opportunities are to be significantly utilised.

Why now?

In addition to the issues raised in the problem statement stated below, The East African Community designated the Lake Victoria Basin as an Economic Growth Zone (EGZ).[18] The Lake Victoria Basin Commission is already in place to coordinate the sustainable development of the Lake region.[19] In that regard several instruments and institutions have been put in place to facilitate the coordination with a view meeting both the development needs and environmental interests.[20] As such, a review of the current ENRM would serve the purpose of taking stock of the achievements, while at the same time raising the current and potential challenges in propagating the environmental agenda. Therefore, studies, such as this thesis, are timely and of

[18] A research project was subsequently launched and its findings are reported in: East African Community and CODA Consulting Group, *The Economic Potential and Constraints of Developing Lake Victoria Basin as an Economic Growth Zone* (EAC, Arusha, Tanzania 2006).

[19] Established under Article 33 of the Protocol for the Sustainable Development of Lake Victoria 2003, and pursuant to Article 114 (2)(b)(vi) of the East African Community Treaty 1999, the LVBC was inaugurated in 2006, though its full operationalisation remains drawn back by the delay in the enactment of the long overdue Lake Victoria Basin Commission Bill.

[20] See discussion in Chapters Ten and Eleven.

importance to any party with interest in the management of the Lake Victoria region or any other similar shared resource.

Problem statement

The Lake Victoria region's natural resources are increasingly being degraded, despite their ecological and socio-economic importance to the lacustrine communities and nation-states and even far beyond.[21] If not urgently addressed, the degradation, which has of late reached alarming levels, is likely to be a major cause for deeply devastating consequences within and outside the Lake region. Notwithstanding the natural processes, unsustainable human activity has been at the centre of the degradation. Among the underlying factors triggering the unsustainable human practices is the lack of an effective management regime. Most particularly, the resource management structures are in each country state-centric and thus not focussed on the fact that Lake region resources are also of local and regional interest. The opportunity presented by the recent developments that *inter alia* saw the local government structures strengthened, regional cooperation revived and most environmental laws reviewed, have not been optimally utilised to forge a strong institutional framework to cater for effective participation at the local and regional levels, which is crucial in the success of the Lake region's ENRM regime.

Purpose of the study

The purpose of this thesis is three-fold. First to argue that in addition to being an underlying cause in its own right, state centrism has significantly precipitated the impact of other underlying causes for environmental degradation in the Lake region. Second to demonstrate that despite the existence of local and regional institutions, their effective involvement in the management of the Lake Region's resources is minimal, as most of the functions and powers are concentrated within the central governments, which on the other hand have a lot of control and influence over the

[21] See discussion in Chapter Three.

local and regional institutions. Third is to argue for the need to redefine the legal and institutional framework relevant to the management of the Lake region's resources, by strengthening the synergy among the regional, national and local governments.

Scope Study

This thesis's scope of study is bounded by two issues: The geographical and the conceptual limits. Geographically, this thesis is limited to the three countries of Uganda, Kenya and Tanzania, which physically border Lake Victoria, and therefore are expected not to have the same interests as the other countries found in the entire Lake's basin. These three countries share a common history, part of it relating to the Lake region,[22] and this is discussed in the thesis. Also, by the time of commencement of this thesis, the East African Community, which is of great interest to this study, was constituted by only these three countries.[23] Our limitation to a particular region and its distinction from the entire Lake basin is further discussed in Chapter Two. Since none of the selected countries has distinctive laws or designated structures for the management of Lake Victoria, the thesis generally considers the applicable national and sub-national laws and structures.

Conceptually, the thesis is focussed on government structures as the framework for multi-level participation. As such, as shall be later elaborated in Chapter One, our scope is limited to the term 'government' as opposed to 'governance', which though similar is more general. In that regard we are focussed on the terms 'Multi-level

[22] The initial scope of cooperation among the three riparian countries was confined to the fisheries sector and particularly, fisheries research and development. This involved the establishment of the Lake Victoria Fisheries Service, in 1947, and the East African Fisheries Research Organisation, in 1949. Although, the 1994 Convention for the Establishment of Lake Victoria Fisheries Organisation is also focussed on fisheries management, it embodies a wider scope of cooperation. The EAC Treaty 1999 and its subsidiary instrument, the Protocol for the Sustainable Development of Lake Victoria Basin 2003 are more comprehensive, as their approach perceives the Lake Victoria basin and its resources as part of a wider ecological and socio-economic system.

[23] Rwanda and Burundi were admitted into the East African Community, in June 2006. See East African Community, *Communiqué of the 5th Extraordinary Summit of EAC Heads of State: EAC Enlargement for Peace, Security, Stability and Development of the East African Region*, made on 18th June 2007 at Kampala, Uganda.

Government' and 'Local Government' and not 'Multi-level Governance' and 'Local Governance', respectively. It is, however, pertinent to note at this point that much as the units within the local government system are variously known across the countries under study, the term local government shall be uniformly applied in reference to all such units.

The Research Questions

In view of the above stated problem statement and the justification, purpose and scope of study, this thesis attempts to answer five research questions. Thus;

1) To what extent are the natural resources of the Lake Victoria region degraded and what is the ecological and socio-impact of such degradation?
2) What central issues of concern cut across the many factors underlying environmental degradation in the Lake Region?
3) What are the historical roots of the central issues indentified under research question (2), and how have those issues been addressed in successive political eras?
4) To what extent and with what level of success have the recent legal and institutional developments at the local level addressed the central issues in (2) above?
5) To what extent and with what level of success have the recent legal and institutional developments at the regional level addressed the central issues in (2) above?

The research questions are arranged in a manner that chronologically coincides with the thesis structure, where each of the five Parts is focussed on answering one research question. It must, however, be stressed at this point that not all the material found in the thesis will be focussed at directly answering these questions. A significant part of the material shall be useful in providing context and building the

case that eventually leads to the required answers. In that regard, it is important for all Chapters in a given Part to be considered alongside each other, so as to broadly envision the answers adduced in the conclusion of each Part.

Methodology

The work in this thesis is primarily an output of documentary reviews, where the major sources of the material included books; journals articles; national laws and policies; government documents; East African laws, policies and documents; and international agreements. The other sources included newspaper articles; conference papers; unpublished work; and material from the internet. While a great part of the information found in Parts I, II and III was obtained from secondary sources, the remainder of the thesis is significantly based on a primary analysis of the laws and various official documents.

To back up the various data, however, field research was conducted and thirty-three persons were interviewed out of the targeted population of fifty.[24] All interviews were semi-structured and conducted on a face-to-face basis. The semi-structured questioning was chosen because, as can be derived from the details in appendix 1, the interviewees were drawn from different sectors and social settings. The preference for the face-to-face interview method was mainly premised on the understanding that many of the targeted interviewees: have busy schedules; work within strict policy guidelines; and are not easily accessible through telephone and mail. That aside, face-to-face interviews provided the opportunity of assuring the respondents on the issue of anonymity, whenever requested, or in instances where signs of holding back information were sensed. More details on the interviews are found in Appendices 1 and 2.

[24] See Appendix 1 for the details. Since many of the interviewees requested for anonymity, however, it was imperative to withhold all the names and use codes instead.

Structure

This thesis is divided into five Parts. An attempt has been made for each of the five parts to answer one of the five research question presented above. Part I which is divided into Chapters One, Two and Three, attempts to answer research question (1). Chapter One explores the theoretical and contextual issues that underlie our conceptual scope of study namely, the concepts of multi-level governance, decentralisation and regionalism. It also explains why the thesis limits itself to local government and not local governance and why the former is preferred among other options. Generally, this Chapter introduces us to several issues of central importance to the rest of the thesis. As such this chapter is severally linked to other Chapters that continuously refer back to it, whenever necessary.

Chapters Two basically explores the geographical area of study – The Lake Victoria region, in terms of geophysical features and human geography. It also briefly highlights the legal and institutional framework for natural resource management in the Lake region. This Chapter also takes us through a historical account on the socio-economic transformation of the Lake region. Chapter Three explorers the Lake region's natural resources endowment in light of its ecological and socio-economic importance to the lacustrine communities and countries and beyond. Generally, Part I serves the purpose of introducing us to the issues of crucial importance to Part II, which discusses the underlying factors for environmental degradation in the Region.

Part II is constituted of only Chapter Four, which is intended to answer research question (2). Through a mixture of information provided in the previous chapters, brief literature reviews and findings from the field research, this Chapter explores several of the underlying factors that are commonly attributed to natural resource degradation in developing countries. It will be argued that the lack or ineffectiveness of multi-level government, or rather the manifestation of state-centrism, appears to be a major precipitator of the other major underlying causes for environmental

degradation in the Lake region. In the light of this, it is contended that the other major underlying factors can best be addressed through the strengthening of a multi-level institutional framework in a manner that facilitates effective participation and coordination in decision making and implementation at the local, national and regional levels. Together with material drawn in the chapters before it, this Chapter general sets the scene for the rest of the discussion.

Part III is constituted of Chapters Five, Six and Seven. It attempts to answer research question (3) by reflecting on the historical roots of the centrist paradigm in natural resource management, right from the colonial era, through the early post independent period to the early 1990s, which saw major policy shifts. This reflection is useful in shedding more light on the reasons that could explain the current environmental laws and institutional frameworks applicable to environmental management. It also presents lessons of importance to the discussion in Part IV and V as well as to the general conclusions in Chapter Twelve.

Part IV, is sub-divided into Chapters Eight and Nine and attempts to answer research question (4). It demonstrates that while the East African countries are increasingly, embracing decentralisation in the form of local government, this concept has not been sufficiently extended to the natural resources managements sector, as the centralist paradigm remains vividly visible. Chapters Eight explores the local government frameworks with a view of ascertaining their potential and challenges that are likely to impact on their effectiveness playing a major role in ENRM. Chapter Nine discusses the environmental laws and other applicable laws in light of their contribution towards the dispersal and rationalisation of environmental management functions and authority between the sub-national and national level. It will generally be seen that decentralised natural resource management is faced with both design and implementation challenges, most of which seem to arise from the unwillingness

of the central governments to cede reasonable ENRM powers and functions to local government.

Constituted of Chapters Ten and Eleven, Part V attempts to answer research question (5). Chapter Ten takes us through the institutional framework of the East African Community (EAC), which is the regional integration body for the three countries. This is done against the backdrop that each of the key EAC organs has a role to play in ENRM. It is suggested, however, that there are intra-institutional challenges that, if not addressed, are likely to impact on EAC's effectiveness in Environment and Natural Resource Management (ENRM). Chapter Eleven discusses EAC's environmental laws and institutions responsible for the management of the Lake region. As shall be seen, the EAC has made a tremendous contribution towards the development of an ENRM regime for the Lake region. Our interest is focussed on the extent to which this emerging regime has been able to mitigate the problem of state-centrism in ENRM.

Chapter Twelve is the general conclusion. Largely drawing its material from Parts IV and V, Chapter Twelve concludes that despite the clear and urgent need for it, the concept of multi-level government is weak in the legal and institutional frameworks applicable to natural resource management in the Lake Victoria region. It therefore calls for the strengthening of the concept of multi-level government by utilising the existing structures at the sub-national and regional government levels, rather than creating new structures.

CHAPTER ONE

The Theoretical and Contextual Review of the Key Concepts

As mentioned in the introduction, this thesis concerns the application of the concept of multi-level government in natural resource management. It is therefore pertinent to first explore the theoretical and conceptual issues that underlie the key terms of multi-government, decentralisation and regionalism. These concepts will be explored in terms of their definition, type and relationship with environmental management. Prior to further discussion, however, the following two sections explain why this thesis limits itself to government structures and not the broader spectrum of governance.

The Terms 'Governance' and 'Government'

Although it is not rare for the terms 'governance' and 'government' to be used interchangeably, they are increasingly being deliberately distinguished in recent literature. According to the Oxford Dictionary the word 'government' can mean "the group of people who are responsible for controlling a country or state," or a "particular system or method of controlling a country."[1] More than often, however, application of the word 'government' is, as in term 'local government', extended to other legitimate levels responsible for public service delivery.

The term 'governance' is broader that 'government'. Rhodes finds six separate uses of the term 'governance'. We, however, take interest in the one that looks at governance as a network where both government and non-government actors are involved in service delivery,[2] thus suggesting the involvement of non-state actors in

[1] S. Wehmeier, (ed) *Oxford Advanced Learner's Dictionary* (New Seventh Edition edn, Oxford University Press, Oxford, United Kingdom 2006) 646.
[2] R.A.W Rhodes, 'The New Governance: Governing Without Government' (1996) XLIV Political Studies 652, 653.

public sector matters. The term 'governance' and not 'government' is, therefore, particularly used to "denote the interaction between public and private institutions and actors."[3] According to Eckerberg *et al*, the common aspect in recent usage of the term 'governance' entails the erosion of the traditional bases of power by the shifting from the traditional to a new way of management or government.[4] In that context we see that government is part of governance but not vice-versa. As such the theory surrounding the concept of governance remains applicable and relevant to the study of government. Therefore, although this thesis is about 'multi-level government', we feel no constraint in referring as necessary to the theoretical work that encompasses the broad term of 'multi-level governance'.

It is emphasised that our limitation to multi-level government is not intended to suggest that non-state actors have no role to play in natural resource management. Rather, the argument is that the non-state actors should play their roles within a unified but variably and rationally empowered multi-level government institutional structure. The choice for a government based structure rests upon the hypotheses that government structures posses a higher level of universal legitimacy; already have structures and capacity to build on; are more broadly accountable; are permanent; and can easily be coordinated. As such, multi-level government is not being fronted as an end to the environmental problems being faced in the Lake region, but as a means intended to facilitate the participation and coordination among interests at various levels of government.

Why Local Government?

As is the case with many other development issues, environmental management has progressively been presented with ideas that imply radical changes. As the concept of state-centrism continues to be attributed as a major cause for the inefficiencies in

[3] See Rosanne Palmer, *Devolution, Asymmetry and Europe: Multi-level Governance in the United Kingdom* (P.I.E Peter Lang, Brussels, Belgium 2008) 25.
[4] Katarina Eckerberg and Joas Marko, 'Multi-level Environmental Governance: A Concept under Stress?' (2004) 9 Local Environment 405.

the management of local affairs, several options have been presented to complement and in some case supplant the centralist paradigm in various public services. Therefore, the question 'why local government?' arises from the fact that the decentralisation of ENRM can be implemented through various channels, including Community Based Organisation (CBO) and Non-Governmental Organisation (NGO) networks. While privatisation has often been a treasured option in divesting government responsibilities, it entails little interest in the decentralisation of ENRM. Instead, systems that embody direct local participation of the local communities appear to have taken the day. There remain wide disparities, however, as to the institutional setup that is deemed likely to return the best results. Amongst others, the concepts of local government, Community Based Natural Resource Management (CBNRM),[5] and the elevation of NGOs, have been promoted as the core frameworks for decentralised ENRM.

As has been mentioned, our focus on government structures, and this case local government, is not intended to marginalise the potential contribution of non-state actors, but to emphasise that they ought to operate within a permanent, legitimate and robust multi-level institutional framework. While the successes of CBNRM in assisting in the dispersal of environmental management power and responsibility has been, in some instances, applauded,[6] this concept can at times be implemented in a manner that sidelines the participation of local government institutions and, as such,

[5] While community-based management approaches have for long been in existence, their application in natural resources management, and particularly in East Africa, is a recent development that gained prominence since the 1990s.

[6] For example, the case of Zimbabwe's widely acclaimed Communal Areas Management Programme for Indigenous Resources (CAMPFIRE). See A.N. Songorwa, K. Bührs and K. Hughey, 'Community-Based Wildlife Management in Africa: A Critical Assessment of the Literature' (2000) 40 Natural Resources Journal 60; See also E. Barrow and M. Murphree, 'Community Conservation: From Concept to Practice' in D. Hulme and M. Murphree (eds), *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* (James Currey, Oxford 2001) 31. For the East African, arguments for CBNRM see Fumihiko Saito, 'Uganda's Local Council and the Management of Commons: An Attempt of Theoretical Reassessment' (11th IASCP Biennial Conference, Bali Indonesia, 19-23 June 2006) 2; Hajo Junge, 'Decentralisation and Community-based Natural Resource Management in Tanzania: The Case of Local Governance and Community-based Conservation in Districts around the Selous Game Reserve' in Rolf D. Baldus and Ludwig Siege (eds), *Tanzania Wildlife Discussion Paper No 32* (GTZ Wildlife Programme in Tanzania, Dar Es Salaam 2002).

is used to uphold the state-centric approaches.[7] As for the NGOs, while much of their rapid rise, since the 1980s, can be attributed to poor performance of the public sector,[8] they cannot be a perfect substitute to government structures.[9] NGOs are faced with the problems of: legitimacy; external control, especially from their funders; not being broadly accountable; and being constrained in mandate.[10] Indeed, Arts Bas stresses that the power of NGOs should not be exaggerated, as their success depends on partnerships with government and other stakeholders.[11]

Working through the local government framework

While it appears to be a widely appreciated position that the effective management of local resources can best be attained if the local communities are involved, the unpopularity of the local government system is mainly founded in the contention that it is merely an extension or localisation of central government. The truth, however, greatly depends on the manner in which the local-central relations are defined. As will be seen in Chapter Eight, loose arrangements such as administrative deconcentration tend to maintain a thin line between local and central government, while the reverse is true under strong devolution models. The central-local relations must be complementary and not based on submissiveness. Saito observes that:

> "Facilitation differs from domination. Thus, creating effective local facilitation is indispensable, and often this role needs to be played by the public offices."[12]

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[7] See, for example, discussion on Beach management Units (BMUs) in Chapter Eight.

[8] S. Madon, 'International NGOs: Networking, Information Flows and Learning' (1999) 8 Joumal of Strategic Information Systems 251; See also, Akbar S. Zaidi, 'NGO Failure and the Need to Bring Back the State' (1999) 11 Journal of International Development 259, 261.

[9] See Zaidi (1999) op. cit., n. 8.

[10] ibid.; See also, Tina Wallace, 'The Role of NGOs in African Development' in Deryke Belshaw and Ian Livingstone (eds), *Renewing Development in Sub-Saharan Africa: Policy, Performance and Prospect* (Routeledge, London 2002) 13.

[11] Arts Bas, 'The Global-Local Nexus: NGOs and the Articulation of Scale,' 95 Economic and Social Geography 498.

[12] See Saito (2006) op. cit., n. 6, at p.3.

He subsequently argues that the direct participation of local government is among the critical factors for community conservation practices to work.[13]

Whatever the shortcomings of NGOs and CBNRM, they remain important actors in local service delivery. Their contribution will be optimised if coordinated through a local government system, which usually has a broader spectrum of services and is also fully accountable to its entire citizenry. Aside from the likely problems of conflict of interest and the unnecessary waste of resources that often arises from fragmented approaches to service delivery, the mandate and capacity of non-state actors is more limited, especially when they operate in isolation. Indeed several writers have questioned the effectiveness of community based conservation measures, especially, if based on models that negate the participation of other critical stakeholders such as local government.[14] It is probably because of the advantage of economies of scale that Zaidi contends that, the only alternative to state failure in development related service delivery is the state itself. He also observes that the state should, nonetheless, be reformed along principles of participation under democratic and decentralised structures.[15]

[13] ibid.

[14] See, generally, Jesse C. Ribot , Chhatreb Ashwini, etal, 'Institutional Choice and Recognition in the Formation and Consolidation of Local Democracy' (2008) 6 (Special Issue) Conservation and Society 1 and; Jesse C. Ribot, *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation* (World Resource Institute 2002); Fumihiko Saito, 'Community Environmental Conservation in Uganda: Possibilities and Limitations of Decentralized Management' 6 Society and Culture 283.

[15] See Zaidi (1999) op. cit., n. 8.

The Concept of Multi Level Governance (MLG)

As earlier mentioned, much as our scope is largely focussed on government structures and institutions, we shall, because of its relevancy, generally explore the concept of multi-level governance. Owing to the dictionary meaning of its prefix – multi-level, the Multi-level Government (MLG) concept literally means practising governance at various levels and in an interconnected manner. This concept has been theorised and applied within both the private and public sectors. While it is, commonly presented in the public governance domain, as one of the theories of regional integration,[16] it has also been analysed with regard to the modernisation of the traditional notion of the separation of powers within government.[17] As a regional integration theory, the MLG concept attempts to explain the coordination, collaboration, integration, policy making, implementation and the activities of pressure groups within a framework consisting of regional, national and sub-national actors.[18] As we shall shortly see, the theoretical issues surrounding the MLG concept do not end with the explanation of the integration process, but also present operational models that are useful to our study.

While MLG is arguably an old phenomenon, its re-modelling as theory in regionalism is relatively a new thing. Pioneered by Liesbet Hooghe and Gary Marks in the early 1990s, this remodelling originates from the studies on European Integration, especially arising from the new structural outlook established by the Maastricht Treaty of 1992. The MLG model attempts to fill the gap left by the inter-governmental theorists whose proposition is that national governments dominate regional policy making processes. Indeed, Bache observes, in the European Union

[16] See, generally, Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (Rowman and Littlefield Publishers Inc., Oxford, England 2001); Liesbet Hooghe and Gary Marks, 'Unraveling the Central State, but how?: Types of Multi-level Governance' (2003) 97 American Political Science Review 233.

[17] Christoph Möllers, 'Steps to a Tripartite Theory of Multi-Level-Government' (Jean Monnet Working Paper 5/03, New York University School of Law, USA, 2003).

[18] Choi Jong Young and James A. Caporaso, 'Comparative Regional Integration ' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (SAGE Publications, London, United Kingdom 2002).

(EU) context, that the intergovernmental theorists stand the risk of undermining their key preposition if they were to ably account for the roles played by other actors, such as the European Commission.[19] He nonetheless, also criticises the multi-level governance theorists for failing to capture the important role of other actors such as the sub-national governments in regional policy making processes.[20] Palmer, however, observes that the initial conception of MLG has drastically evolved from the traditional two-tiered perspective – State and regional, to encompass sub-state actors.[21] Simply stated, the MLG concept is the direct opposite of the state-centric model, which tends to pose the national governments as the ultimate decision makers.[22] It is important to stress here that this thesis limits its discussion to the term multi-level government as a governance model and not as a theory of regional integration. For purposes of scope, therefore, our discussion on other regional integration theories, later in this Chapter, is brief.

Placing the Concept of Multi Level Government within Our Context of Study

According to Hooghe and Marks, the concept of Multi-level Governance (MLG) entails the dispersal of authority from central government to other levels of government and non-state actors, to ensure that decision-making competencies are shared by various actors at different levels.[23] This dispersal, which is not limited only to state-actors, can be downwards to sub-national units and entities or upwards to supranational institutions and entities. The authors hasten to add, however, that the MLG concept does not undermine the importance of national governments and national arenas in the policy making processes. Rather, they emphasize that national governments should not monopolise the processes.[24]

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[19] See Ian Bache, *The Politics of European Union Regional Policy: Multi-level Governance or Flexible Goal Keeping* (Sheffield Academic Press Ltd, Sheffield England 1998) 148.
[20] ibid.
[21] Palmer (2008) op. cit., n. 3, at pgs. 25-32.
[22] See Hooghe (2001) op. cit., n. 16, at pgs. 2-12.
[23] ibid., at p. 3.
[24] ibid.

According to Palmer, the existing literature on MLG has been developed and shaped by three notable trends focussing on: the differentiation between state-centric approaches and MLG; the multi-level aspect; and governance itself.[25] The focus of this study cuts across the first two but within the limits of government at the local, national and regional levels.

While it has been criticised to be a 'top-down' approach,[26] MLG is not necessarily applied in a strict subordinate hierarchy. Rather its framework can be intended to facilitate intra and cross level engagement and thus the dispersal of power and authority.[27] As seen in Table 1 below, several terms or concepts are used to examine the interaction and allocation of authority and functions across government tiers or other legitimate structures. As may further be noted, disengagement of centralism tends to be known differently across disciplines and regions.

Table 1: Concepts Against Unitary Government

Field of Study	Concepts Against Unitary Government
European Union studies	Multi-tiered, multi-level governance; network governance; consortio and condominio
International relations	Multilateral cooperation; global governance; fragmegration; multi-perspectival governance
Federalism	Multiple jurisdictions; multi-level government or governance; multicentered governance; matrix of authority; decentralization; competing jurisdictions; market-preserving federalism; Functional Overlapping Competing Jurisdictions
Local government	Multiple local jurisdictions; fragmentation vs. consolidation; polycentric governance
Public policy	Polycentric governance; governance by networks; multi-level governance

Table reproduced from Table 1, Liesbet Hooghe and Gary Marks[28]

[25] Palmer (2008) op. cit., n. 3, at p. 26.
[26] ibid., at p. 27.
[27] See discussion below under sub-title 'Types of Multi-level Governance and the Linkage Dimensions'
[28] Hooghe (2003) op. cit., n. 16, at p. 235.

As can be adduced from the table, the literature embodying the basic postulate of the concept of 'authority dispersal' is enormous.[29] For purposes of the scope of this thesis, however, we shall in addition to the central government, be focussed on decentralisation in the form of local government and regionalism from the perspective of the East African Community. As such, we look at the concept of multi-level government as an institutional framework intended to disperse and rationalise natural resource management powers and functions among the local, central and regional levels. The concept of multi-level government is thus seen as a framework for multi-stakeholder interaction and coordination and not as an end to the environmental management problems in the Lake Victoria region.

Types of Multi-level Governance and the Linkage Dimensions

Hooghe and Marks identify two types of multi-level governance, which they attempt to distinguish along the issues of: nature of jurisdiction; underlying basis for interaction between members; limitations on number of jurisdictions and; flexibility in design. Table 2 below summarises Hooghe *et al's* two MLG models which they refer to as Type I and II.

Table 2. Types of Multi-level Governance

Type I	**Type II**
General Purpose jurisdictions: Decision making powers dispersed and functions are bundled together and various tiers. Denotes areas with strong local government e.g In Europe	*Task-specific jurisdictions:* Distinctive functions are fulfilled by multiple and independent jurisdictions.
Nonintersecting memberships: Much as membership share an apex, they usually do not intersect at territorial level	*Intersecting memberships:* Many decision making centres that may have functional, overlapping and competitive jurisdictions. May act autonomously to solve common problems

[29] Hooghe et al's Article on the types of multi-level governance gives a good indication on the expansiveness of the literature on this subject. See Hooghe (2003) op. cit., n. 16

Jurisdictions at a limited number of levels: Jurisdictions are organised at a few levels	*No limit to the number of jurisdictional levels:* Governance is organised across a large number of levels. Jurisdictions can be on diverse scale. Popular among the public choice theorists, who argue that each public good or service should be provided by the jurisdiction that effectively internalizes its benefits and costs
System-wide architecture: The architecture is durable. Based on the *trias politica* doctrine (Executive, legislature and judiciary), institutional choice is usually systematic. structure remains similar but more complex at higher levels	*Flexible design:* Jurisdictions designed with flexibility to allow for change in preferences and functional requirements

Table adapted from Liesbet Hooghe and Gary Marks[30]

As can be seen, much as MLG is about mitigating centralism, these models indicate that the dispersal of authority can be done several ways, some of which clearly contrast. The boundaries between these two models can be blurred, however, especially when viewed from the context of wide and complex institutional frameworks. Indeed, Hooghe *et al* observe that the two types coexist and are complimentary because each is good at different things.[31] As can also be derived from Table 2 above, the MLG concept presents two dimensions through which institutions can be interlinked. First, the vertical dimension that entails, for example, the linkage between lower and higher level governments. Secondly, the horizontal dimension, which refers to the linkage across same level institutions, such as local governments. Considering that this thesis is arguing for strengthening the already existing institutional arrangements, it is most inclined to Type I. It should be noted, however, that the lack of flexibility and horizontal intersection, which Type II appears to address, is often synonymous with centrism.

[30] Hooghe (2003) op. cit., n. 16.
[31] ibid., at p. 240.

The coordination and rationalism problem

As may be the case with any governance model, MLG is faced with various challenges amongst which are the issues of coordination and rationalism in the dispersal of authority and functions. As we shall see in our discussion, these two issues have been pivotal in weakening and in some cases eroding the MLG spirit in the management of the Lake region's resources. To address the jurisdictional coordination challenge, Hooghes *et al* suggest two optional strategies, thus:

> "One strategy is to limit the number of autonomous actors who have to be coordinated by limiting the number of autonomous jurisdictions. The second is to limit interaction among actors by splicing competencies into functionally distinct units."[32]

As pointed out in earlier discussions, since our focus is on three levels, we are emphasising a limitation in the number of autonomous jurisdictions. It should be noted, however, that that our other focal issue is coordinated participation. As such, the strategy of splicing competencies into functionally distinct units remains outside our model. The main issue concerning the rationalisation of power dispersal is often a question on how much is rational?

In lieu of the usual pattern of outcomes from the EU policy making processes, Bache questions whether the involvement of actors other than national governments amounts to actual influence or simple participation. He thus coins the term multi-level participation to cater for those situations were other actors may be involved but insignificantly.[33] In other words, the existence of governments at various levels does not necessarily imply the existence of multi-level governance. This may actually be so irrespective of whether the multi-level governance concept is legally entrenched. It is against this backdrop that this thesis argues that, much as the recent adoption of

[32] Hooghe (2003) op. cit., n. 16 at p. 239.
[33] See Bache (1998) op. cit., n. 19 at p. 155.

decentralisation and regionalism manifest the existence of a multi-level framework in East Africa, its application must be significantly strengthened in the management of the Lake Victoria resources.

The Concept of Decentralisation

While the issue of decentralisation will be discussed at length in Chapters Seven and Eight, it will also be variously discussed in earlier Chapters. It is therefore important, at this stage, to discuss the theoretical and conceptual issues that concern it.

Although the concept of decentralisation is not new in the systems of government, since the early 1980s it has become a pertinent issue in development literature.[34] Of late, it is being increasingly fronted as a system of government intended to improve democratic accountability and to also serve as a medium for poverty reduction among the developing countries.[35] Decentralisation is being embraced to complement central government efforts in the management of local public affairs, by filling the acknowledged gaps of the centralised approach to government. African governments have often operated highly centralised systems, which not only detach them from the people they serve, but also suppress the input of local institutions and communities in decision making. As a result, central governments have often been ineffective and inefficient in managing local resources.

Centralised systems are blamed, *inter alia*, for their inability to: equitably distribute resources and benefits streams across the myriad heterogeneities among the communities; take into account varying local interests; effectively reach every corner of the country; and respond to local interests in a timely manner.[36] In contrast, decentralisation is seen as a system that takes government closer to the people

[34] See Diana Conyers 'Future Directions in Development Studies: The Case of Decentralisation' (1986) 14 World Development 593, 595; See also, Junge (2002) op. cit., n. 6, at p.23.

[35] See Olowu Dele, *Decentralization Policies and Practices under Structural Adjustment and Democratization in Africa* (Democracy, Governance and Human Rights Programme Paper Number 4, United Nations Research Institute for Social Development 2001).

[36] This can generally be derived from the entire discussion in decentralisation in this Chapter.

through processes and arrangements that provide opportunities for democratic government through political participation.[37] It is believed that decentralisation: enhances transparency and local accountability mechanisms; quickens response to local issues; increases the information flow between government and people; enhances the responsiveness of government institutions; and takes into account varying interests through community participation in decision making.[38] A major underlying argument for decentralised government is that, because of their superior capacity to understand local situations, local people are better placed to manage their own affairs.

Defining the Concept of Decentralisation

The term decentralisation continues to be marred by definitional problems and as a result has been unsystematically presented in different works.[39] Differences in the definitions mostly emanate from the questions of what, how, to where and by how much power and responsibility are transferred in order for decentralisation to be said to occur. Notwithstanding the differences, however, most definitions are consistently unified by the underlying principle that decentralisation entails the transfer of powers and responsibilities away from the centre.[40] As such, the definitional controversy emanates more from the scope than the underlying principle of the concept. According to Rondinelli *et al*, whose definition appears to present a more widely acceptable benchmark, decentralisation is:

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[37] See, generally, C. J. Ribot, A. Chhatre and T. Lankina, 'Institutional Choice and Recognition in the Formation and Consolidation of Local Democracy' (2008) 6 (Special Issue) Conservation and Society 1

[38] See, generally, J. Manor (1999) 'The Political Economy of Democratic Decentralisation', quoted in Junge (2002), op. cit., n. 6, at p.27; See also, James S. Wunsch, 'Decentralisation, Local Governance and Recentralisation in Africa' (2001) 21 Public Administration and Development 277.

[39] See John M. Cohen and Stephen B. Peterson. *Methodological Issues in the Analysis of Decentralisation* (Development Discussion Paper series No. 555, The Harvard Institute for International Development 1996).

[40] See, for example, the definition of decentralisation in Wunsch (2001) op. cit., n. 37; Diana Conyers, 'Decentralisation and Development: A framework for Analysis' (1986) 21 Community Development Journal 88, 88; Ross Stephens 'State Centralization and the Erosion of Local Autonomy' (1974) 36 The Journal of Politics 52, 52; Norman Furniss, 'The Practical Significance of Decentralisation' (1974) 36 The Journal of Politics 958.

> "the transfer of responsibility for planning, management, and resource-raising and allocation from the central government to: (a) field units of central government ministries or agencies; (b) subordinate units or levels of government; (c) semi-autonomous public authorities or corporations; (d) area-wide regional or functional authorities; or (e) Non Governmental Organisations / Private Voluntary Organisations."[41]

Conyers, who perceives the concept of decentralisation from a wider view observes that Rondinelli's definition is inclined to 'territorial' as opposed to 'functional' decentralisation and thus does not take into account the transfer of powers and responsibilities from the centre to same level peripheral organisations.[42] As indeed Andrews *et al* argue, decentralisation is a complex process with a peculiar distinctiveness in each country, in that definitive generalisations may not be reliable unless specifically analysed on a case to case basis.[43]

While it has been seen that the underlying objective of decentralisation is to tone down centralisation, it is important also to know how the concept of 'centralisation' can be manifested within a decentralised framework. According to Stephens:

> "A centralised organisation or institution is one in which the lower levels and employees assigned thereto are subject to central directives and discipline and identify in one way or another with the central leadership, for example, professionally, by interests, or in goals and values. Central control of finances and public policy are basic elements. Machinery for communication, reporting, inspection record-keeping and conflict resolution will exist at the

[41] D. Rondinelli, 'Government Decentralisation in Comparative Perspective: Theory and Practice in Developing Countries' (1980) 47 International Review of Administrative Science 133; D. Rondinelli, J. Nellis and S. Cheema, *Decentralisation in Developing Countries: A Review of Recent Experience* (World Bank 1983); D.A. Rondinelli and G.S. Cheema, *Decentralisation and Implementation in Developing Countries* (Sage Publications, London 1983).
[42] Conyers (1986) op. cit., n. 39, at p. 88.
[43] See Andrews Matthew and Larry Schroeder, 'Sectoral Decentralisation and Inter-Governmental Arrangements in Africa' (2003) 23 Public Administration and Development 29

higher level or at least be responsible to the central unit [...] conversely, in a centralized situation the state controls basic public policy, allocates resources, and delivers public goods and services".[44]

While this quotation tends toward the weakest side of the decentralisation continuum, it brings to light the fact that an aspect of centralisation can exist within a decentralised framework. For example, Ribot observes that, while natural resource management has been decentralised among African countries, local government participation is usually limited to implementation matters, while issues concerning the allocation of privileges, rights, titles, and easements are retained at central government level.[45] We shall, in our discussion in Part IV, ascertain the extent of central control within the decentralised frameworks and how this impacts on natural resources management in the Lake Victoria region.

Local Government and its Interrelationship with Decentralisation

The interest in decentralisation in this thesis concerns local government. The definition of the term 'local government' is now considered to see how it fits within the concept of decentralisation. Although the concepts of decentralisation and local government are not exclusively synonymous, the latter is one of the manifestations of the former. The term 'local government' can be defined either as a function or an institution. From a functional point, Miller defines local government as:

"...a sub-national level of government which has jurisdiction over a limited range of state functions, within a defined geographical area which is part of a larger territory."[46]

[44] Stephens (1974) op. cit ., n. 40, at p.52
[45] See Jesse C. Ribot, A. Agrawal and A. Larson, 'Recentralisation While Decentralising: How National Governments Reappropriate Forest Resources' (2006) 34 World Development 1864
[46] Keith L. Miller, 'Advantages and Disadvantages of Local Government Decentralisation' (Caribbean Conference on Local Government & Decentralisation, Georgetown, Guyana, 25-28 June 2002) 3.

And from the institutional perspective, he defines it as:

> "…an institution or structure, which exercises authority or carries out governmental functions at a local level."[47]

It can clearly be seen that although the concepts of decentralisation and local government are founded on similar principles, they are actually not necessarily synonymous. The close relationship between these two concepts often causes confusion resulting in the two terms being used interchangeably. As shall generally be seen in Part IV, decentralisation can be manifested in other forms that may even by-pass local government.[48] Also, the manner in which decentralisation is manifested may vary across different models of local government.

Since local government is also closely associated to the term 'local governance' it is useful to explore the meeting or divergence point between these two concepts. Local government differs from local governance in that, the latter which is broader, refers to:

> "…the processes through which public choice is determined, policies formulated and decisions are made and executed at the local level, and to the roles and relationships between the various stakeholders that make up the society."[49]

The above definition suggests that local governance embodies both processes and institutions of non-state actors. As such, local government is part of a system through which local governance is delivered. As an institution, it is among the players in the local governance arena. The promotion of local government, as a core component in

[47] ibid
[48] Børhaug Kjetil, *Local Government and Decentralisation in Sub-Saharan Africa: An Annotated Bibliography*, (CMI Working paper WP 1994: 5, Chr. Michelsen Institute 1994).
[49] Miller (2002) op. cit., n. 46, at p. 3.

local governance, is substantially underpinned by the belief that it elevates the participation of local communities and institutions in the management of their affairs.[50] It is in this vein that the EU principle of *subsidiarity*, which entails that the power of governance ought to reside at the lowest feasible level, is gaining universal acceptability in environmental management.[51]

Turning back to the general concept of decentralisation, our next interest is in exploring the manner in which it is broken down to ease the understanding of its various manifestations. Decentralisation can, on one hand, be classified according to the degree or method of transferring power and on the other, in accordance to the type of power transferred. The types or models include *deconcentration, delegation, devolution and privatisation,*[52] while the powers transferred can be categorised as *administrative, political, financial and economic* decentralisation.[53] Owing to the closeness and blurriness between these two approaches, however, they are at times presented concurrently or in an overlapping manner. Admittedly, attempts to separate these two perspectives to the concept of decentralisation can be confusing but rather worthwhile, as it will be later attested.

The Case for Decentralisation in Natural Resources Management

While the concept of decentralisation has always been common in the sectors of education, health, community development, agriculture extension and feeder roads, its application in natural resource management has often been limited in Africa.[54]

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[50] See Junge (2002) op. cit., n. 6, at p.26.
[51] See Michael Longo, 'Subsidiarity and Local Environmental Governance: A comparative and Reform Perspective' 18 University of Tasmania Law Review 2, 226
[52] Rondinelli et al (1983) op. cit. n. 40; Jennie Litvack, Ahmad Junaid and Richard Bird, *Rethinking Decentralisation in Developing Countries* (International Bank for Reconstruction and Development/World Bank, Washington 1998).
[53] See Diana Conyers 'Decentralisation: The Latest Fashion in Development Administration' (1983) 3 Public Administration and Development 97; See also, A. Mills and others (eds), *Health System Decentralisation: Concepts, Issues and Country Experience,* (World Health Organisation, Geneva 1990).
[54] Jesse C. Ribot, 'Democratic Decentralisation of Natural Resources: Institutional Choice and Discretionary Power Transfers in Sub-Saharan Africa' (2003) 23 Public Administration and Development 53, 63.

This has changed, however, recently as the issue of involving the local communities in the management of their resources is increasingly becoming a policy concern not only to government, but also practitioners and development partners.[55] Indeed, natural resource management is among the issues that are increasingly being incorporated in the new decentralisation programmes,[56] and poverty reduction strategies.[57] The issues of local democracy and poverty reduction have been at the centre of development literature, which commonly influences national strategies in the developing world. From the local democracy perspective, Ribot argues that, given the relationship that local people have with their environment, engaging them in decision making reinforces the principle of democracy, and may in the process achieve both environmental and democratic objectives.[58] Actually, to Ghai, the matter of local participation in decision making is a basic right.[59]

Also, the decentralisation of Environment and Natural resources Management (ENRM) is increasingly being seen as measure for poverty reduction. This perception is premised on the argument that those who are mostly affected by environmental degradation are often not part of the decision making processes that affect the well being of the resources. It is believed that the likelihood for local people to conserve natural resource is significantly dependent on the understanding of how their choices would increase their resilience to environmental threats and thus promote an improvement in their well-being.[60]

In East Africa, the agitation for decentralised ENRM comes at a time when all the countries are advancing local government as the major channel for local service

[55] Priya Shyamsundar, *Devolution of Resource Rights, Poverty, and Natural Resource Management: A Review* (Environmental Economics Series, International Bank for Reconstruction and Development/ The World Bank, Washington 2005) p. 1.
[56] See, generally, Shyamsundar (2005) op. cit., n. 55.
[57] See, generally, Jeff Brokaw, *Issues in Poverty Reduction and Natural Resources Management* (USAID Law Resources Management Team, Washington 2006).
[58] Ribot (2003) op. cit., n. 54, at p. 55.
[59] D. Ghai, and J.M. Vivian, (eds.) 1992 quoted in Junge (2002) op. cit., n. 6, at p.6.
[60] Brokaw (2006) op. cit., n. 57, at p. 6

delivery.[61] The policy shift towards decentralised natural resource management is basically intended to scale down state-centralism, which is often associated with inhibiting factors such as: political interference; extended bureaucracy; sanctions oriented management; ill-adaption to natural resource management; and non-consultative processes.[62]

While the case for the decentralisation of natural resource is diversely argued, most of the accounts are pegged on advocacy for the enhancement of the principle of local participation. First, it is argued that the state has limited institutional capacity to intervene and regulate environmentally degrading activities in all parts of the country.[63] Second, it is said that the state often lacks sufficient information on both the local communities and their resources. It is argued then that the state is often unable to arrive at informed decisions based on the heterogeneity of local interests.[64] Since environmental problems are often location specific, they are best understood by the local people and institutions, whose knowledge is invaluable.[65]

A third argument is that the state rarely takes into account local participation and consequently, the sense of ownership is lost.[66] Fourthly because local communities are homogeneous with shared values, their capability to act collectively towards common needs and a shared environmental goal is high.[67] It is, however, important to add that local communities are incrementally becoming more stratified than under traditional egalitarianism. Internal divisions continue to emerge among them as improved marketing, modernisation of production and consumption methods and

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[61] See Chapters Six and Seven for the details on the trend of local government in East Africa.
[62] Benjamin J. Richardson, 'Environmental Management in Uganda: The Importance of Property Law and Local Government in Wetlands Conservation' 37 Journal of African Law 109, 112.
[63] ibid., at p. 113.
[64] See J. Barkan and M. Chege, 'Decentralising the State: District Focus and the Politics of Re-Allocation in Kenya' (1989) 27 Journal of Modern African Studies 432.
[65] Arun Agrawal and Elinor Ostrom, 'Collective Action, Property Rights, and Decentralization in Resource use in India and Nepal' (2001) 29 Politics and Society 485, 490.
[66] See generally, Barkan (1989) op. cit., n. 64.
[67] See Jeremy Lind and Jan Cappon, *Realities or Rhetoric? Revisiting the Decentralisation of Natural Resources Management in Uganda and Zambia* (ACTS Press, Nairobi 2001).

the 'comodification' of natural resources takes root.[68] Nonetheless, the sense of belonging remains high among many local communities. Fifthly, that the decentralisation of environmental management encourages and facilitates the participation of minority or disadvantaged communities, most of whom greatly depend on natural resources.[69] Sixthly it is said that placing the local at the centre of their resources entails higher transparency and accountability, since monitoring and evaluation is easily incorporated within the routine community activities. Because of such challenges and failures on the part of central government, highly centralised resources management regimes are often susceptible to degeneration into open-access regimes.[70]

The case for decentralised natural resources management is not without criticism. According to Sheberle, those against the decentralisation of natural resources management argue that devolution does not provide an assurance for citizens to enjoy a minimum level of protection, which could best be set centrally. Secondly, it may breed a local reluctance to protect the environment, since doing so may competitively disadvantage local industries. Thirdly, it creates a power-relations atmosphere revealing social realities that could be abused to enhance group inequalities. Fourthly, it is incapable of handling environmental problems of a trans-boundary nature.[71] Sheberle, however, challenges such arguments by citing several examples where the performance of devolution has been outstanding in comparison to similar situations under centralised management.[72] The issue of the inability for the locals to handle problems of a trans-boundary is, among others, the reason that

[68] T. Enters and J. Anderson, 'Rethinking the Decentralisation and Devolution of Biodiversity Conservation' (1999) 50 Unasylva 6.
[69] See generally, Jesse C. Ribot, Ashwini Chhatreb and Tomila Lankinad, 'Institutional Choice and Recognition in the Formation and Consolidation of Local Democracy' (2008) 6 (Special Issue) Conservation and Society 1.
[70] See Agrawal Arun and Ostrom Elinor, 'Collective Action, Property Rights, and Decentralization in Resource Use in India and Nepal' (2001) 29 Politics and Society 485.
[71] Denise Scheberle, 'Devolution ' in Robert F. Durant , Daniel J. Fiorino and Rosemary O'Leary (eds), *Environmental Governance Reconsidered: Challenges, Choices and Opportunities* (MIT Press, Cambridge 2004) 361 – 392.
[72] ibid.

this thesis suggests a multi-level effort, providing both horizontal and vertical interaction among interests at the local, national and regional levels.

On a general note, it is argued that the involvement of local individuals and institutions in decision-making precipitates a higher motivation for sustainable natural resource use. In that light, several of the proponents for bundling environmental management with the ongoing decentralisation reforms in Africa contend that the environmental resources are threatened because there has not been a commensurate replacement of the participative traditional management systems, whose authority was eroded by the incursion of colonialism.[73] While several attempts continue to be made towards re-creating the traditional management systems, these efforts are often faced with the problem of legitimacy and thus the increasing advocacy for democratic local institutions. Following his appreciation that the transfer of environmental power is inevitably shaped by the existing political and economic situations, Ribot emphasises that such a transfer can only support democratic relations if the institutions themselves are democratic.[74] While Carter cautions that democratic mechanisms are not necessarily a guarantee for environmentally benevolent outcomes,[75] such uncertainty can surely never be worse than lacking legitimacy. As earlier argued and later seen in this Chapter, the issue of legitimacy is among the key reasons that underlie this thesis' argument for the government structures to be at the core of the multi-level government framework.

Policy Models for Intergovernmental Relations in Environmental Management

Ribot argues that effective environmental decentralisation entails devolving significant discretionary powers over natural resources to local representatives and

[73] See Chapter Two for a more detailed discussion on the Traditional Natural Resource Management (TNRM) systems and their demise under the colonial administrations.
[74] Ribot (2003) op. cit., n. 54 at p. 63.
[75] Neil Carter, *The Politics of the Environment: Ideas, Activism* (Cambridge press, Cambridge 2001) 278 – 283.

downwardly accountable institutions.[76] This must occur, however, within a framework that defines the relationship between the ceding and receiving parties. May *et al* compare two policy models of intergovernmental relations in environmental management. The first is a *coercive model,* where local governments are considered regulatory agents tasked to implement rules prescribed by the higher-level governments. Under this arrangement, the procedures and standards for achieving policy goals are detailed, with no space for discretion at local government level. Local governments are recipients and not innovators of policy decisions. They are in that regard, monitored for purposes of procedural and not substantial compliance. This model assumes that compliance is a potential problem better enforced through penalties. Although the coercive model may run local government capacity building programmes, its major emphasis is on compliance, where penalties may be invoked for non-compliance.[77]

A second possibility is the *cooperative model*, where local units or lower governments act as regulatory trustees that share common goals with higher governments. The higher government may formulate the general policy framework and the details of how to go about it are left to local governments. Leaning on the assumption that the problem is not on the issue of compliance, the cooperative model puts more emphasis on local government capacity building supported by the higher government in the form of financial and technical assistance.[78] While the cooperative model depicts a high degree of decentralisation, it also has shortcomings. Based on the assumption that local governments have no significant disagreements with policy aims, the model feels no need to enforce compliance.[79] Since local governments are not homogenous in terms of capacity, attitude and priorities, compliance under the cooperative model is likely to create gaps that may

[76] Ribot (2003) op. cit., n. 54, at p. 63.
[77] Peter J. May et al, *Environmental Management and Governance: Intergovernmental Approaches to Hazards and Sustainability* (Routeledge, London 1996) 3.
[78] ibid.
[79] ibid. at p. 5

be hard to address, unless some level of coercion is applied. Furthermore, the flexibility of the model makes it susceptible to abuse of authority by individual self-seekers. For instance, the elected local officials may be engaged by parochial development interests, where their preference for economic benefits is executed at the expense of environmental interests.

Considering that both models have strengths and weaknesses, a mixed model can be derived based on a selection of attributes from each model. What actually matters most is the ratio of the mixing of the two models. For instance base levels for mandatory environmental compliance could be set by central government and incentives made available for the local governments that surpass the minimum limits. Under such an arrangement, local governments would be encouraged to make rules and management decisions that supplement but do not supplant set standards. In other words, punishment and other coercive methods can be applied positively.

The main problem affecting central-local relations in natural resources management is the lack of efficient and secure links between the two power centres. While there have been legal and policy efforts to address the problem of late, this has not been sufficiently well articulated as to offer solutions to the ever lopsided management structures for environmental management. Saito notes that many of the successful collaboration efforts are mostly based on personal ties than institutional arrangements.[80] These policy models are of assistance to us in Chapters Eight and Nine, which evaluate the decentralisation of ENRM among different laws and across the three countries.

[80] Fumihiko Saito, 'Uganda's Local Council and the Management of Commons: An Attempt of Theoretical Reassessment' (11th IASCP Biennial Conference, Bali Indonesia, 19-23 June 2006) p. 3.

Regionalism and Environmental Management

As earlier stated and also emphasized in Part V, the main interest with regard to regionalism in environmental management is in the East African Community, which is a regional cooperation framework for the three East African countries of Uganda, Kenya and Tanzania. Prior to exploring in greater details the concept of regionalism, in Part V, it is useful to have the theoretical and conceptual discussion at this point. This will assist in developing an early contextual understanding of the regional issues which are discussed later. This section reviews the regional integration theories, the general concept of regionalism and various issues that concern international law and institutions.

Regional Integration Theories

As indicated while discussing the concept of multi-level government earlier in this Chapter, this thesis' interest in the concept of regionalism is not focussed on theorising the emergence of the East African Community. Its major concern – multi-level government - is part of the broader concept of multi-level governance, whose origins are within the realms of the theories of regional integration. It is thus useful to highlight the key tenets of the other regional integration theories.

The theories of regional integration are traditionally focussed on understanding the structures of regional institutions and their policy dimensions. Although the theory of multi-level governance is steadily attracting attention, regional integration theory has traditionally been dominated by realist, functionalist, inter-governmentalist and the constructivism approaches, many of which have variants. Basically, the *realist* theory presupposes that, states are the important units of action in the international, political arena and they, as such, rationally pursue their power objectives either as a means or an end.[81] Initially, contributed by Kenneth Neal Waltz, the variant of *neo-realism* posits that state actions are often influenced by the archaic nature of

[81] See Robert O. Keohane, 'Realism, Neorealism and the Study of World Politics' in Robert O. Keohane (ed), *Neorealism and its Critics* (Columbia University Press, New York 1995).

international competition pressures that often limit and constrain state choices.[82] To the neorealist, regional integration is as a result of hegemonic power projections, a response to the convergence of national interests.

The *functionalist* theory, whose contemporary development is greatly credited to David Mitrany, is premised on the belief that the integration between states can develop its own internal dynamism as states integrate in limited functional, technical, and/or economic areas.[83] It presupposes the integration process to take place within a framework of human freedom, where knowledge and expertise are deemed to be available to meet the needs for which the functional agencies are built. It is further assumed that such a process is not sabotaged by the states. Functionalism stresses the importance of transferring functional tasks from state governments to specifically created supra-national administrative structures. While both are built on the same core principle of regional cooperation as an incremental process woven along functional areas, a major point of departure between functionalism and *neo-functionalism* is that the former tends to separate politics from economics. Largely drawing on the work of Hass,[84] the neo-functionalists argue that cooperation in economic and technical fields eventually spills over into the political arena, leading to the creation of a supra-national political community made up of various supra-national institutions.

The theory of *neo-liberalism* is largely credited to Keohane and Joseph Nye, who have theorised in their various works, that states are forced to cooperate or integrate because of the increasing levels of interdependence existing between them. States are attracted by the incentive of the benefits that are likely to accrue from their

[82] William C. Wohlforth, 'Realism and Foreign Policy' in Steve Smith, Amelia Hadfield and Steve Dunne (eds), *Foreign Policy: Theories, Actors and Cases* (Oxford University Press 2008) 31- 48.
[83] See, generally, Mitrany David, *A Working Peace System* (Quadrangle Books, Chicago 1966).
[84] See, generally, Ernst B. Hass, *The Uniting of Europe* (Stevens & Sons, London 1958).

cooperation or integration with one another.[85] In that way, regional integration is incrementally strengthened as common interests are collectively addressed through formalised institutions and processes.

These theories can collectively be referred to as rationalist theories, in that they presuppose the behaviour of states to be influenced by rational considerations as to the course of action taken in pursuit of their interests. *Constructivism* or critical theories argue that state interests are formed and continue to be shaped through the social interaction processes in which they participate with other states within the international system.[86] Such theories criticise the rational theories for being incognisant of the human aspect in the decision-making processes.

In line with these theories, various circumstances can give rise to regionalism. Although the process of regionalism can be initiated from outside the mainstream government structures, the state remains a key, if not the lead actor, in regionalism. As such, regionalism can generally be said to be greatly dependent on state will. The concept of regionalism is theorised as a limitless process, embodying not only the processes through which parties are brought together but also those that entail their interaction in its implementation. For two reasons, however, it is often difficult to associate the initiation and functioning of any given regional block within the confines of only one regional integration theory. First, the boundaries between these theories are often blurred. Second, since it is a process, regionalism is in metamorphosis rendering it difficult to sustain the arguments that any given regional block is a result of a single regional integration theory.[87] That notwithstanding, this overview of the regional integration theories remains important in assisting the

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[85] See, generally, Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (2nd edn, Longman, New York 1989).

[86] For a more detailed discussion on constructivism see, Gerard J. Ruggie, 'What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" International Organization' (1998) 52 International Organization 855.

[87] Ian Bache, *The Politics of European Union Regional Policy: Multi-level Governance or Flexible Goal Keeping* (Sheffield Academic Press Ltd, Sheffield England 1998) 148.

understanding of the evolution of regional cooperation among the East African countries, which is covered in Parts III and IV.

The Concept of Regionalism

Broadly, the concept of regionalism can, in international governance, be manifested in the form of a cooperation framework, an organisation or institution. As is the case with other governance frameworks, the concept of regionalism varies in degree. At one extreme are very limited and simple forms of cooperation and on the other are very complex patterns of integration. As such, attempts have been made to distinguish the terms 'regional cooperation' and 'regional integration', where, unlike the former which is often *ad hoc* and on thematic issues, the latter is more institutionalised and broad in terms of functions and mandate.[88] Both approaches are, however, operationalised through policy coordination or harmonisation.[89]

According to Schultz *et al*, regionalism is, in the broader sense, about formal projects and processes. And in the narrow and operational sense, it:

> "…represents the body of ideas, values and concrete objectives that are aimed at creating, maintaining or modifying the provision of security and wealth, peace and development within a region."[90]

Regionalism can also be understood as an instrument that supplements, enhances or protects the role and power of government in the wider context of international affairs, thus supporting the neorealist view that regions are formed in response to external challenges.[91] Ideally, the concept of regionalism entails pooling state

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[88] See Alan Matthews, *Regional Integration and Food Security in Developing Countries* (Food and Agriculture Organization of the United Nations, Rome 2003) Ch. 3.
[89] ibid.
[90] Micheal Schultz et al, *Regionalisation in a Globalising World* (Zed Books Limited, New York 2001) 5.
[91] Andrew W. Axline 'Underdevelopment, Dependence and Integration: The Politics of Regionalism in the Third World' in Gosh K. Pradip (ed) *Economic Integration and Third World Development* (1984).

sovereignty in order to address an array of regional interests including matters that pertain to global, national and even local issues. In that regard, the cooperating states partially forfeit their sovereignty as semi-independent parties in a larger community.[92] Sarooshi contends that:

> "The State that transfers powers to an international organisation does not confer its powers in *toto* on the organisation. It retains the powers as part of its sovereignty, but has agreed to limit its rights to exercise these powers in favour of an exclusive right of the organisation to exercise the conferred powers."[93]

Precise measurement of the transferred powers is, however, difficult and this presents a major challenge of regionalism.[94]

Although regionalism is normally focused on a set of aims and objectives, its success and benefits are neither definite nor necessarily evenly or reciprocally distributed among the cooperating parties. In some cases, cooperating states are at liberty to decide their level of involvement in the cooperation, thus the principle of variable geometry, which is increasingly being embedded in regional cooperation agreements.[95] In some cases, some members are allowed longer time to achieve the set objectives, thus the principle of variable or multi speeds.[96] As was seen in the discussion on the regional integration theories, regionalism can be susceptible to both internal and external influences. Most important, however, success of

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See also, Donald Palmer *The New Regionalism in Asia and the Pacific* (1991). Both quoted in Schultz (2001) op. cit., n. 90 at p. 4.

[92] Schultz (2001), op. cit., n. 89, pgs. 4 - 5

[93] Dan Sarooshi, *International Organisations and their Exercise of Sovereign Rights*, (Oxford University Press, New York, 2005) 69.

[94] ibid.

[95] Schultz (2001), op. cit., n. 90, at p. 7

[96] See Chapter 3 in Matthews (2003) op. cit., n. 88.

regionalism is significantly premised on the political will and commitment of the contracting parties.[97]

Regionalism in Environmental Management

It is common knowledge that the basic and at times sole reason for regional cooperation or integration is economic benefit.[98] This certainly explains why regional arrangements are commonly referred to as Regional Economic Cooperation (RECs). Of late, however, the scope of regionalism is changing considerably.[99] Amongst others, human rights, environmental management, good governance and social development are increasingly becoming priority issues in regional integration.[100] This shift is primarily influenced by the realisation that, because of the strong linkage between sectors, governance should entail an integrative management approach.[101] For that reason, cross-sectoral policy, law and institutional coordination or harmonisation has become a pivotal aspect in regionalism and this perception is increasingly being captured at both regional and national levels.

Though now more common and rooted, the cooperation and co-existence of modern states over natural resources is not a new phenomenon. In a much less formalised

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[97] See 'International: Regionalism Will Shape Global Politics' *Oxford Analytica Daily Brief Service* (Oxford, 15 May 2009) at <http://www.proquest.com/> accessed 19 March 2010; See also, Andrea Goldstein and Ndung'u S. Njuguna, *Regional Integration Experience in the East African Region* (Development Centre Working Papers 171, OECD, Paris 2001).

[98] See Economic Commission for Africa (ECA), *Assessing Regional Integration in Africa* (ECA Policy Research Report, Addis Ababa, Ethiopia 2004); Wilbert Kaahwa, 'Towards Sustainable Development in the East African Community' in Schrijver Nico and Weiss Friedl (eds), *International Law and Sustainable Development* (Brill Academic Publishers, Leiden, The Netherlands, 2004) 636.

[99] See Economic Commission for Africa (2004) op. cit. n. 96. See also, Kaahwa (2004) op. cit. n. 96. at pgs. 636-637; John Mugabe, 'Regionalism and Science and Technology Development in Africa' in Louk Box and Rutger Engelhard (eds), *Science and Technology Policy for Development, Dialogues at the Interface* (Anthem Press, London, UK 2006) 37-54.

[100] Human rights, environmental management, social development and good governance have all attained international acclamation in the recent past. Indeed, international concern for human rights and environmental management has particularly led to the convening of global meetings and signing of various international laws instruments including; The 1992 United Nations Conference on Environment and Development on whose basis a number of Multi-national Environment Agreements have been signed.

[101] See Wilbert Kaahwa, 'Perspectives on Racism, Racial Discrimination, Xenophobia and Related Intolerances: The Role of the East African Community' (East Africa Law Society Regional Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance at Arusha, August 2001).

manner, the surrendering of aspects of territorial sovereignty and integrity for the sake of common interest environmental resources can be traced back to the early era in the evolution of statehood.[102] It is only recently, however, that inter-state cooperation in environmental management has been formally championed especially under auspices of international organisations and institutions. The powers, roles and functions of International organisations and institutions in the management of natural resources and the environment in general, have continued to expand with the increased appreciation of the need to cooperate in ENRM. This has been boosted and enhanced by the continued development and adoption of international environmental law.

Regionalism in environmental management can be a confined package or a part of a wider regional integration process. It is increasingly being guided by international law principles including the: prior notification; information sharing; common but differentiated responsibility; equitable use and distribution; and the sustainable development principles. The development and adoption of these principles is particularly premised on the argument that environmental problems tend to be borderless. These principles are, in that regard, intended to manage the relationship between states and state conduct in managing the resources. Especially for the states that share particular resources, it has become clear that they need to: share management responsibility; harmonise their management regimes; have common goals and benefits; create common and higher negotiation, arbitration and litigation levels; and enhance lobbying capacity. For this to happen, however, cooperating states are expected to cede part of their powers, roles and duties to regional institutions.

[102] Thilo Marauhn, 'The Changing Role of the State' in DanieBodansky l, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, New York 2007) 730.

On the other hand, regionalism in environmental management is instrumental in checking the excesses of nation-states in environmental management. State governments often, under the guise of the legendary international law principles of state sovereignty and territorial integrity, have contributed directly or inadvertently to the degradation of the environment. Aside from being direct users, central governments under the same guise, at times, have deliberately refused to institute environmental management measures considered to be in conflict with their other objectives.

International Organisations and Institutions in Environmental Management

As we shall be exploring several regional or international organisations and institutions, this section briefly enlightens us on the role that these organisations and institutions often play in ENRM. Notwithstanding the flexibility with which the words 'institution' and 'organisation' can be interchanged,[103] regional organisations are international institutions, although the reverse is not necessarily true. International institutions or organisations can be global,[104] regional[105] or even be constituted by parties sharing similar interests but not necessarily within the same geographical location.[106]

In exercising their roles and functions, international organisations and institutions normally take their mandate from their respective constitutive agreements that range between 'soft and 'hard' instruments. [107] They may, however, also be guided

[103] Nigel D. White *The Law of International Organisations* (2nd edn, Manchester University Press, Manchester 2005) p. 1.
[104] For example, the United Nations and its subsidiary organisations and institutions such as the United Nations Environment Programme (UNEP).
[105] Examples include: the European Union (EU), The African Union (AU) and The North American Free Trade Agreement (NAFTA).
[106] For example, The Organization of Petroleum Exporting Countries (OPEC), which brings together some major oil producing countries, is a cartel of 12 countries from different regions and continents of world. Interestingly the OPEC headquarters are in Vienna, Austria, which is a non-member.
[107] See Phillipe Sands, *Principles of International Environmental Law* (Second edn, University Press, Cambridge 2003) p. 76.

by customary international rules or principles and other international instruments that may be of relevance.

The involvement of international organisations and institutions in ENRM may be manifested in several forms including the provision of judicial, legislative, administrative, technical, advisory and financial services. According to Sands, international organisations basically perform five main functions. These are: provision for a medium of cooperation; information gathering and dissemination; development of international legal instruments; implementation and enforcement of compliance and; provision of independent dispute settlement forum and mechanisms.[108] In addition international organisations are also increasingly being used as a channel for funding and as hubs for technical support services.

Increasingly, the establishment of organisations and institutions charged with environmental matters is becoming part of the regional integration and globalisation processes. Aside from those established as or under regional cooperative frameworks,[109] the inter-governmental international organisations or institutions involved in environmental governance include: those that arise from Treaties, Protocols or other Multi-national Environment Agreements;[110] specialised agencies of the United Nation but established by a separate Treaty;[111] UN General Assembly bodies;[112] and those that arise from cooperative arrangements between other international institutions.[113]

[108] ibid. at p. 76-78.
[109] For example, the Lake Victoria Basin Commission and the Lake Chad Basin Commission
[110] Such as the COPs and Secretariats of the UNFCCC, CBD and the Ramsar Convention.
[111] Such as FAO, IFAD and the World Bank that was established pursuant to Article 57, in conjunction with Article 63, of the Charter of the United Nations, 1945.
[112] Such as UNDP and UNEP established pursuant to Article 22 of the Charter of the United Nations 1945.
[113] Such as the Global Environment Facility (GEF) and Inter-Government Panel for Climate Change (IPCC).

The traditional approach of setting up of stand-alone joint bodies to oversee the management of particular natural resources is gradually dying out because of the growing establishment of wider mandate regional organisations and international institutions. The European Union (EU) presents a good example of regional inter-governmental institutions that have deeply encompassed the concept of a supra-national led environmental management regime. In Africa, the East African Community (EAC), South Africa Development Cooperation (SADC), Economic Cooperation for West African States (ECOWAS) and the Inter-Governmental Agency on Development (IGAD) with varying degrees, have all embraced regional-wide approaches to environmental management. Irrespective of such efforts, however, since regional institutions are usually incapable of handling matters that involve non-parties, the existence of resource specific international agreements has also remained relevant.[114] The next section discusses international environmental law, the enforcement of which remains a major challenge to international and regional organisations.

International Environmental Law

As we talk about regionalism in environmental management, it is also important to explore issues that concern international environmental law, which may, define the level and forms of involvement of the regional institutions in environmental management. Let us, however, begin by generally exploring the concept of environmental law.

Environmental law, along with the corresponding regulatory, policy and institutional frameworks, forms part of the broader environment natural resource management regime, which manages the relationship between individuals in their interaction with

[114] Examples include, The Niger Basin Authority, The Senegal River Development Organization (OMVS), The Gambia River Basin Organization, The Lake Chad Basin Commission (LCBC), The Kagera Basin Organization, The Okavango River Basin Commission, The Mano River Union, and The Nile Basin Initiative.

the environment and natural resources.[115] Irrespective of being a relatively new legal discipline, environmental law is already a substantial and complex issue.[116] Hughes *et al*, however, observe that laws concerning the environment are not necessarily a new phenomena, but that environmental consciousness has increased remarkably over the past 30 years.[117] It can, therefore, be noted that the evolution of environmental law and its application as a subject area, is substantially a result of increased environmental consciousness.

As for International environmental law it basically provides the principle framework that guides the contracting parties in the achievement of the intended legislative, administrative and adjudicative functions.[118] According to Sands, international environmental law;

> "…includes those substantive, procedural and institutional rules of international law which have as their objective, the protection of the environment." [119]

The development of international environmental law has primarily been through the negotiation of international agreements. These include treaties; conventions; protocols; memoranda of understanding; any other form of Multi-national Environmental Agreements (MEAs); and instruments of bilateral, regional or international institutions or cooperation frameworks. The other traditional sources include: customary rules; general principles of international environmental law;

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[115] Daniel Bromley, 'The Commons, Common Property and Environmental Policy' (1992) 2 Environmental and Resource Economics 1, 22.
[116] Alexandre Kiss and Dinah Shelton *Manual of European Environmental Law* (Second Edition edn, Grotius Publications-Cambridge University Press, UK 1997) 3.
[117] David Hughes, *Environmental Law* (Fourth Edition edn, Butterworths Lexis Nexis Bath, UK 2002) 3.
[118] Phillipe Sands, *Principles of International Environmental Law* (Second edn, University Press, Cambridge 2003) 12 -13.
[119] ibid. at p. 15.

judicial decisions; and published works.[120] While it is increasingly distinguished as a separate branch of law, international environmental law continues to be perceived, developed and implemented within the shadow of international law principles and practice. In most cases, however, international environment law is often presented in the form of 'soft law'. Bodansky argues that:

> "Unlike the European Union, which is rapidly developing into a new constitutional order, international environmental law remains rooted within the voluntarist tradition of environmental law."[121]

Although the aspect of voluntarism is increasingly being turned around to entice compliance, it remains a major weakness in the enforcement of international environmental law. In contrast with hard law, which often refers to precise legally binding obligations juxtaposed with delegated authority to interpret and implement law,[122] soft law tends to emphasize non-confrontational enforcement mechanism. It is because of its non-binding nature and at times vagueness that soft law has also been referred to as a 'halfway house'[123] or 'half-way stage' in the law making process.[124] Soft law instruments include: codes of practice; recommendations; guidelines; resolutions; standards; frameworks; and declaration of principles. According to Birnie *et al*, half-way stages are a reality and necessity as a non-traditional source of environmental law.[125] Aside from the weakness of lacking the force of law, the implementation of international environmental law is faced with several challenges which are discussed in the following section.

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[120] Patricia Birnie and Alan, Boyle *International Law and the Environment* (Second edn, Oxford University Press, Oxford, UK 2002) 12-21.
[121] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 American Journal of International Law 596, 598.
[122] See Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' 54 International Organization 421.
[123] Hughes (2002) op. cit., n. 117, at p. 65.
[124] Birnie (2002) op. cit., n. 120, at p. 25.
[125] ibid.

Challenges in the Implementation of International Environmental Law

According to Baber international environmental law is mainly faced with three challenges – the democratic deficit of legitimacy, the aspect of non-self executing instruments and the complications of dispute settlement.[126] We shall be returning to the former two issues, in the next section, as we discuss the role of the state in international environmental law. Often international agreements, such as the MEAs, bind the consenting parties to rules rather than governance structures.[127] As such consensus is often the most obvious and plausible solution, for the implementation of international environmental law. To achieve consensus is, however, time-consuming and, at times, impossible. Despite the increasing imposition of state rights and duties under international environmental law, the *Trail Smelter* case[128] has surprisingly remained a relatively isolated example of a trans-border dispute settled through litigation. Trans-boundary environmental disputes between states[129] have increasingly been handled politically rather than pursued in court.[130] Even the well known Chernobyl and Sandoz accidents did not lead to court action.[131] States have generally been reluctant to invoke the law against fellow States, even when legally empowered to do so.[132]

Other than the issues that concern its implementation, international environmental law is also faced with challenges that are inherent within its framing. Lynton Caldwell identifies three fundamental questions that underpin the effectiveness of any

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[126] For a more detailed discussion see Walter F. Baber and Robert V. Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (MIT Press 2009).
[127] Bodansky (1999) op. cit., n. 121 at p. 607.
[128] *Trail Smelter Case (United States v. Canada)* [1941 3 U.N.R.I.A.A.1905]
[129] For instance the transboundary pollution cases in North America involving the Douglas plant in Arizona, a Tacoma plant in Washington and the Nacozari plant in Mexico were settled at a political level.
[130] Jutta Brunnée, 'Common Areas, Common Heritage and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, New York 2007) 551.
[131] Daniel Bodansky, Jutta Brunnée and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, New York 2007) 9.
[132] Brunnée et al (2007) op. cit., n. 130 at p. 551.

international environmental agreement. First, whether the *coverage* is adequate to include all the necessary parties and issues? Second, whether the provisions of the agreement are *compatible* with the corresponding elements of the domestic law of the contracting parties? And, third, whether the provisions are appropriately structured to ensure reasonable *compliance* on the part of the parties to the agreement?[133] We shall later return to these questions as we explore the legal and institutional framework of the East African Community, in Chapters Ten and Eleven.

The Traditional State-Centric Approach in International Environmental Law

Despite major recent developments in regionalism, the gradual shift towards the dispersal of environmental management authority to the regional level continues to be faced with various manifestations of state-centric tendencies.[134] As Marks observes, state-centrism in international law, as an argument or outlook or approach, can mean or be gauged by reference to many different things including: who matters in the global political system; the kinds of power that matter; the structure of the global polity and; the locus of political authority in the international arena.[135] As for the issue of political authority, which is our major area of interest, Marks goes further to broaden it as being a claim about;

> "...the relative autonomy of governments, the political significance of nationalism, the moral significance of boundaries, the fate of territorial scale."[136]

In international law, the paradigm of state-centrism is particularly boosted by two classical principles – territorial integrity and territorial sovereignty.[137] The principle of

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[133] See L. K Caldwell, 'Law and Environment in an Era of Transition; Reconciling Domestic and International Law' (1991) 2 Colorado Journal of International Environmental Law and Policy 1.
[134] Bodansky (2007) op. cit., n. 131, at p. 9.
[135] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 Leiden Journal of International Law 339, 339.
[136] ibid.
[137] Bodansky (2007) op. cit., n. 131, at p. 9.

territorial integrity bestows states with the right of being free from interference by other states,[138] and that of territorial sovereignty allows states to manage their affairs within their boundaries as they wish.[139] These principles present enormous challenges to international environmental law, which is often designed to depend on the cooperation of states, both as clients and enforcers of environmental law. As such, the issues of territorial integrity and sovereignty continue to be key areas of concern in the negotiation and implementation of Multi-national Environment Agreements (MEAs). In light of his observation that States have often opted for more pragmatic approaches in handling issues concerning shared natural resources, Maraunh argues that although states in modern times have deployed the concept of sovereignty, it has often remained a matter of claim, as various bilateral and international agreements clearly illustrate.[140] Indeed, International environmental law would be greatly incapacitated if the principles of territorial integrity and territorial sovereignty were to be applied in totality. It is partially because of the inhibition of these principles that several environmental law principles have been developed to mitigate the aspect of state centrism, especially in the management of shared resources. These include: the principles of: international cooperation; prior notification; equitable utilisation; common but differentiated responsibilities; no harm; and that of reasonable use of resources. Other applicable principles include those of precaution, prevention at source, and sustainable development. Chapter Eleven will review the EAC's legal regime partially for the purpose of ascertaining its responsiveness to common environmental law principles.

[138] This principle is explicitly stated in Article 2(4) of the United Nations Charter. It is also well captured in charters establishing regional organisations such as that Organisation of American State (OAS) and the Organisation of African Unity (OAU), which was recently transformed into the African Union (AU)

[139] The concept state sovereignty lies at the heart of both customary international law and the United Nations (UN) Charter, Art. 2 (1).

[140] Marauhn (2007) op. cit., n. 102, at p. 730.

The Role of the State in International Law Making

As indicated earlier, the adoption of multi-level government entails the dispersal of powers and functions and this is likely to impact on the role of the State in the regional or international arena. While its role in environmental management has not only been intellectually questioned but actually threatened,[141] the state remains a necessarily and inevitable actor in environmental management regimes. Unlike in the era of standards setting, states now find themselves in much more complex environmental regimes that involve both national and international non-state actors.[142] What ought to be an issue of concern, however, is the changing role of the state and not its demise.[143] Briefly, we explore three major areas that define the importance of the state in international environmental law.

Authors of international environmental law

Basically, the debate on the role of the state in the authoring of environmental law is dominated by two opposing sides. The positivists argue that the legitimacy of international environmental law is strongly founded on the consent of states in its authoring, while the naturalists believe that international law should be based on moral dictates and not state consent.[144] Although the naturalists' doctrine tends to offer an alternative that may limit state-centrism in international environmental law, its major challenge is that it may often produce outcomes that are not legally tenable, let alone not being politically appealing. For various reasons, International law has to be legitimate[145] and entrusted with legally recognised centres of responsibility,[146] which are usually the nation-states. It can, therefore, be self

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[141] See Reinor I. Steinzor, 'Reinventing Environmental Regulation: The Dangerous Journey from Command and Control' (1998) 22 Harvard Environmental Law Review 103

[142] See Marauhn (2007) op. cit., n. 102, at pgs. 729 -746

[143] ibid.

[144] Duncan B. Hollis, 'Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law 137, 140.

[145] See Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, New York 2007) 704-723.

[146] Marauhn (2007) op. cit., n. 102, at p.734.

defeating not to include the interests of the potential trustees in the process of authoring the law.

As is the case with the general body of international law, MEAs are normally adopted and ratified by states. Also, states still largely enjoy their traditional role of having the final decision in treaty signing. More so, state practice and principles are usually a basis for shaping international environmental law.[147] Notwithstanding such facts, however, the role of the state is changing in the law-making process. We now see non-state actors, such as international institutions and powerful international NGOs having significant influence in the drafting of MEAs.[148] Mainly through sponsorship of various aspects in the law development processes, non-state actors are increasingly exerting their active participation in the international law arena.[149] Despite these positive attributes, however, the outcomes of the emerging order in international law have at times met resistance from states. In some cases states have merely adopted but not actually implemented the agreement to the letter.

States as Addressees of international environmental law

Irrespective of whether the intention is to address issues that directly or eventually concern the private sector, international environmental law is often directed towards states, obliging them to adhere to actions or omissions intended to enforce, refrain, prevent or preserve. The enforcement of these obligations usually requires: the adoption or review of policies and legislation; the establishment of the necessary

[147] See generally, Hollis (2005) op. cit., n. 144.

[148] For a more detailed discussion on the role and involvement of NGOs in international law making see Peter J. Spiro, 'NGOs in International Environmental Lawmaking: Theoretical Models' Temple University Legal Studies Research Paper No 26 at <http://ssrn.com/abstract=937992> accessed 14 Febuary 2007. See also, Farhana Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10 Review of European Community and International Environment Law 149.

[149] See Peter J. Spiro, 'Non-Governmental Organisations and Civil Society ' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *International Environmental Law* (Oxford University Press, New York 2007); See also, Elen Hey, 'International Institutions' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Newyork 2007) pgs. 749-769.

institutions and systems to enforce the new regimes; and at times the need for restorative action or environment enhancement activities.[150] This requirement is actually among the major stumbling blocks in the implementation of environmental law, as it is usually left to the states to decide and enforce their implementing measures.

States as guardians of international environmental law

Although regional blocks have steadily increased their interest and participation in environmental matters, the enforcement of international environmental law remains largely dependent on states. The state still bears the responsibility for breach of intemational law and any accruing reparations. Marauhn, however, observes that recourse to the law of state responsibility is on the decline. He cites the recent examples of the Chernobyl radiation accident, the Sandoz chemical spill and the salination of the Rhine, where, despite clear facts and evidence, no court action was sought against the states.[151] These examples present but a few of the cases that depict the mutation of compliance procedures in international environmental law. We, in other words see that, unlike the traditional 'carrot and stick' paradigm, the new order has even subjected the issue compliance to negotiations.[152] The shift is away from: unilateral to collective enforcement; confrontation to cooperation; repression to prevention; and sanctions to compliant assistance. As guardians of international environmental law, the changing role of the state is, therefore, tilting more towards extensive engagement in procedural issues such as: ensuring information and data sharing; prior notification; participation in decision making; and joint monitoring and assessments.[153]

[150] Marauhn (2007) op. cit., n. 102, pgs. 734-735.
[151] Marauhn (2007) op. cit., n. 102, at p. 735.
[152] See Jan Klabbers, 'Compliance Procedures' in Bodansky Daniel, Brunnée Jutta and Hey Ellen (eds), *International Environmental Law* (Oxford University Press, New York 2007) 1000.
[153] Marauhn (2007) op. cit., n. 102, at p. 735.

As can clearly be seen from the above three roles, the effectiveness of international law lies more in state willingness than the content of the law. That notwithstanding, however, the nature of law remains an important indicator for state will. It is from that perspective that Part V will examine the regional legal regime applicable to the management of the Lake region.

The Role of Local Government in International Law

As Bodansky observes, the issues of democratic representation and social legitimacy are bound to become more central in international environmental law with the strengthening of decision making on the international plane.[154] These issues indeed stand out among the major draw backs in the implementation of international law. According to Bodansky:

> "Legitimacy relates to the grounds or justification for political authority. Legitimacy and illegitimacy are properties of decision-makers and decision making processes - institutions."[155]

For purposes of effectiveness, therefore, it is crucial for the development and implementation of international environmental law to be cognisant of the interests and participation of local communities and their institutions. Arguing that:

> "Local governments have the greatest exposure to the economic damage wrought by global climate change, yet they are usually the farthest removed from the creation of problem-solving strategies."[156]

Christopher argues that:

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[154] See, generally, Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 American Journal of International Law 596

[155] Bodansky (2007) op. cit., n .145, at p. 706.

[156] Christopher W. Caleb, 'Mr. Smith Goes to Nairobi: The Unwritten Role of Local Actors within International Environmental Law', p. 7 available at <http://works.bepress.com/caleb_christopher/5> accessed, 02 February 2008.

> "Law-making without meaningful consensus, agreement and capacity by those responsible for enforcement is doomed to failure."[157]

While the development and implementation of international law is traditionally a state affair, the European Union's initiated subsidiarity principle provides a major means for the effective participation of local institutions, such as local governments, in international environmental law. As Schilling observes, the subsidiarity principle is intended to bring local communities closer to the decision making processes.[158] As noted by Christopher, however, the gap between local actors and the implementation of international environmental law is yet to be narrowed. He cautions:

> "The failure to bring local governments closer into international environmental decision-making limits the desire or ability of such local governments to enforce international policy."[159]

Since a major reason for the adoption of local government is to complement central government in the enforcement of law and policy within local jurisdictions, it would certainly be self defeating for local government institutions to be sidelined or not supported in the development of policies and laws that concern them. As such, international environmental legal systems devoid of local participation would lack perceived legitimacy,[160] as local institutions would likely consider decisions made under such systems to be invalid.[161]

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[157] ibid.
[158] Theodore Schilling, 'Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously' Monnet Center Working Paper, NYU School of Law, available at <http://www.jeanmonnetprogram.org/papers/95/9510ind.html > accessed 21 July 2009.
[159] See Caleb "Mr. Smith Goes to Nairobi" op. cit., n. 156 at p. 7.
[160] ibid. at p. 8.
[161] See Sean T. McAllister, 'Note: Community-Based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way' (1999) 10 Colorado Journal of International Environmental Law and Policy 195

Conclusion

This Chapter has introduced some of the theoretical and conceptual issues that concern the three concepts of multi-level governance, decentralisation and regionalism. Since these concepts are at the centre of the discussion in the greater part of the thesis, it is imperative to discuss them at the beginning, as to allow a good understanding of the central concepts from the outset.

As seen, the concept of multi-level governance entails the engagement of state and non-state actors at various levels. Much as this thesis appreciates the role of non-state actors at various levels, however, its interest is focussed on a multi-level framework based on government structures. As such, the focus in the discussion has been on the concepts of decentralisation and regionalism. As for the concept of decentralisation the discussion has been focussed on the aspect of local government. Particular interest has been on role and potential of the local and regional government, as part of a nested framework intended to enable the participation and coordination among several interested parties. It has been shown that these levels of government are instrumental in complementing the traditional roles of the state. Such a nested framework is certainly more crucial in the management of the Lake region, whose resources are shared at both the sub-national and national levels. We saw, however, that the effective engagement of the concepts local government and regionalism often faces challenges arising most especially from the unwillingness of the state to cede reasonable functions and powers.

It is against this theoretical background that we shall examine, in Part IV and V, the current legal and institutional frameworks with a view of ascertaining the extent to which they have been responsive to the concept of multi-level government in the environmental management of the Lake Victoria region. Prior to these discussions, however, the next two Chapters introduce the geographical area of the study – the Lake Victoria region, and its natural resources endowment.

CHAPTER TWO

Lake Victoria Region:
The Geography and a Brief Historical Account on its Socio-economic Transformation

The Lake Victoria region, hereinafter often referred to as the Lake region or simply as the Region, is part of the Lake Victoria Basin, which likewise is, hereafter referred to as the Lake basin or simply as the Basin. This Chapter introduces the geography and history of the Lake region. It also highlights the legal and institutional framework for natural resources management in the Lake region. The first section explores the physical geography and also the issues of demography and poverty in the region. The second section offers an overview of the institutional and legal framework applicable in the management of the Lake region's natural resources. This aspect is necessary at this stage to enable a general knowledge of the legal and institutional framework prior to the more detailed discussions in Chapters Six to Nine. The third section offers a brief historical account on the transformation of the Lake Victoria region into a major socio-economic hub, a factor that, as we shall later see, partially contributes to the Lake region's vulnerability to environmental degradation.

Lake Victoria Basin *vis-à-vis* Region

The terms Lake Victoria basin and Lake Victoria region are widely used and more than often, interchangeably. Most specifically, however, the latter is commonly used in reference to that part of the Basin found in the countries that physically share the Lake. In that regard, the Lake region is confined within the three lacustrine states of Uganda, Kenya and Tanzania, leaving out the other Lake basin countries of Rwanda and Burundi.[1] Although not documented, distinguishing the Region from the entire Basin appears to arise from the fact that the countries that physically border the Lake ought to have greater and even more particular stakes in the Lake than the rest of

[1] Rwanda and Burundi are the upstream States of the Kagera River, one of Lake Victoria's eleven major feeder rivers.

the countries sharing the Basin. The Region should be seen as a specific management area, unlike the basin which is hydrologically mapped. Having the Region as a *de facto* management area also appears to have gained prominence from the fact that the East African Community was originally constituted of only the three lacustrine states, which indeed designated it as an economic growth zone, with the intention of ensuring that the exploitation its resources is done in a sustainable and coordinated manner.[2] Actually, in its unprecedented push for regionalism in natural resources management, the EAC Treaty envisaged a regional body to manage the Lake region and not necessarily the entire Basin.[3] However, much as the thesis is focused on the Lake region, most of the available data and information useful for this introductory Chapter is on the entire Basin. This should, nonetheless, not be a major drawback since much is shared in common throughout the Basin and attempts have been made to limit the data and information to the Region, wherever possible.

Lake Victoria: The Geo-physical and Hydrological Features.

Lake Victoria is among the major water bodies found in the Great Lakes Region of Africa. It is shared among the three East African states of Tanzania, which takes up 51% of its surface area, followed by Uganda with 43% and Kenya with the smallest portion of 6%.[4] Having a surface area of 68,800km^2 and a shoreline of 3,450kms,[5] it is the world's second largest freshwater lake, after Lake Superior, in terms of surface area. At its widest points, the Lake stretches 412 kilometres from the north to the south, between $0^0$30'N and $3^0$12'S and 355kms from the west to the east between

[2] See East African Community, *Second EAC Development Strategy: 2001-2005* (East African Secretariat, Arusha, Tanzania 2001).
[3] See Treaty for the Establishment of the East African Community 1999, Art. 114 (2) (b)(6). (This Treaty is *hereinafter* referred to as the EAC Treaty, in these footnotes.).
[4] See Lake Victoria Environmental Management Programme, *State of Lake Victoria Basin: Fisheries Research* (LVEMP 2002).
[5] Lake Victoria Environmental Management Programme, *Review of the Exploitation Pressure on the Fisheries Resource of Lake Victoria* (Revised Draft edn, Lake Victoria Environmental Management Programme 2005) and Ong'ang'a Obiero, *Lake Victoria and its Environs: Resources Opportunities and Challenges* (2nd edn, Osienala, Kendu Bay, Kenya 2005) 2-3.

$31^{0}37'W$ and $34^{0}53'E$.[6] It is crossed by the equator in its northern reaches and stands at an altitude of 1135 meters.

Map 1: Map Showing the Location of Lake Victoria

Source: East African Community (2006)

The Lake is estimated to have been formed 25,000 – 35,000 years ago as a result of tectonic movements. It is estimated that about 90% of the water input into the Lake is through rainfall, approximated at a precipitation of 1595mm/yr and the remaining 10% is contributed through river flow and percolation.[7] The Lake forms part of a larger and complex ecosystem constituted of biotic and abiotic components and processes that are interdependent in an endless web of relationships.[8] It is connected to an extended feeder river network, where the Kagera River is the major inflow.[9]

[6] R. F. Fuggle, 'Lake Victoria: A Case Study of Complex Interrelationships' in UNEP (ed), *Africa Environment Outlook Case Studies* (UNEP, Nairobi 2002) 75.
[7] B. S. Piper, D. T. Plinston and J. V. Sutcliffe, 'The Water Balance of Lake Victoria' (1986) 31 Hydrological Sciences 25.
[8] See generally, Joseph L. Awange and Obiero Ong'ang'a, *Lake Victoria Ecology, Resources, Environment* (Springer Berlin Heidelberg, New York 2006).
[9] Other major feeder rivers of the lake are: The Nzoia, Yala, Kuja, Sio and Sondu-Miriu in Kenya, the Mara, Mori, Grumenti, Ruwana, Simiyu, Mbalageti, Biriadi and Isanga in Tanzania and the Katonga in Uganda.

The River Nile, which is the major outflow,[10] contributes 14% of the Lake's water-mass[11] drain. The Lake's hydraulic retention and flushing times are estimated at about 70 and 138 years, respectively.[12]

Compared to the other big lakes in the region,[13] Lake Victoria, despite its large surface area, has a relatively smaller water volume of 2760km^3. This is because of its shallow depth, which averages at 40 meters, with the deepest point being 84 meters.[14] It is due to this shallowness that the Lake has at times been referred to as a 'big pond',[15] a condition that makes it very vulnerable to various environmental threats such as pollution and erratic decrease in water levels.

The Lake Victoria Basin

The Lake Victoria Basin includes the Lake itself and its 250,000km^2 catchment, which is constituted of parts of Tanzania (79, 600 km^2), Kenya (38, 900 km^2), Uganda (28, 900 km^2), Rwanda (20, 500 km^2), and Burundi (13, 100 km^2).

[10] R. Ogutu-Ohwayo, 'Efforts to Incorporate Biodiversity Concerns in the Management of the Fisheries of Lake Victoria, East Africa' (Blue Millennium: Managing Global Fisheries for Biodiversity Thematic Workshop, Victoria, British Colombia, June 2001).

[11] Yin Xungang and Sharon E. Nicholson, 'The Water Balance of Lake Victoria' (1998) 43 Hydrological Sciences Journal 789, 792.

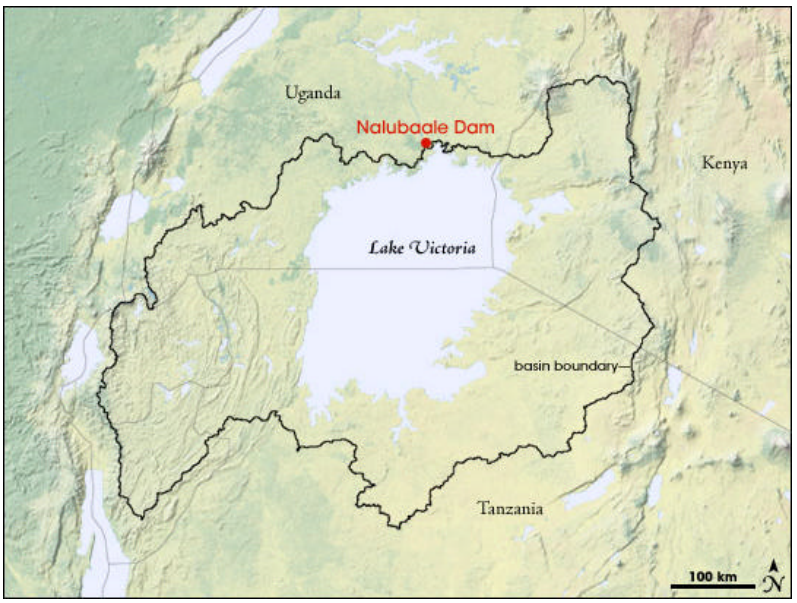
[12] Lake retention time refers to measurements based on the volume of water in a lake and the average rate of outflow. See Byron Shaw, Christine Mechenich and Lowell Klessig, *Understanding Lake Data* (Cooperative Extension Publishing Operations, St. Madison, USA 2004). While flushing time is defined as the time needed to drain a volume of liquid through an outlet at a given velocity. Water retention and flush times are important in determining a water body's sensitivity to pollutants. This information is available at <http://www.es.flinders.edu.au/~mattom/ShelfCoast/notes/chapter15.html> accessed 20 October 2005.

[13] Lake Victoria's water volume is about 15% of that of Lake Tanganyika. Lake Tanganyika's surface area is smaller, at 32,000 km^2, but has a mean depth of 572 m and a maximum of 1471mtrs, thus a volume of 17, 00km^3. Lake Malawi's area is 6,400km^2 and Volume 8,400km^3; Lake Edward's area is 2,325km^2 and has a volume of 39,525km^3; Lake Albert has an area of 5,300km and volume of 280km^3; and Lake Turkana's area is 6,750 and its volume is 203Km.^{3} Data obtained from World Lakes Database available at <http://www.ilec.or.jp/database/afr/afr-06.html on the 21/02/05. > accessed 20 October 2005.

[14] Fredrick Muyodi., Fredrick Bugenyi and Robert Hecky., 'Experiences and Lessons Learned from Interventions in the Lake Victoria Basin: The Case of Lake Victoria Environmental Management Project' (13th World Lake Conference, Wuhan, China, 1-5 November 2009).

[15] See, 'Lake Victoria: One of Africa's Greatest Natural Resources Needs Saving' *The Economist, Vol 382, Iss 8514* (1 Febuary 2007) 56.

Map 2: Map showing Outline and Location Lake Victoria Basin



Source: East African Community (2006)

The Climatic Conditions

The Lake Victoria Basin has an equatorial climate, which is largely mild, with daily temperatures in most parts varying between 15^0C and 30^0C, but with a shorter monthly mean range of between 19^0C and 25^0C. Some parts of the Basin, especially along the northern and north eastern lake shore areas, experience a bimodal pattern of rainfall, with the wet seasons occurring between March and May/June and then between October and December.[16] Most of the southern parts experience one rainy season between December and March.[17] Mean annual rainfall averages between 1,200-1,600mm with the highlands receiving up to 2000mm and some parts, especially in the southwest, receiving as low as 750mm.[18] Wind speed is generally low during the wet season (0-3.5 m/s). According to Talling, these low wind speeds

[16] Declan Conway et al, 'Rainfall Variability in East Africa: Implications for Natural Resources Management and Livelihoods' (2005) 363 Philosophical Transactions of the Royal Society 49; G.R Kassenga, 'A Descriptive Assessment of the Wetlands of the Lake Victoria Basin in Tanzania' (1997) 20 Resources, Conservation and Recycling 127, 128.
[17] R. H. Lowe-McConnell, *Ecological Studies in Tropical Fish Communities* (Cambridge University Press, Cambridge, UK 1987).
[18] Xungang (1998) op. cit., n. 11, at p. 791.

cause the accumulation of a *thermocline*, which is a major cause of stratification in Lake Victoria.[19] The stratification and overturn in Lake Victoria is experienced annually, resulting in an upwelling of nutrients.[20] The wind speeds do increase, however, during the dry season, reaching in the excess of 15 m/s blow between May and June.[21] These strong, southerly winds cause high evaporation rates, at times resulting in a decrease in water levels, since this happens at a time when the Lake is hardly being replenished by rainfall, which is its main source of water mass.

Population and Demography in Lake Victoria Region

Ethnicity in the Region

The Lake region is inhabited by numerous large and small ethnic sub-groups/tribes,[22] most of whom are believed to have migrated from central and southern Africa. The majority of the tribes belong to the *Bantu* ethnicity, which is believed to have been the first permanent major settler group in the Lake region. By the 14th Century, the *Bantu* had established themselves into organised communities, kingdoms and chiefdoms around the lacustrine region. They were later followed by the *Luo,* in the 18th Century, who mostly settled around the north-eastern shores. Most of the tribes that currently live within the region belong to these two ethnic groups.[23] Inter-marriages, migrations urbanisation, resettlements, economic factors and socio-political strife have had an impact, however, on the outlook of settlements in the Region. The communities have been altered from settlements confined along tribal lines to a relatively mixed population. Inevitably, this has had an impact on the traditional practices that were erstwhile associated with particular ethnic

[19] T. F. Talling, 'The Annual Cycle of Stratification and Phytoplankton Growth in Lake Victoria (East Africa)' (1966) 51 Internationale Revue der Gesamten Hydrobiologie 545.
[20] Lowe-McConnell (1987) op.cit., n. 17.
[21] R. H Spigel and G. W. Coulter, 'Comparison of Hydrology and Physical Limnology of the East African Great Lakes: Tanganyika, Malawi, Victoria, Kivu and Turkana ' in Johnson T.C. and Odada E.O. (eds), *The Limnology, Climatology, and Paleoclimatology of the East African Lakes* (Gordon and Breach Publishers, Amsterdam, The Netherlands 1996).
[22] The major ethnic sub-groups/tribes include the Ganda, Soga, Nkore and Samia in Uganda, Luo, Suba and Samia in Kenya and the Sukuma, Ukerewe and Haya in Tanzania.
[23] Obiero (2005) op. cit., n. 5, at p. 16

communities. For instance, socio-economic activities such as fishing, herding or farming that may have been predominantly a preserve of certain traditions or communities are now inter woven into a new socio-economic order dictated by many other factors.

The Population Attributes

As of 2005, the Lake Basin had a population of about 35 million persons,[24] with the highest concentrations found in the Kagera River catchment area (40%), the Nyanza and Western provinces in Kenya (30%) and along the northern shoreline area in Uganda (15%).[25] In Kenya, the four provinces of Nyanza and Western provinces, which are wholly within the Lake basin, constitute about 27% percent of Kenya's population,[26] and this translates to about 12.7 million people. Uganda has a population of 11.3 million living in the Basin, which is about 40% of its total population.[27] Parts of Uganda's most populated areas in the central and eastern regions are located within the Basin. This is in addition to its capital city - Kampala, which is the most populated urban centre in Uganda.[28] In Tanzania, three of the four most populated regions are part of the Lake basin. Altogether Tanzania's four lacustrine regions are inhabited by 27% of the country's total population.[29] The Lake basin's population is predominantly rural and is 50.8% constituted of women. The working age group of between 16 and 64 years constitutes 38-50% of the total

[24]East African Community, *Operational Strategy Lake Victoria Basin Commission (2007-2010)* (EAC Secretariat, Arusha, Tanzania 2007) 2.

[25] Swedish International Development Agency (SIDA), *Strategy for Swedish Support to the Lake Victoria Basin: Strategy for Swedish Support for Poverty Reduction and Sustainable Development in the Lake Victoria Basin (September 2004 - December 2006)* (SIDA, Stockholm, Sweden 2004) 4.

[26] Republic of Kenya, 'Central Bureau of Statistics: Population Figures for Towns and Municipalities (1999)' available at <http://www.citypopulation.de/Kenya.html > accessed 6 June 2007.

[27] East African Community and CODA Consulting Group, *The Economic Potential and Constraints of Developing Lake Victoria Basin as an Economic Growth Zone* (EAC, Arusha, Tanzania 2006) p. 13.

[28] As of 2002 Kampala's population was 1,189,142 persons. Uganda's other large towns in the Lake region include Jinja (71, 213 persons), Masaka (67, 768) and Entebbe (55, 066) (These population figures are based on 2002 statistics) See Uganda Bureau of Statistics (UBOS), *National Population and Housing Census, Appendix 2* (UBOS, Kampala, Uganda 2002).

[29] The regions in Tanzania that are fully or largely part of the Lake region include: Mwanza (3,207,000 persons), Shinyanga (3,070,000), Kagera (2,214,000) and Mara (1,460,000).

population, representing a labour force of up to 13.1million, most of which is not gainfully employed.[30]

Given the per annum average rate of 6% in the urban and 3% in rural areas,[31] the Lake Victoria region has one the highest population growth rates in the world.[32] Owing to the fact that it has a relatively higher concentration of urban centres, its growth rate far surpasses the East African average of 3%.[33] The Region's population density is high and highly ranked among the most densely populated rural areas in the world. At approximately 192 persons per square kilometre,[34] the Region's population density is far higher than the East African national averages.[35] In Kenya, for example, while national population density averages at 37/km^2, that of its Lake region stands at an average of 280/km^2,[36] with some parts reaching densities of above 1000/ km^2.[37] Aside from the relatively high total fertility rates, which were in 2004 averaged at 4.3 in East Africa,[38] the Region's high population is attributed to intra and international immigration, precipitated by political and socio-economic factors.[39] See Table for a comparative analysis on area and population in the Lake Basin.

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[30] East African Community (2006) op. cit., n. 27.

[31] M. J. Ntiba, W. M. Kudoja and C. T. Mukasa, 'Management Issues in the Lake Victoria Watershed' (2001) 6 Lakes & Reservoirs: Research and Management 211, 213.

[32] Kayombo Sixtus and Jorgensen Erik 'Lake Victoria: Experience and Lessons Learned Brief,' available at <http://www.ilec.or.jp/eg/lbmi/pdf/27_Lake_Victoria_27February2006.pdf> accessed 18 July 2008.

[33] Swedish International Development Agency (SIDA), *Lake Victoria Basin: National Resources under Stress*, vol Publications on Water Resources: No 11: 1 (SIDA, Stockholm, Sweden April 1997) p. 5.

[34] SIDA (2004) op. cit., n. 35, at p 4.

[35] See Anderson David, 'Depression, Dust Bowl, Demography, and Drought: The Colonial State and Soil Conservation in East Africa during the 1930s' (1984) 83 African Affairs 321, 329. See also, Obiero (2005) op. cit., n. 5, at p. 15.

[36] East African Community (2006) op. cit., n. 27, at p. 23.

[37] Obiero (2005) op. cit., n. 5, at p. 19.

[38] Uganda's fertility rate, in 2004, stood at 7.1 and that of Kenya and Tanzania was 5.0 and 4.9, respectively. This gives a regional average of 5.7 as compared to that of the world which is 2.8. See, World Health Organisation, *Working Together for Health: The World Health Report 2006 (Annex: Table 1 Basic Indicators for all Member States)* (WHO, Geneva, Switzerland 2006) pgs. 168-176.

[39] In Rwanda and Burundi, for instance, international immigration has mainly been a result of war and civil strife, especially during the 1950s and most recently in the 1990s. See Obiero (2005) op. cit., n. 5, at p. 18.

Table 3: The Lake Victoria Basin; Surface Area, Catchment, Shoreline, Population and Population Density by Country/Area

	Shoreline		Lake Surface Area		Catchment Area		Population (000,000)	Population Density
Country/Area	km	%	sq km	%	sq km	%	Persons	sq km
Tanzania	1,150	33	33,756	49	79,570	44	5.6	70
Uganda	1,750	50	31,001	45	28,857	15.9	5.6	94
Kenya	550	17	4,113	6	38,913	21.5	12.5	321
Rwanda					20,550	11.4	6.9	336
Burundi					13,060	7.2	4.1	313
Total Land Area					**180,950**			
Total Lake Area	**3,450**		**68,870**		68,870			
Basin (Total)					**249,820**		**34.7**	**192**

Source: East African Community (2007),[40] Swedish International Development Agency (2004)[41] and Bullock *et al* (1995)[42]

Such demographic attributes have certainly exposed the Region to various forms of environmental stress. Owing to the fact that a large part of the lacustrine population is significantly dependent on natural resources for a livelihood, a large, concentrated and fast multiplying population is more certain to exert commensurate pressure on the resources. For instance, the land stressing practice of land fragmentation, which is often an outcome of population pressure, is a cultural norm that is widely practised in the Region.[43] Among some Kenyan riparian communities, for example, average land holding is 1.94 ha and this drops to 0.3 ha nearer the shore.[44] As for the population structure, it presents a high percentage of vulnerable groups that are susceptible to social and economic injustices, such as unemployment and poverty,[45]

[40] East African Community, 'Lake Victoria Basin' available at at <http://www.eac.int/lvdp/basin.htm> accessed 20 May 2009.
[41] SIDA (2004) op. cit., n. 35, at p. 4.
[42] East African Community (2006) op. cit., n. 27, at p. 9.
[43] Obiero (2005) op. cit., n. 5, at p. 20
[44] K. Geheb, 'The Regulators and Regulated: Fisheries Management, Options and Dynamics in Kenya's Lake Victoria Fishery' (PhD Thesis, University of Sussex, UK 1997) 35-41.
[45] Obiero (2005) op. cit., n. 5, at p. 18.

which conditions are believed to have a direct bearing on utilisation and management of the environment and natural resources.[46]

The Poverty Situation

Poverty, which is believed to be worsening by the day, remains a major socio-economic challenge of the Lake region. Especially in the rural areas, poverty has in some cases been qualified to be 'absolute' or 'core', amongst some lacustrine communities. While poverty is a general problem in East African, its incidence is strikingly high in the Lake region, especially in Kenyan and Tanzanian parts.[47] In the Lake regions of Kenya and Tanzania, 61% and 41%, respectively, of the population live on less than one US dollar a day.[48]

The causes of poverty are numerous but a major underlying cause arises from the inability to earn and generally to improve on livelihood. The once thriving agriculture no longer yields well in terms of both quantity and market price. Many major industries in the region have either collapsed or operating below capacity, leading to unemployment and collapsed local economies. The fisheries industry which has been booming in the recent past is believed to be more beneficial to foreign investment companies that exploit the fishermen.[49] Poverty has precipitated disease, illiteracy, social strife and insecurity in the region, which factors eventually impact on the state of the natural resources.[50] It is because of such far reaching consequences that the fight against poverty has been stepped in all of the countries. Indeed, the national development plans and long-term vision frameworks of all of the three riparian countries are based on poverty reduction or eradication strategies, which form the

[46] See discussion on the linkage between poverty levels and environmental degradation in Chapter Four.
[47] SIDA (2004) op. cit., n. 35.
[48] These percentages are far greater than Kenya's and Tanzania's national averages of 52% and 36% respectively. On poverty in the Lake region generally, see Oyugi Aseto, Obeiro Ong'ang'a and Joseph L. Awange, *Poverty Reduction: A challenge for Lake Victoria Basin* (Osienala, Kisumu, Kenya 2003).
[49] ibid.
[50] See Aseto et al (2003) op. cit., n. 48; Obiero (2005) op. cit., n. 5.

basis for annual and mid-term expenditure.[51] Nonetheless, poverty remains a big challenge that requires the full understanding and attention of several sectors, including the management of the environment and natural resources.

An Overview on the Legal and Institutional Framework

Although Parts IV and V of the thesis returns to this in greater detail, this section gives a general overview of the legal and institutional framework relevant to the environmental management of the Lake region. For now, this overview prefaces the main discussion on the current institutional and legal framework for ENRM at both the national and regional levels.

The Legal Regime

The legal regime applicable in the management of the Lake region's environment and natural resources is basically derived from four major sources: national laws including the Constitutions, statute laws and subsidiary legislation issued by various authorities; local government laws usually in the form of Ordinances and By-laws; East African Community laws including the EAC Treaty, Protocols, Ministerial directives and Acts of the Regional Assembly and; International law mainly in the form of Treaties and other agreements to which the EAC member states are signatories. Together, these instruments are of significant importance in the protection of the Region's resources. It is important to note, however, at this point that most of the laws or the institutional structures that they create are, aside from a few EAC law exceptions,[52] general rather than specific to the Lake region.

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[51] See, generally, the Poverty Reduction Strategy Papers (PRSPs): Government of Kenya, *The Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 (ERSWEC)* (GOK 2004); The United Republic of Tanzania, *National Strategy for Growth and Reduction of Poverty (NSGRP)* (Vice-Presidents Office, URT 2005); and The Republic of Uganda, *Poverty Eradication Action Plan 2005/06 - 2007/08 (PEAP)* (Ministry of Finance, Planning and Economic Development 2004).

[52] In addition to the Protocol on the Sustainable Development of the Lake Victoria Basin, the East African Community has adopted various subsidiary instruments that specifically concern the management of the Lake region's natural resources. See Chapters Ten and Eleven for a detailed discussion.

National laws

With the exception of Kenya, which is in the process of adopting a new constitution, Environment and Natural Resources Management (ENRM) is provided for in the national Constitutions and that of Uganda is particularly elaborate.[53] In addition, all the three countries recently enacted ENRM framework laws mainly for the purpose of *inter alia*: coordinating the lead agencies in resource management; guiding policy and law making; regulating resource use and; enforcing environmental law.[54] That notwithstanding, however, environmental law making and enforcement remains fragmented and at times conflicting, as each sector or sub-sector tends to front its own interests. In addition to the newly introduced environment management framework laws, the fisheries, water, forestry and wildlife policies and laws, which are of specific interests in our discussion, have been or are in the process of being reviewed.[55] The review has been instrumental in bringing on board several established and emerging environmental law principles and practices including those on: community participation; access to environmental justice and information; environment impact assessment; environmental standards; and, though to a limited extent, the application of economic instruments. Although some of the reviews have attempted to address the historical problem of resource management rights, the ownership and control of the natural resources largely remains under central government.[56]

International and EAC laws

The three countries are in their individual capacities signatories to various Multi-national Environment Agreements (MEAs) and other international agreements with

[53] These Constitutional provisions are discussed in detail under the sub-section on the 'Constitutional Foundations for Environmental Rights, Duties and Management' in Chapter Eight.
[54] See National Environmental Management Act 1983 (Tanzania); National Environment Act 1995 (Uganda); and the National Environment Management Coordination Act 1999 (Kenya).
[55] For a more detailed discussion see sub-section on 'Environmental Policy and laws and the Devolution of Environment Management Powers and Functions to Local Governments' in Chapter Eight.
[56] See Chapters Eight and Nine that basically discuss the responsiveness to the concept of decentralisation under the current environmental laws.

relevance to environmental management.[57] While provisions of the EAC Treaty are yet to be invoked to enable its Parties to jointly sign international agreements, the Treaty obliges the member states to honour their commitments in respect of other multinational and international organisations to which they are parties.[58] At the regional level, the recently revived East African Community has ushered in a new layer of jurisprudence, presided over by the EAC Treaty. EAC environmental law is mainly constituted of Protocols and Ministerial Directives, several of which are particular to the Lake, its resources and hinterland.[59]

Aside from elaborating on ENRM matters, the Treaty has particular provisions on the sustainable management and development of Lake Victoria.[60] It is against these provisions that the EAC has put in place regional-wide instruments,[61] and also those that specifically concern the Lake basin.[62] Variously, the Treaty calls for the harmonisation of environmental laws and policies of the Partner states.

Ordinances and By-laws

Although in varying form and degree of implementation, all the three countries have a local government system. As such, the Lake region is shared among several local government or administrative units. The local governments, though variably across the countries, have powers to make ordinances or by-laws and in many cases, this devolved legislative function extends to ENRM matters. As will later be discussed,

[57] The Multi-national Environment Agreements to which the East African Partner States are party include: Convention of International Trade in Endangered Species (CITES), Ramsar Convention, Convention on Biological Diversity (CBD), the Agreements signed under the 1992 United Nations Conference on Environment and Development (UNCED).
[58] EAC Treaty 1999, Art. 130 (1).
[59] See discussion in Chapter Eleven.
[60] See EAC Treaty 1999, Ch. Nineteen, and in particular, Art. 114 (2) (b) (vi).
[61] These include the Protocol on the Environment and Natural Resources Management 2006 and the Regional Guidelines on Environment Impact Assessment (EIA) for Shared Ecosystems (Revised Draft 2005).
[62] These include a Convention that establishes the Lake Victoria Fisheries Organisation 1994, The Protocol on the Sustainable Development of Lake Victoria Basin 2003 and several Ministerial Directives.

however, by-law making and enforcement remains faced with various challenges and thus least visible in the ENRM regimes.[63]

The Institutional Arrangement

None of the countries has a specific institutional structure that is solely responsible for the ENRM of the Lake region. At the regional level, however, attempts are being made to establish and operationalise regional structures specifically mandated to deal with Lake Victoria management issues. The Lake Victoria Fisheries Organisation (LVFO) Convention and the Lake Victoria Basin (LVB) Protocol each establish an institutional arrangement constituted of both the policy making organs and technical teams.[64] The Lake Victoria Basin Commission is specifically established as a specialised institution responsible for coordinating the sustainable management of the Lake Victoria basin. We shall later see how the mandate and legitimacy of these structures has been greatly curtailed by several limitations, the most pronounced of which are the issues of state sovereignty and centrism. Besides the mainstream EAC institutional arrangement, there are also other regional-wide projects and organisations that are involved in the management of the Lake region resources.[65] Especially for the non-state actors, these projects and organisations run own institutional structures. Recently, however, an effort is being made by the Lake Victoria Basin Commission to ensure that the activities are coordinated through a broader strategic framework overseen by the Commission.

At the national level, each sector or management area has a structure through which its scope of mandate in managed. There appears to be no permanent cross-sectoral institutional arrangement for the day to day transactions. The national bodies responsible for environmental management have a thin presence at the lower levels. At the local level, local government laws create multi-purpose structures at various

[63] See discussion on the local government powers in Chapter Nine.
[64] See Chapters Ten and Eleven for a detailed discussion on the regional level institutional arrangement.
[65] These include the Lake Victoria Region Local Authorities Committee (LVRAC) and the East African Communities' Organization for the Management of Lake Victoria Resources (ECOVIC).

levels many of which have some aspect of environmental management within their mandate. The more specific structures – environment committees - are established by the environment management framework laws. In addition, some environmental laws establish local structures or provide for local representation on the wider committees. As discussed in Part IV, however, many of these structures are yet to be formed and many of those in place are non-functional. Aside from the capacity related issues, the decentralisation of natural resources management tends to follow or institute distinctive management structures, leading to overlaps and in some cases contradictions.[66] Basically, the link between the institutional frameworks provided for under the ENRM framework laws and those established by sectoral laws is minimal.

[66] See, generally, the discussion in Chapters Eight and Nine.

A Brief History on the Socio-Economic Transformation of the Lake Region

Owing to the interaction between man and nature, human utilisation of environmental resources can be said to be as old as humankind itself. In recent history, however, the turning point for environmental degradation in Africa has been closely associated with the colonial incursion and its aftermath.[67] There are several prominent factors believed to have initiated or exacerbated environmental degradation during the colonial era. First, there are direct interventionist policies such as those that that led to the dismantling of the Traditional Natural Resource Management (TNRM) Systems and generally the transformation of the traditional socio-economic order by monetising the economies and comodifying the natural resources. Second, there are indirect factors such as the concept of poverty which arose as an outcome of the direct interventions. Third, there are infrastructural developments such as urbanisation and industrialisation which changed the consumption pattern and also impacted on population distribution. Fourth there is the relentless unsustainable exploitation of the resources by the colonial administrations. Concertedly, these factors magnified the pressure exerted on the natural resources, especially in areas such as the Lake Victoria region, which due to it rich natural resource endowment attracted many socio-economic activities.

From the onset of its being exposed to the outside world, the Lake Victoria region was of paramount interest to the early traders, explorers, and missionaries. Although the early missionaries had initially neglected British East Africa,[68] they had to trek through its inhospitable highlands in order to access the richer and more civilised lands around Lake Victoria.[69] The opening up of Lake Victoria[70] region to the 'outside

[67] See, generally, Bernhard Gißibl, 'German Colonialism and the Beginnings of International Wildlife Preservation in Africa' (2006) 3 Ghi Bulletin Supplement 121; Elspeth Huxley, 'The Menace of Soil Erosion' (1937) XXXVI Journal of the Royal African Society 357; David Anderson, 'Depression, Dust Bowl, Demography, and Drought: The Colonial State and Soil Conservation in East Africa during the 1930s' (1984) 83 African Affairs 321; David Anderson, ''Master and Servant in Colonial Kenya, 1895-193' (2000) 41 Journal of African History 459.

[68] The then British East Africa was largely constituted of the present day republic of Kenya.

[69] Edward Grigg, 'British Policy in Kenya' (1927) XXVI African Affairs 193, 198

world' was pioneered by the Arab slave traders, who first traversed the region in the 16th century.[71] They established the inland trade routes and contacts that were to later assist the early European exploration expeditions. From the mid 19th century several European explorers traversed the region and, in 1864, John Hanning Speke, a celebrated British explorer, established that Lake Victoria was the source of the Nile. The expeditions of Speke and his partner Richard Burton, and later Henry Morton Stanley, who circumnavigated the Lake in 1875, opened up the inner East Africa to more European expeditions, missionary work and international trade, all of which eventually led to the formal establishment of colonialism.

The incursion of colonialism found some communities gradually moving away from hunting and gathering to comparatively less rudimentary methods of food production and general livelihood. Several communities were permanently settled in the Region and practising agriculture mainly in the form of shifting cultivation. Characteristic of the pre-colonial era, the socio-economic activities of the Lake Victoria region communities were largely done on a small-scale basis and intended to serve domestic requirements. Although there was barter trade involving food items, this did not substantially increase the level of farming or fishing as trading transactions were largely interested in luxury goods, such as ivory and gold. Farming and fishing also remained on a relatively low scale because of a lack of markets, transport hardships, poor farming technologies and, at times, hostilities among the communities.[72]

This status quo was, however, significantly transformed by the incursion of colonialism, which trickled in during the late 1890s. Targeting the Lake region along with other productive areas, the colonial administrations in East Africa kick started

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[70] Before being named Lake Victoria, in honour of the then reigning Queen of Great Britain (1819-1901), the Lake was, among the then riparian, communities known by different names such as; Nalubale, Nhyandha, Nyanza and Ukerewe.

[71] See 'Encyclopedia Britannica' <http://www.britannica.com/eb/article-9075259/Lake-Victoria> accessed 26 May 2006.

[72] The facts presented in this paragraph are further discussed in generally in Chapter Five.

their agricultural production drive with the introduction of new cash crops. This was intensified with the introduction of new farming services and technologies.[73] The introduction of coffee and cotton in 1903 and 1905, respectively, marked the beginning of mass cash-crop production in the Lake region. Tea, tobacco, wheat and sugarcane were also later introduced as cash crops.[74] Although crop cultivation was essentially done in the highlands and dry lowlands, the later introduction of paddy rice marked an increased use of wetlands for agriculture.[75] The embracing of cash crop growing by the natives was particularly induced by the introduction of poll tax in 1910, which as of matter of necessity entailed them to labour in order to be able to meet their tax obligations. As farming thrived, the requirement for labour attracted more people into the Lake region. The need to process the cash crops gave rise to processing and manufacturing industries within the region, whose suitability for industrialisation was later enhanced by the availability of cheap hydro-electric power.[76] As in regard to fisheries, the introduction of the gill net, in 1905, opened up the Lake to more intense forms of fishing,[77] the necessity of which was particularly boosted by the widening of the market for fish.

While Tanganyika was under the Germans and Kenya and Uganda were under the British, a functional approach to regional cooperation was at times inevitable; the colonial masters shared similar interests.[78] To support their agrarian policies and more generally to ease the transport problem, the colonial administration embarked

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[73] This included: farm advisory services; improved farming tools; and later the introduction of agro machinery and chemicals.

[74] Nonetheless, food crops such as maize, beans, millet, sorghum and various vegetables continued to be widely grown, of which maize later became a major cash crop.

[75] A. Gordon-Brown, (ed) *The year and Guide to East Africa*, quoted in R. F. Fuggle, 'Lake Victoria: A Case Study of Complex Interrelationships ' in UNEP (ed), *Africa Environment Outlook Case Studies* (UNEP, Nairobi 2002).

[76] Industrialisation in the basin, especially in the north and north-east, was boosted by the construction, in 1954, of the Owen-falls power station at Jinja, which provided sufficient, cheap and reliable hydro-electricity.

[77] Ogutu-Ohwayo (2001) op. cit., n. 10, at p. 6.

[78] See generally, A. G. Church, 'The Inter-Relations of East African Territories' (1926) 67 The Geographical Journal 213. On the early forms of cooperation in East Africa see, P. M Henry, 'A Functional Approach to Regional Co-operation' (1953) 52 African Affairs 308.

on building a transport network targeted at road, water and railway transport. As was the case in most colonies, transport was instrumental in facilitating natural resource exploitation, which was a major colonial objective.[79] In addition to the various trunk and feeder roads, a railway line was as a matter of priority constructed from 1895 to 1903, connecting Lake Victoria to the Kenyan coastal town of Mombasa. Hardly two years after this, another railway link was constructed between 1905 and 1914 to link Lake Victoria, at Mwanza, to the coastal town of Dar es Salaam in the then German East African territory of Tanganyika.[80] Several of the agricultural and industrial centres often formed the nuclei for the growth of urban centres. This growth was on the other hand catalysed by the retail business pioneered by the Indians, most of who had remained behind, having provided labour for the construction of the Kenya-Uganda railway.[81] The present day riparian urban centres of Jinja, Kisumu, Bukoba and Mwanza became major agricultural and industrial towns and, in the process, also attracted more people.

Despite the unreliability and inconsistencies in historic population data, it is well documented that population in all the three East African countries began to significantly increase between the 1920s and 1930s.[82] The basin's population increased from 4.6 million in 1932 to 27.7 million in 1995;[83] six fold in six decades. The increase in population certainly exerted more pressure on natural resources as it demanded extra land for farming, settlement and other socio-economic purposes. But as we shall see in Chapters Three and Four, the visibility of population pressure

[79] Frank Melland 'The Natural Resources of Africa' (1932) XXXI African Affairs 113, 119-120.
[80] Gordon-Brown (1950) op. cit., n. 75.
[81] Gordon-Brown (1950) op. cit., n. 75.
[82] See Anderson (1984) op. cit., n. 67, as per information extracted from R. Kuczynski, *Demographic Survey of the British Colonial Empire*, vol. ii (Institute of International Affairs, Oxford 1949), chs 7-10; C. J. Martin, 'Some Estimates of the General Age, Distribution, Fertility and Rate of Natural Increase of the African Population of British East Africa', (1953/54) Population Studies 7, pgs..181-199; and J. E. Goldthorpe, 'The African Population of East Africa: A Summary of its Past and Present Trends', Appendix 7, Report of East African Royal Commission, 1933-1955, Cmd. 9475 (HMSO, London 1955) at pgs. 462-473.
[83] D. Verschuren et al, 'History and Timing of Human Impact on Lake Victoria, East Africa' (2002) 269 Proceedings of the Royal Society B: Biological Sciences 289.

on natural resources was more a result of colonial policies than 'high' numbers. Cramming of natives into reserves was not a result of land shortage, for instance, but the colonial policy of allocating large portions of it to their interests.

Given such developments, the Lake Victoria region found itself becoming East Africa's hub for socio-economic activity. Aside from favourable climatic conditions and the abundance of natural resources, the existence of a large population and various administrative and urban growth centres consolidated its stature as a region of great political and socio-economic importance to the colonial governments. With the improvement in transport means, the colonial administrations had effectively opened up the Lake region and the surrounding highlands to several socio-economic activities that were essentially focused on the exploitation natural resources. As will be variously demonstrated in the coming Chapters, colonialism gravely altered the TNRMs and replaced them with systems that aimed at upholding colonial power and it interests, regardless of their impact on the resources and the general livelihoods of the native communities. This development gradually transformed the native way of life through a process that eventually unveiled a monetised and a highly restrictive socio-economic order. Eventually, therefore, the behaviour and activities of the natives became less influenced by nature or social ties than by the new policies and political economy.

Conclusion

Generally, this Chapter has served the purpose of providing information and statistics important to our further discussion. As has been seen, the vast and ecologically complex Lake region is not only shared among different countries but also various local communities. This certainly gives rise to various interests, some of which are likely to conflict and thus posing challenges to the legal and institutional frameworks for natural resources management. We have also seen that the Lake region has a high poverty incidence and population, both of which are often believed to be major challenges in ENRM. Indeed, these two issues are, in Chapter Four, further explored among the factors believed to be the major underlying causes for environmental degradation in the Lake region.

Much as several aspects of the legal and institutional framework applicable to the Lake are further discussed in Parts IV and V, its overview in this chapter will enable us better understand the issues discussed prior the main discussion on these issues. We shall, for instance, be able to comprehend that the continuing degradation of the region's natural resources is not necessary due to the absence of laws or institutions. We have also been able to see the history that underlies the transformation of the Lake region into a major socio-economic hub and as such an insight into the potential environmental threats posed by this development. The next chapter, which is the last in Part I, takes us through the ecological and socio-economic importance of the Region's resources and the arising impact.

CHAPTER THREE

The Lake Victoria Region and its Natural Endowment: Resource Use and the Impact

The previous Chapter introduced us to the bio-physical and the ethno-demographic features of the Lake Victoria region and its communities. It further outlined the legal and institutional framework that underpins the Region's Environment and Natural Resource Management (ENRM) regime. It also provided certain highlights in the recent history of the Region's transformation to become a major political and socio-economic hub in the East African region.

This Chapter presents the justification of the need to rethink the reconstruction of the legal and institutional regime through which the natural resources of the Lake Victoria region are managed. As will be demonstrated, the Region's invaluable ecological and socio-economic importance is being threatened devastatingly by actual and potential environmental risks and human activity is largely to blame. It will then be argued that the need for strengthening multi-level government is likewise a crucial factor in the strengthening of the Region's ENRM regime. Broadly, the Chapter is sub-divided into three sections. The first section explores the various natural resource endowments found in the Lake Victoria region. It also outlines several of the ecological and socio-economic values attached to the resources many of which are of importance even beyond the Region. The second section examines the current and potential environmental challenges being faced in the Region. It goes ahead to point out the activities that are believed to be the immediate cause of the environmental degradation being experienced.

The Lake Region's Natural Resource Endowment and its Ecological and Socio-Economic Importance

The Fisheries Resources

Lake Victoria is documented amongst the world's fresh-water bodies rich in fish species diversity. It is a home to a variety of fish,[1] representative of 5 *orders*, 13 *families*,[2] and 28 *genera* and over 200 *species*.[3] Several hundreds of fish species, mainly *haplochromine* cichlids are endemic to the Lake.[4] Between 1969 and 1971 Lake Victoria's *ichthyomass*[5] was estimated at about 679, 000 tonnes of which 83% was made up of *haplochromines*, the *tilapines* were less than 1% and the Nile Perch population was 0.0006%.[6] This has since flipped over especially as a result of the introduction of exotic species. Although the Lake is now dominated by the *Nile Perch*, *Nile Tilapia* and the *Daaga*, it still has an estimated 300 to 500 species of cichlids.[7] Aside from fish, the Lake system also supports other *taxa* including insects, freshwater mollusc, invertebrates, aquatic-dependent reptiles, amphibians, mammals, plankton and birds species, which are important in the region's food-web and reproductive cycles.[8] Many of the Region's water bodies are also endowed with a variety of fish species and other aquatic fauna and flora.

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[1] Tony J. Pitcher, *Fisheries Ecology* (Chapman and Hall, London 1982) pgs. 26 - 30.

[2] The Lake region, is also a host of other fish fauna families including; *Alestiidae, Amphiliidae, Clariidae, Cyprinidae, Mochokidae, Mormyridae, Poeciliidae and Protopteridae*.

[3] Ong'ang'a Obiero, *Lake Victoria and its Environs: Resources Opportunities and Challenges* (2nd edn, Osienala, Kendu Bay, Kenya 2005) 29.

[4] K. Geheb et al, 'On Pitfalls and Building Blocks: Towards the Management of Lake Victoria Fisheries' in K. Geheb and S. Marie-Therese (eds), *African Inland Fisheries* (Fountain, Kampala 2002) p. 145.

[5] *Ichthyomass* is the amount of fish flesh present in any habitat at any one time; or a standing crop of fish. See ichthyology dictionary available at <http://www.briancoad.com/dictionary/I.htm.> accessed 13 Novemeber 2003.

[6] Joseph L. Awange and Ong'ang'a Obiero, *Lake Victoria Ecology, Resources, Environment* (Springer Berlin Heidelberg, New York 2006) p. 53.

[7] M. J. Ntiba, W. M. Kudoja and C. T. Mukasa, 'Management Issues in the Lake Victoria Watershed' (2001) 6 Lakes & Reservoirs: Research and Management 211, 211.

[8] See Rose H. Lowe-McConnell, *Ecological Studies in Tropical Fish Communities* (Cambridge University Press, Cambridge, UK 1987) pgs. 78 – 84.

Especially in the recent past, the fisheries industry has become a major source of socio-economic activity in the Lake region. In East Africa, the fisheries sector is estimated to employ 2.7% of the labour market,[9] of which, an estimated 3 million people are directly or indirectly dependant on Lake Victoria fisheries for a livelihood.[10] As of 2006, the total number of fishers on Lake Victoria was estimated at 153, 066,[11] most of whom were attracted by the Nile perch boom.[12] In 1998, Lake Victoria contributed 48.3% of the freshwater fish landed in Uganda, 90% in Kenya and 60% in Tanzania.[13] In 2006, the value of fisheries landed was approximately US$ 400 Million from an annual estimate catch of between 400-500 metric tonnes, of which, 40%, 35% and 25%, respectively, came from Tanzania, Kenya and Uganda.[14] Fish, which is widely consumed throughout East Africa, provides a cheap source of animal protein.[15] The Lake region's per capita consumption of fish was, in 2000, 12kg/year,[16] which though higher than the Sub-Saharan Africa average of 8kg/year, is lower than the world's average of 16 kg/year.[17]

While it has been criticised for its predation, the Nile perch has particularly proved to be of significant socio-economic value. Owing to its economic versatility, it has at

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[9] ibid.

[10] R. Abila, 'Fish Trade and Food Security: Are They Reconcilable in Lake Victoria?' in FAO (ed), *Report of the Expert Consultations on International Fish Trade and Food Security, Casablanca, Morocco, 27–30 January 2003* (Fisheries Report 708, FAO, Rome 2003) p. 138; See also, Crispin Bokea and Moses Ikiara, *The Macro Economy of The Export Fishing Industry in Lake Victoria- Kenya* (IUCN Socio-economics of Lake Victoria, IUCN-EARO 2000).

[11] Lake Victoria Basin Commission, *Special Report on the Declining of Water Levels of Lake Victoria* (East African Community, 2006) p. 2.

[12] Abila (2003) op. cit., n. 10, at p. 132.

[13] P.O. J. Bwathondi, R. Ogutu-Ohwayo and J. Ogari, 'Lake Victoria Fisheries Management Plan' in I.G. Cowx and K. Crean (eds), *Lake Victoria Fisheries Research Project Phase II - Uganda* (Technical Document No. 16 / Lake Victoria Fisheries Research Project, LVFO, Jinja, Uganda 2001).

[14] Lake Victoria Environmental Management Programme, *Review of the Exploitation Pressure on the Fisheries Resource of Lake Victoria* (Revised Draft edn, Lake Victoria Environmental Management Programme 2005)

[15] Bokea Crispin and Ikiara Moses, *The Macro Economy of the Export Fishing Industry in Lake Victoria- Kenya* (IUCN Socio-economics of Lake Victoria, IUCN-EARO 2000) p. 7.

[16] See Bwathondi *et al* (2001), op cit. n. 13. See also, W.M. Ssali *et al* "Fish and Fuel, Food and Forests: Perspectives on Post-Harvest Issues in Uganda." quoted in Republic of Uganda, *State of The Environment Report for Uganda, 2000/2001* (National Environmental Management Authority, Kampala, Uganda 2001).

[17] Environmental Information Database at < http://earthtrends.wri.org/country_profiles/index.php?theme=1> accessed 19 March 2007.

times been referred to as '*The gold of Lake Victoria*', with its fillet, maws and bladder all being of export value.[18] After filleting, the head and skeleton are sold to local people as food or to fishmeal processors.[19] Although not a traditional export commodity, fish has since the mid-1990s become a major export commodity. In Uganda, for instance, it has of recent, seldom been the second leading export commodity after coffee. In 2006 Uganda's export earnings from fish were US$ 145, 837, representing 15 % of the total exports.[20] As of 2001, East Africa's fisheries, contributed 3% of Uganda's and Tanzania's Gross Domestic Product (GDP) and 0.5 of Kenya's GDP.[21]

The export market for Lake Victoria fisheries has led to the rapid development of fish processing plants in the region. Between 1980 and 2001, the number of plants more than tripled from 8[22] to 35 plants,[23] of which 88% were established in the early 1990s, at the peak of the Nile Perch boom.[24] Aside from fish fillet, which is its basic product, the fish processing industry by-products provide raw materials to other industries. The biggest beneficiary is the animal feeds industry, which uses the discarded fish, fish products and some particular types of fish[25] as major ingredients in the production of animal feeds.[26] The animal feeds industry also uses snail shells as a major ingredient in poultry feeds. Trading in the shells employs gatherers, loaders, brokers, transporters and the processors. The need to preserve and transport fish

[18] Abila (2003) op. cit., n. 10, at p. 134.
[19] See J. Mugabe, E. Jansen and B. Ochieng, *Foreign Cash for Local Food Insecurity? Socio-Economic Impacts of the Liberation of Trade in Lake Victoria Fisheries - Technical Report* (African Centre for Technology Studies, Nairobi, Kenya 2000).
[20] Uganda Bureau of Statistics, *Statistical Abstract (Provisional) - Export Statistics* (UBOS, Kampala Uganda 2005)
[21] Bwathondi *et al* (2001), op cit., n. 13.
[22] See Mugabe J. et al (2000) op. cit., n. 19, at p. 2.
[23] In Kenya, 12 processing plants were, as of 2001, registered and 10 of them were functional. During the same period, Uganda and Tanzania had 11 and 12 fish processing plants, respectively. East African Community and CODA Consulting Group, *The Economic Potential and Constraints of Developing Lake Victoria Basin as an Economic Growth Zone* (EAC, Arusha, Tanzania 2006) p. 50.
[24] According to a LVFRP survey reported in Bokea *et al* (2000) op. cit., n. 15 at p. 10.
[25] The *Dagaa* fish species is a major ingredient in the making of poultry feeds.
[26] Bokea *et al* (2000) op. cit., n. 15.

over long distances has contributed to the growth and increase in ice producing plants and also boosted the transport sector. [27]

The Water Resources

Lake Victoria region's hydrological system is well endowed with natural water sources, including lakes, rivers, streams, springs and aquifers.[28] This network is generally instrumental in climate moderation of its basin and far beyond. Being a core component of the hydrological system, the Lake is particularly significant in influencing the temperatures and rainfall patterns within its entire region.[29] From the socio-economic point of view, the region's water resources are extensively utilised for domestic, municipal, industrial, transport, agricultural purposes and in the generation of hydro-electric power.

Hydro-power generation

The river network presents several potential sites for hydro-power generation,[30] several of which are already being utilised,[31] others are being developed[32] or have been earmarked for future development.[33] It is estimated that the River Nile's hydro-power potential between Lake Albert and Lake Kyoga is in the excess of 2,700MW

[27] Based on personal knowledge and observations.

[28] Aside from the Lake itself, the basin's hydrology is composed of other water bodies and courses including several smaller lakes, rivers, springs and underground water resources. The small satellite lakes within the Lake Victoria ecoregion include: Kanyaboli, Sare, Namboyo in Kenya; Lakes Nabugabo, Gigati, and Agu in Uganda; and Lakes Ikimba and Burigi in Tanzania. See P. A. Aloo, 'Biological Diversity of the Yala Swamp Lakes, with Special Emphasis on Fish Species Composition, in Relation to Changes in the Lake Victoria Basin (Kenya): Threats and Conservation Measures' (2003) 12 Biodiversity and Conservation 905.

[29] Cowx I. G. and others, 'Improving Fishery Catch Statistics for Lake Victoria' (2003) 6 Aquatic Ecosystem Health & Management 299, 299.

[30] These include: Rusumo falls along the Kagera in Rwanda; Odino falls along the Sondu-Miriu in Kenya; and Ripon, Bujagali, kalagala and Itanda falls along the Nile in Uganda.

[31] For example, the Ripon Falls along the Nile in Uganda, which feeds the Nalubaale and Kiira powers stations, which are major sources of hydro-electric power in the entire East Africa region.

[32] For example, Rusumo falls power project along Kagera River and the Sang'oro hydroelectric power plant project along the River Sondu-Miriu. See KenGen, 'Kenya to Build Kshs.4 Billion Hydropower Plant' *KenGen News* (23 January 2007).

[33] In Kenya, for example, plans are under way to construct power stations at Kuja River, Moi's bridge and Nandi forest, and this will bring the total hydro-electricity generated within Kenya's part of the Lake basin 278MW. See East African Community (2006) op. cit., n. 23, at p. 55.

and this is dependent on water flowing from Lake Victoria.[34] As a major driving force behind various developments, the hydro-power industry has contributed to urbanisation, industrialisation, employment, foreign exchange earnings and the general well being of society in the region and beyond. Having the largest and oldest power station, Jinja town, owes its rise as one of the industrial and commercial hubs in the region, to hydro-power generation within its hinterland.[35]

Water for Irrigation

The presence of reasonably abundant fresh water presents the opportunity for irrigation agriculture within the Lake region. This opportunity has, however been constrained by the 1929 and 1959 Nile Waters Agreements, which were concluded between Egypt and Britain.[36] The agreements require the upstream states to seek the consent of their downstream counterparts before engaging in activities that are likely to affect the flow of the Nile.[37] The downstream states are highly dependent on irrigation from the Nile, which partially draws its water from Lake Victoria.[38] On grounds that the agreements are not only unfair but also no longer legally enforceable, [39] the East African states have since their independence, been engaged in negotiations over the matter, without much success to-date. In particular,

[34] Obiero (2005) op. cit., n. 3, at p. 49.

[35] The growth of Jinja was particularly boosted by the completion, in 1954, of the Owen Falls hydro-power plant, which has since been the largest power plant in East Africa. East African Community (2006) op. cit., n. 23, at p. 55.

[36] Britain was then a colonial master for all the three East African states of Uganda, Kenya and Tanzania that share Lake Victoria, the source of the Nile.

[37] See 'Exchange of Notes Regarding the Use of Waters of the Nile for Irrigation Purposes, 1929' [Egypt- U.K., 93 L.N.T.S. 43]; and also, 'United Arab Republic and Sudan, Agreement (with annexes) For Full Utilization of the Nile Waters, 1959' [United Arab Republic-Sudan, 453 U.N.T.S. 6519], both of which are commonly referred to as the Nile Waters Agreements.

[38] Sixtus Kayombo and Erik Jorgensen 'Lake Victoria: Experience and Lessons Learned Brief,' available at <http://www.ilec.or.jp/eg/lbmi/pdf/27_Lake_Victoria_27February2006.pdf> accessed 18 July 2008.

[39] Although the possibility of invoking provisions of the Vienna Convention on the Law of Treaties (1969) has been raised in Uganda's national parliament, the Government seems to be focused on a diplomatic settlement. It has been alleged by one member of the Uganda Parliament that Uganda has been reluctant to push hard for the revision of the Nile agreements because it had secretly agreed not to do so at the request of the World Bank, which was to finance the construction of a much needed hydro-power station at Bujagali. See Jeevan Vasagar, 'Storms lie Ahead over Future of Nile' *The Guardian* (London, 13 February 2004).

Tanzania appears to have run out of patience over the slow and protracted negotiations and it recently unilaterally decided to go ahead with the Kahama-Shinyanga water project that is intended to supply water from Lake Victoria to communities living up to 170kms away.[40] Notwithstanding limitations of the agreements, however, a few commercial schemes [41] use Lake Victoria waters for irrigation, mostly in the naturally drained area. Small-scale irrigation especially in the form of the tedious bucket irrigation is practised among small holding vegetable gardeners, who cultivate close to water sources but in places that receive little or unreliable rainfall.[42]

Water for Domestic, Municipal and Industrial Consumption

In addition to being major sources of water, the water resources are extensively used as depositaries for domestic, municipal and industrial waste and effluent. The riparian cities of Mwanza, Bukoba, Kisumu, Kampala, Jinja and Entebbe are largely, if not solely dependent on Lake Victoria for their municipal water supplies and effluent disposal.[43] That aside, usage and demand for ground water sources is equally high. In Uganda, for example, 8.1 million persons, representing 70% of the people in the entire Lake basin, depend on ground water.[44]

Water as a Medium of Transportation

For decades and probably millennia, the Lake has provided a cheap transport link between the three countries, which have jointly in the past, run a common transport

[40] Rwambali Faustine, 'Tanzania Ignores Nile Treaty, Starts Victoria Water Project' *The East African* (Nairobi, 9 February 2004).
[41] Examples include: Ahero rice and West Kano irrigation schemes in Kenya. See Onjala Joseph, *Water Pricing Options in Kenya: Cases of Mwea and West Kano Irrigation Schemes* (CDR Working Paper 01.9, Centre for Development Research, Copenhagen 2001).
[42] Geheb K. and Binns T., ''Fishing Farmers' or 'Farming Fishermen'? The Quest for House Hold Income and Nutritional Security on the Kenyan Shores of Lake Victoria' (1997) 96 African Affairs 73, 87.
[43] As the urban centres grow, their demand for resources and services are equally increasing. Kampala's current demand of 27.5 million cubic meters per day is, for example, expected to soon double. See East African Community (2006) op. cit., n. 23, at p. 41.
[44] East African Community (2006) op. cit., n. 23, at p. 41.

service. The defunct East African Railways and Harbours common service utilised the Lake as a main transport interchange.[45] Aside from water transport being cheap, Lake Victoria is strategically positioned as a major transport link for the three East African countries. While it is among the least tapped potential, as the Lake is now dominated by small boats, commercial inland water transport is currently being vigorously promoted by the East African Community,[46] whose campaign has already led to the signing of two agreements,[47] and the recent enactment of the Lake Victoria Transport Management Act (2007).[48]

Water for Tourism

Increasingly, water resources have continued to contribute to the growth of tourism in the region. In addition to cruise tourism on the Lake and along the navigable rivers, several falls, rapids and cataracts, along the Victoria Nile, present spectacular aesthetic and sporting spots. They include the Bujagali falls that is at the core of the internationally acclaimed Victoria Nile white water rafting circuit, which generated approximately US$ 500,000 in 2000, after only four years in existence.[49] Unfortunately, the on-going construction of Bujagali hydro-power station is expected to submerge the falls and also affect part of the rafting circuit.

Wetland Resources

Wetlands cover about 3% (17, 480 km^2), 10% (94,508 km^2) [50] and 13% (30,105km^2)[51] of Kenya's, Tanzania's and Uganda's total surface area, respectively. Varying in

[45] The defunct East African Community (EAC), through East African Ports and Harbours Organisation, jointly and successfully managed a fleet of vessels on Lake Victoria, something that made the Lake a major medium for transport in the region.

[46] See para. 4.5.5.4 of the East African Community, *East African Community Development Strategy (2006-2010)* (EAC, Arusha, Tanzania 2006).

[47] That is; The Tripartite Agreement on Inland Waterway Transport (November 2002) and; Search and Rescue Agreement (September 2003).

[48] As is the case with most Community laws, however, these instruments are yet to be fully implemented.

[49] Bujagali Energy Limited, *Bujagali Hydropower Project Social and Environmental Assessment - Main Report* (BEL, Guelph, Canada 2006) 142-153.

[50] NEMC/WWF/IUCN (1990) *Development of Wetland Conservation and Management Programme for Tanzania*, quoted in P.K Machiwa, 'Water Quality Management and Sustainability: The Experience of

character and vegetation type, a reasonable percentage of these wetlands are found in the Lake region.[52] Wetlands are instrumental in micro climate stabilization and biomass export. They form extensive buffer zones around the Lake and thereby assist in filtering pollutants such as excess nutrients and toxins; holding back sedimentation; reducing extremes of water flow; preventing erosion; and maintaining the water table. They also serve as wildlife habitats and centres of biological diversity.[53]

As natural habitats, wetlands are a home, breeding ground and source of livelihood for many species of life. For example, a study carried out by the Food and Agriculture Organisation (FAO) in 1996 found that wetlands in Uganda were a home of 271 Macrophytes, 159 birds, 52 fish, 48 amphibian, 43 dragon fly, 14 mammal and 9 molluscs species.[54] The papyrus swamps, which often form part of the wetland systems, are believed to be the second most widely spread refugium for fish and other fauna. They protect a number of fish species from Nile perch predation.[55] Also, wetlands, such as those fringing Serengeti National Park plains, support large numbers of wild animals, both as a habitat and a source of water and food.[56]

Socio-economically, the wetlands are used as agricultural land, especially in areas with water and land stress. Paddy rice, which has recently joined East Africa's leading food and cash crops, is specifically grown in the wetland. Especially along their

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Lake Victoria Environmental Management Project - Tanzania' (2003) 28 Physics and Chemistry of the Earth 1111.

[51] Republic of Uganda, *State of the Environment Report for Uganda, 2000/2001* (National Environmental Management Authority, Kampala, Uganda 2001).

[52] Omodi (1994) quoted in J.K. Kairu, 'Wetland Use and Impact on Lake Victoria, Kenya Region' (2001) 6 Lakes and Reservoirs: Research and Management 117.

[53] The Republic of Uganda, *National Policy for the Conservation and Management of Wetland Resources* (Ministry of Natural Resources, Kampala 1995); See also, Obiero (2005) op. cit., n. 3, at p. 45.

[54] The Food and Agriculture Organisation (FAO), quoted in Republic of Uganda, *State of the Environment Report for Uganda, 2000/2001* (National Environmental Management Authority, Kampala, Uganda 2001).

[55] Chapman L., Chapman A. and Chandler M., 'Wetland Ecotones as Refugia for Endangered Species' (1996) 78 Biological Conservation 263.

[56] Kairu (2001) op. cit., n. 52.

fringes or during dry seasons, wetlands are used as free grazing grounds to provide fodder, forage and water for livestock. In Kenya, cattle keepers in the lake shore Nyanza region are often encouraged to grow *Napier* grass in the wetlands as forage for cattle.[57] Wetlands are also used as: fishing grounds; mining areas especially for sand and clay; water sources; settlement areas and woodlots.[58] They are also mediums of transport, places of aesthetic beauty for tourism, cultural heritage centres and archaeological sites.[59] Various wetlands plants, especially papyrus reeds, are extensively used in the making of hand crafted goods such as mats, baskets and chairs.[60]

The Fertile Soils

The most common types of soils found in the Lake region are *Nitosols, plinthosols, vertisols* and *greysols*.[61] The variability in soils is well reflected in the diversity of the basin's agro-ecological zones. Crop cultivation is, however, mostly supported by the widely spread, fertile and less-weathered *Nitosols.* [62] Ecologically, soil is important in providing food and water for plant growth; it is a habitat for terrestrial and aquatic biodiversity. It regulates water flow, reduces flooding by absorbing excess water, and absorbing some dangerous compounds like carbon and methane. Generally, soil plays an important role in the nitrogen, oxygen, carbon, moisture, and mineral cycles which are important in supporting life.[63]

The ability of the Lake Victoria region to support the growth of a wide range of crops leads to it being ranked among East Africa's most agriculturally productive areas,

[57] Kairu (2001) op. cit., n. 52, at p. 120.
[58] Omodi (1994) quoted in Kairu (2001) op. cit., n. 52, at p. 120.
[59] F. B Bugenyi, 'Tropical Freshwater Ecotones: Their Formation, Functions and Use' (2001) 458 Hydrobilogia 33.
[60] P. K Machiwa, 'Water Quality Management and Sustainability: The Experience of Lake Victoria Environmental Management Project - Tanzania' (2003) 28 Physics and Chemistry of the Earth 1111.
[61] East African Community (2006) op. cit., n. 23, at p. 47.
[62] ibid.
[63] See Soil Association, *Soil- The Importance and Protection of a Living Soil*, vol version 003.3 (Policy Document, Soil Association, Bristol, UK 2005).

aided by the climate and the fertile soils. Although agriculture is often classified as an informal category of employment,[64] it is by far the single largest activity engaged in the Lake region[65] and it accounts for over 70% of East Africa's total employable population,[66] and in Uganda alone, it takes up to 77% of the country's labour force and 19.1% of paid employment.[67] The rating for agriculture remains high even when done as a secondary activity. In Tanzania, for example, over 90% of the people employed in other informal sub-sectors were found, in 2002, to be engaged in agriculture as a secondary activity.[68] For a diversity of reasons, many persons in the Lake region are engaged in a 'tri-economy' that involves farming, fishing and livestock keeping.[69]

As is the case throughout East Africa, farming in the Lake region is mainly on a small scale [70] and characterised by dependence on family labour, use of hand tools and is mostly subsistence in nature.[71] At house-hold level, crops grown in the Region include cotton, coffee, maize, sisal, tobacco, beans, sugarcane, potatoes, cassava and bananas.[72] Others are rice, legumes, vegetables and sorghum. Large and commercial scale farming is practised especially in the growing of raw materials or cash crops such as wheat, cotton, coffee, barley, sugar-cane, pyrethrum, tea, rice and maize.[73] The favourability for commercial farming has attracted over time agro-based industries such as sugar mills, tea and tobacco processing plants, cotton ginneries

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[64] For the classification of labour categories see, for example, United Republic of Tanzania, *Integrated Labour Force Survey, 2000/01 - Analytical Report* (National Bureau of Statistic, Dar es Salaam-Tanzania 2002).

[65] P.O.J Bwathondi, R. Ogutu-Ohwayo and J. Ogari, 'Lake Victoria Fisheries Management Plan' in Cowx I.G. and Crean K. (eds), *Lake Victoria Fisheries Research Project Phase II - Uganda* (Technical Document No. 16 / Lake Victoria Fisheries Research Project, LVFO, Jinja, Uganda 2001).

[66] Obiero (2005) op. cit., n. 3, at p. 48.

[67] See Uganda Bureau of Statistics, *Uganda National Household Survey 2002/2003* (UBOS, Kampala, Uganda 2003

[68] See Table 5.8 in United Republic of Tanzania (2002) op. cit., n. 64.

[69] See, K. Geheb and T. Binns, ''Fishing Farmers' or 'Farming Fishermen'? The Quest for House Hold Income and Nutritional Security on the Kenyan Shores of Lake Victoria' (1997) 96 African Affairs 73

[70] Obiero (2005) op. cit., n. 3, at p. 48.

[71] ibid.

[72] See Table 1 in Geheb (1997) op. cit., n. 69, at p. 87; See also, Ntiba (2001) op. cit., n. 7, at pgs. 211and 214.

[73] ibid.

and textile mills,[74] most of which have been nuclei for industrial development in the region.[75] In 2001, agricultural products contributed 53.46% of Kenya's total exports. In Uganda and Tanzania, in 2005, it represented 43.3%[76] and 30%[77] of the total export value, respectively. Most of East Africa's leading agricultural exports are, at least partially, grown within the Lake region.[78]

Also because of the favourable natural conditions, livestock rearing is widely practised throughout the Lake region, though more intensively in the drier areas such as northern Tanzania and the Kagera region, which covers parts of western Tanzania and Uganda and the animals commonly reared include cattle, goats and sheep. Especially among the pastoral communities, livestock serves as the main source of income, draught power and manure. It is also used for social purposes such as a medium for paying a bride price.[79] As can generally be seen, primary production and most specifically agriculture, is the backbone for both domestic consumption and export earnings not only in the Lake Region, but East Africa in general.

Forests and Other Vegetation Cover

In both its high and lowlands, the Lake region is endowed with various vegetation types including woodlands, shrubs and forests, with the forest alone estimated to

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[74] Swedish International Development Agency (SIDA), *Strategy for Swedish Support to the Lake Victoria Basin: Strategy for Swedish Support for Poverty Reduction and Sustainable Development in the Lake Victoria Basin (September 2004 - December 2006)* (SIDA, Stockholm, Sweden 2004) 5.

[75] In Uganda, for instance, Kakira and Lugazi sugar mills have been spring boards for large industrial complexes, several of whose industries use sugar or its by-products as a core raw material.

[76] Uganda Bureau of Statistics, *Statistical Abstract (Provisional) - Export Statistics* (UBOS, Kampala Uganda 2005) 203.

[77] The United Republic of Tanzania, *The Economic Survey - 2005* (Ministry of Planning, Economy and Empowerment, Dar es Salaam, Tanzania 2005). See section on domestic economy and particularly the part on economic growth.

[78] Tea, which has for long been Kenya's top agricultural export and in 2001 represented 28.41% of the total exports, is mostly grown in the Lake region. In Uganda coffee, which is leading export and also extensively grown in the Lake region, in 2006, earned the country US $ 190 Million, which was 20% of total exports earnings. See Uganda Bureau of Statistics (2005) op. cit., n. 76.

[79] Hongo H. and Masikini M., 'Impact of Immigrant Pastoral Herds to Fringing Wetlands of Lake Victoria in Magu District Mwanza Region, Tanzania ' (2003) 28 Physics and Chemistry of the Earth, Parts A/B/C 1001, 1002.

make up to 40% of the Lake basin area.[80] While most of the forests are natural, a significant part of the forest cover in planted. Aside from the large forests that are mostly public owned,[81] and in most cases gazetted as reserves, there are medium and small patches of both public and private forests and concentrated vegetation cover within the Lake region.[82] Amongst the types of natural forests are the widely endowed tropical rain-forests, which are generally rich in biodiversity.[83]

The ecological benefits of its forests extend further than the Region itself. Forests preserve water for hydrological catchments; assist in the fertilisation and conservation of soil; contribute to the stabilisation of micro-climatic conditions and; conserve and provide a natural habitat for biodiversity. Forests and their products are also of cultural or spiritual value to several communities.[84] Aside from the traditional uses of providing food and being places of cultural significance, the forests are now predominantly a major source of building and handcraft materials, timber and energy in the form of firewood. Biomass, mainly in the form of firewood and charcoal, accounts for over 90% of the energy consumed in the Lake region. Both forms of energy are used across urban and rural communities and by cottage and large industries. The reported presence of oil deposits in certain forests is yet to be fully explored.[85] Forest products, mostly timber, are of export value, especially the valuable hard wood, which is extensively used in furniture and the pulpwood used in

[80] See Mongabay Forests Database available at < http://rainforests.mongabay.com> accessed 16 June 2007.
[81] Public ownership of forests in Tanzania is 99.8%, while in Kenya it 97.8% and in Uganda 29.8%. See Mongabay Forests Database op. cit., n. 81.
[82] The large and medium sized forest conservation areas include Mt.Elgon, Kakamega, Kodera and, Maasai Mara, Trans mara, East Mau, Gwasi Hills in Kenya; Mabira, South Busoga, Bugala, Marabigambo and Mt. Elgon in Uganda; and Rumanyika, Rubondo Island and Burigi in Tanzania.
[83] For example, the 29,974 hectares Mabira tropical rainforest in Uganda, which has a biomass of 300 tonnes per hectare and estimated carbon credit worth US$ one billion, is a habitat of 312 trees and shrub species, 287 species of birds, 16 small mammals and 296 species of butterflies and moths. It also has wild *robusta* coffee, *dioscoria* tubers, yams and other plants whose economic importance is unknown. Geresom Musamali, 'Mabira forest loss to cost $890m' *The NewVision* (Kampala, 27 March 2007).
[84] Obiero (2005) op. cit., n. 3, at p. 55.
[85] East African Community (2006) op. cit., n. 23, at p. 55.

the paper industry. In Kenya, the forestry sector, in 2001, contributed US $336.68 million which was 3.44% of its GDP.[86]

Wildlife Resources

As is the case with many other places in East Africa, wildlife in the Lake region is found both within and outside gazetted Wildlife Protection Areas (WPAs).[87] Notwithstanding the debate on the trend of wildlife populations in East Africa, the Lake region's WPAs hold a considerable number and variety of wildlife. The Mara, Mwanza and Kagera region, which are estimated to have five million large animals, are believed to be the largest wildlife sanctuaries in the world.[88] The Region is also home to several birds including those that are globally threatened species.[89] In addition to Jinja and Nyaima bird sanctuaries, there is over 25 reserves and Important Bird Areas (IBAs) within the Region, most of which are found on the islands or fringes of the Lake.[90] It is estimated that the entire Lake basin is home for about 600 bird species.[91] Lutembe Bay, one of the IBAs along the northern shores of Lake Victoria, regularly supports between 20,000 and 50,000 water birds.[92] The Ramsar protected sites include Lake Nabugabo wetlands, Mabamba Bay wetland system and Lutembe Bay in Uganda, all of which fringe Lake Victoria's western shoreline.[93]

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[86] See, Republic of Kenya, *Wood and Wood Products - Kenya* (Kenya Export Processing Zones Authority, Nairobi, Kenya 2005).

[87] These include the 120 sq. km. Ruma National Park and Ndere Island in the Nyanza province of Kenya; the 240 sq km Rubondo Island National Park in Tanzania, which is fully engulfed by Lake Victoria; part of the 14,763 sq km Serengeti National Park also in Tanzania; and Mt. Elgon National park shared between Uganda and Kenya.

[88] East African Community (2006) op. cit., n. 23, at p. 54.

[89] See Achilles Byaruhanga and Dianah Nalwanga, 'Ten Years of Continuous Waterbird Monitoring at Lutembe Bay, Lake Victoria, Uganda' in G.C. Boere, C.A. Galbraith and D.A. Stroud (eds), *Waterbirds Around the World (*Scottish Natural Heritage, Edinburgh, UK 2006).

[90] For more information on each of the three riparian countries, see Birdlife International Data Zone available at <http://www.birdlife.org/datazone/index.html> accessed 23 March 2009.

[91] Obiero (2005) op. cit., n. 3, at p. 40.

[92] See Byaruhanga (2006) op. cit., n. 89.

[93] These sites are designated in accordance to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Commonly referred to as the Ramsar Convention). As of 2005, there were 142 Contracting Parties to the Convention, with 1398 wetland sites, totalling 122.8 million hectares. See Ramsar website available at <http://www.ramsar.org/> accesses 13th December 2005.

For decades now, wildlife tourism is a key industry in the whole of East Africa, mainly as a source of employment and foreign exchange. Of late, however, tourism is being extended into other areas. Aside from the striking scenic views of the Lake and its aquatic life, the basin has several natural sites of tourism potential, some of which are historic.[94] The IBAs form the base for the fast growing bird watching tourism industry. More generally, the peculiarities of several of the terrestrial and aquatic resources in the basin offer a high potential for the globally growing ecotourism industry and natural habitats as Uganda's Mabira rain-forest reserve is being developed for that purpose. Other eco-tourism destinations include Saiwa Swamp, Kakamega Forest and Mau Forest in Kenya; Sango bay and West Bugwe in Uganda; and Saa-Nane Island and Kijereshi in Tanzania.[95] Although still minimal, sport fishing has also recently joined the list of the tourist attracting activities.[96]

Mineral deposits /Small-scale Mining

The Lake basin is endowed with metallic and non-metallic mineral deposits and precious stones, including gold, fluorite, umerite, iron ore, tin, nickel Kisii soapstone and limestone.[97] Also found in the basin are building stones, clay, and sand deposits which are mainly excavated on a small-scale basis to provide building materials for the local construction industry. Other than gold, the mining of metallic minerals is generally not widespread. Aside from Tanzania where it is mined both on large and small scales, gold is generally mined on small scale.[98] In cumulative terms, however, small-scale gold mining is a big industry that, for instance, employs up to 30, 000 unskilled labourers in Tanzania.[99]

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[94] Among the historic sites in the Lake basin is the source of the River Nile at Jinja, whose spectacular view and historic value makes it a major tourist destination in the Lake region.
[95] East African Community (2006) op. cit., n. 23, at p. 53.
[96] Popular sailing and sport fishing resorts include, Jinja, Entebbe and Kisumu sailing clubs. This information is based on personal knowledge.
[97] Obiero (2005) op. cit., n. 3, at p. 33.
[98] East African Community (2006) op. cit., n. 23, at p. 47.
[99] Van Straaten, P., 'Mercury Contamination Associated with Small-Scale Gold Mining in Tanzania and Zimbabwe' (2000) 259 The Science of the Total Environment 105, 106.

As it has been demonstrated, the Lake Victoria region is richly endowed with natural resources that are of invaluable, ecological and socio-economic importance both within the Region and far beyond. The need to sustainably manage those resources can, therefore, not be overstated. In the following section, we examine both the current and potential problems that threaten the Region's resources. We also look at the immediate causes of the problems and their sources.

The Environmental Impacts and Threats

The fact that Lake region's resources are of invaluable socio-economic importance has made them vulnerable to various forms environmental degradation. Aside from being sources of livelihood enhancement, the resources are core to the basic survival of many people. Inevitably, therefore, the process through which the resources are exploited is competitive, among the resource use activities on the one hand and between humans and nature on the other. As a result, several resources have been degraded, others depleted, while others are potentially threatened. SIDA, a non-governmental organisation that is actively involved in the ENRM of the Lake region observes that:

> "In sum Lake Victoria basin is a region marked by negative trends in terms of living conditions, the environment and natural resources."[100]

The following section takes us through the major environmental degradation problems, their causes and likely sources.

Decrease of Fish Stocks and Species

The Lake Victoria fishery has, especially in the recent decades, been faced with two major environmental problems – the decrease in fish stocks and species.[101] While

[100] SIDA (2004) op. cit., n. 74, at p. 6.
[101] J. P. Owino, *Traditional and Central Management Systems of the Lake Victoria Fisheries in Kenya* (Socio-economics of Lake Victoria, Report No. 4., IUCN East African Programme 1999).

Graham observed 80 years ago that Lake Victoria fisheries had started to undergo considerable changes, recent commentators believe that the problem has been escalated in the last thirty to forty years.[102] Although the decrease in fish stocks is attributed to various causes including deterioration in water quality and the invasion of alien species, most particularly the Nile perch, it is primarily a result of the intensification in fishing and more generally the use of unsustainable fishing methods including: under sized nets;[103] beach seining;[104] commercial trawling;[105] fish poisoning;[106] and the non-observance of closed seasons. The Nile perch, which was the most dominant species in the Lake, had, by mid-1990s, started to register a decline both in catch and size.[107] Basalirwa *et al* believe that the change in fishing behaviour has, among others been precipitated by the introduction of modern fishing gear and methods; the thriving market for fish, especially for export; and, generally, the increase in human population density.[108]

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[102] It is, for instance, argued that the impact of the predatory Nile Perch (*Lates Niloticus*), which is believed to have been introduced between been the 1950s and 1960s was not felt until the mid 1980s. See John S. Balirwa et al, 'Biodiversity and Fishery Sustainability in the Lake Victoria Basin: An Unexpected Marriage?' (2003) 53 BioScience 703, 704; See also, J. Mugabe et al (2000) op. cit., n. 19, at p. 1; and Ntiba (2001) op. cit., n. 7 at p. 212.

[103] While mesh nets of 38mm - 46mm and 10mm are recommended to harvest *haplochromines* and *R. argentea*, respectively, sizes as small as 5mm and even below are widely being used. Such a practice is disastrous as it leads to the capture of juvenile fish, something that disrupts the re-stocking cycle. See Richard Ogutu-Ohwayo et al, 'Human Impacts on the Great Lakes of Africa' (1997) 50 Environmental Biology of Fishes 117, 121.

[104] The non-selective beach seining method, which also destroys breeding grounds, continues to be used along many beaches. Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 123.

[105] Aside from harvesting juvenile fish and laid eggs, trawling interferes with water column stability and removes bottom dwelling micro-organism that are ecologically useful. See R.O. Abila, 'Socio-economic Impacts of Trawling in Lake Victoria.' in James Siwo Mbuga and others (eds), *Trawling in Lake Victoria, Its history, Status and Effects* (Project Report No 3, IUCN EARO Communications 1998); See also, Albert Getabu 'The Development And Prospects of Experimental and Commercial Trawling in Lake Victoria' in Mbuga Siwo James and others (eds), *Trawling in Lake Victoria: Its History, Status and Effects* (Project Report No 3, IUCN EARO Communications Unit Communications Unit 1998).

[106] This method involves local application of poisonous chemicals to sections of the Lake resulting in mass death of fish. It is because of the extensive use of this method during the late 1990s that the EU banned the import of fish and its products from East Africa. See Van der Knaap, M. J. Ntiba and I. G. Cowx, 'Key Elements of Fisheries Management on Lake Victoria' (2002) 5 Aquatic Ecosystems Health and Management 245.

[107] Knaap et al (2002) op. cit., n. 106, at 246; See also, R. Ogutu-Ohwayo, 'Management of the Nile Perch, *Lates Niloticus* Fishery in Lake Victoria in Light of the Changes in its Life History Characteristics' (2004) 42 African Journal of Ecology 306.

[108] Balirwa *et al* (2003) op. cit., n. 102, at p. 704

Aside from the general reduction in fish stocks, the same reasons have also led a significant decrease in Lake Victoria's fish species.[109] The native *Haprochromine* cichlids which were abundant have recently dropped below the first three dominant species, namely the introduced *L. niloticus* and *O. niloticus*, and the native cyprinid species, *Rastrineobola argentea.*[110] They have been driven to near extinction and only pockets of them remain in *refugia* such as the protected bays, rocky shores and inlets.[111] It is believed that the predatory Nile Perch, which is believed to have been introduced in the Lake between the 1950s and 1960s, is largely responsible for the declines and probably the extinction of other species.[112] Also introduced into the Lake around the same period were exotic *tilapiine* species, which, though introduced as a stock boost for the then declining native *tilapiine*, turned out to be a threat to the existence of the latter.[113] Although the introduction of the new species boosted fish catches by five fold, from 85,000 metric tonnes in 1975 to 554,000 metric tonnes in the 1990s,[114] 80% of it being Nile perch and Nile tilapia,[115] it has caused irreversible loss of bio-diversity.[116]

While the decrease in fish stock and specifies can be attributed to several causes, these problems have been particularly exacerbated by the lack of an effective fisheries management regime. Notwithstanding the existence of a regulatory regime, fishing on Lake Victoria has generally been considered to be under a *de facto* open access system. It is the weak regulatory regime that has actually misled some writers into referring to the Lake fishery as being managed under an open –access system.[117]

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[109] See, generally, Ogutu-Ohwayo (2001) op, cit., n. 10.
[110] Cowx et al, (2003) op. cit., n. 29, at p. 300.
[111] Ntiba et al (2001) op. cit., n. 7, at p. 213.
[112] See A. M. Anderson, 'Further Observations Concerning the Proposed Introduction of Nile Perch into Lake Victoria' (1961) 26 East African Agriculture Journal 195; See also, Pringle M. Robert, 'The Origins of the Nile Perch in Lake Victoria' 55 BioScience 780.
[113] P. C. Goudswaard, F. Witte and E. F.B. Katunzi, 'The Tilapine Stock of Lake Victoria before and After the Nile Perch Upsurge' (2002) 60 Journal of Fish Biology 838, 848.
[114] Ogutu-Ohwayo (2001) op. cit., n. 10, at p. 10.
[115] Ogutu-Ohwayo et al (1997) op cit., n. 103, at p. 125
[116] Goudswaard et al (2002) op. cit., n. 113, at p. 849.
[117] See, for example, Obiero op. cit., n. 3, at p. 68.

Indeed, others believe the issue of open-access on the Lake is rather a deliberate policy measure driven by socio-economic benefits.[118] The open access mentality among the fishers is largely a result over centralisation in the management of the fisheries resource. As we shall see in Chapter Nine, fisheries management sector has always left little or no room for the participation of local government and the fishing communities. Also, the degree of its coordination at the regional level has often been lacking.

Soil and Land Degradation

While arable land and the fertile soils remain among the Lake region's most valuable natural resources, they are also among the most degraded resources, where land pollution, nutrient depletion and soil erosion remain the most prevalent threats. In Kenya, for example, parts of the Kiisi highlands and the Nzoia and Nyando river catchments have been extensively destroyed by soil erosion.[119]

Although it can naturally occur, land degradation has particularly been worsened by unsustainable human activity including: uncontrolled agricultural and animal husbandry practices; settlement and municipal services; industrialisation; and the indiscriminate utilisation of the flora resources. As a result, some parts have been have extensively eroded, polluted and drained of nutrients. Considering the most prevalent unsustainable practices such as over-cropping, cultivation on slopes, continuous monoculture, over grazing, bush burning, and land clearance,[120] agricultural activities are of no doubt among the leading causes for land degradation in the region. The use of artificial fertilisers pollute soil by suppressing the rich

[118] See R. Ogutu-Ohwayo, 'The Fisheries of Lake Victoria Harvesting Biomass at the Expense of Biodiversity' at <http://www.unep.org/bpsp/Fisheries/Fisheries%20Case%20Study%20Summaries/Ogutu(Summary).pdf> accessed 30 January 2009.
[119] Obiero (2005) op. cit., n. 3, at p. 61.
[120] See, generally, Elspeth Huxley, 'The Manace of Soil Erosion' (1937) XXXVI Journal of the Royal African Society 357; See also, Obiero (2005) op. cit., n. 3, p. 61.

diversity of life that is needed to keep it healthy,[121] land clearance and over-tillage are a major cause of nutrient loss.[122] These factors are exacerbated by high rainfall and steep slopes.[123]

Irrespective of the regulatory regime in place,[124] soil conservation techniques are rarely practised in the Lake region. Instead, agro-chemicals are increasingly being promoted and relied on as the basic means of increasing agricultural production, without following proper precautionary measures.[125] Coupled with the fact that long spells of drought have becoming more frequent due to lesser and unreliable rainfall, the deterioration is soil productivity has gravely impacted agricultural production and as a result posing threats with far reaching socio-economic consequences.[126]

Water Pollution

Pollution is among the main threats to the quality of the freshwater resources in the Region.[127] Lake Victoria's relatively small water volume exacerbates its vulnerability

[121] See, Soil Association, *Soil- The Importance and Protection of a Living Soil*, vol version 003.3 (Policy Document, Soil Association, Bristol, UK 2005).
[122] J. M Majaliwa et al, "Soil and Nutrient Losses from Major Agricultural Land-Use Practices in the Lake Victoria Basin" in Lake Victoria Environmental Management Project, *Knowledge and Experiences Gained from Managing the Lake Victoria Ecosystem*, (LVEMP, 2005, Dar es Salaam) p. 38-49.
[123] J. Okungu and P. Opango, "Pollution Loads in Lake Victoria from the Kenyan Catchment" in Lake Victoria Environmental Management Project, *Knowledge and Experiences Gained from Managing the Lake Victoria Ecosystem*, (LVEMP, 2005, Dar es Salaam) p. 90-108.
[124] Other than the specifically dedicated laws such as 'The National Environment (Minimum Standards For Management Of Soil Quality) Regulations 2001' (Uganda), soil management in variously provided for under several laws including those that concern agriculture, forestry and wildlife.
[125] See, generally, J. Rwetabula et al, 'Transport of Micropollutants and Phosphates in Simiyu River (Tributary Lake Victoria), Tanzania' (The First International Conference on Environmental Science and Technology, New Orleans, 23-26 January 2005).
[126] See, Tanzania Ministry of Agriculture and Cooperative, *An Inventory of Agro Chemical in the Lake Victoria Basin* (Lake Victoria Environmental Management Project - LVEMP 2000); See also, Karani (1986), quoted in A. Lufafa et al 'Prediction of Soil Erosion in Lake Victoria Basin Catchment Using a GIS-based Universal Soil Loss Model' 76 Agricultural Systems 883.
[127] See, for example, Republic of Uganda, *State of The Environment Report for Uganda, 2000/2001* (National Environmental Management Authority, Kampala, Uganda 2001); See also, The Recent Scientific Papers on Water Quality Management – Part IV, in G. A. Mallya et al (eds), *Knowledge and Experiences Gained from Managing the Lake Victoria Ecosystem, Lake Victoria Environmental Management Project* (LVEMP 2005).

to pollution due to limited ability to dilute pollutants.[128] UNEP believes that if it were not for human influence,

> "...water quality would be determined by the weathering of bedrock minerals, by atmospheric processes of evapo-transpiration and the deposition of dust and salt by wind, by natural leaching of organic matter and nutrients from solid and by hydrological factors that lead to runoff."[129]

Unfortunately, the situation in the Lake region's hydrological system is far from such an ideal state. Increased intensity in socio-economic activities coupled with lack of effective control measures has subjected the water resources to various forms and levels of pollution, which mainly occurs through: direct discharges; surface run-offs; atmospheric deposition; and wind.[130] Microbiological pollution has mainly resulted from direct discharge of untreated or ill-treated municipal sewage and the disposal of animal and human waste into the water systems and this is a major cause of diseases like cholera and typhoid, which usually climax during the rainy seasons.[131] Such dangers have not deterred the communities that lack safe water options from using water of the Lake.[132] Chemical pollution is mainly caused by industrial discharges, mining processes, use of agro-chemicals and municipal and medical waste, which are usually carried by run-offs and storm water.[133] Depending on the level of toxicity, chemicals pollutants are capable of killing a range of aquatic life and also make water unsuitable for consumption.[134] Let us now look at pollution in greater detail.

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[128] Ogutu-Ohwayo et al (1997) op cit., n. 103, at p. 120.
[129] UNEP (1995), 'Water Quality of World River Basins', quoted in Okungu et al (2005) op. cit., n. 121, at pgs. 90-108.
[130] Pollution can be micro-biological, where microbiological pathogens are directly discharged or conditions that support their existence created. It can also be chemical, which entails the contamination of a resource with chemicals, or in the form of suspended solids. See Eric O. Odada, et al (2004) Mitigation of Environmental Problems in Lake Victoria, East Africa: Causal Chain and Policy Options Analyses' (2004) 33 Ambio 13, 14.
[131] Of recent, cholera epidemics in East Africa have often started from the Lake region.
[132] Odada et al (2004) op. cit., n. 130, at p. 15.
[133] ibid.
[134] Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 129.

Pollution from Urban Centres and Settlements

Urbanisation and poorly planned settlements exacerbate run-offs because of poor or lack of storm water drainage and waste discharge systems.[135] Waste management in such places is usually poor, leading to solids and chemicals being washed into the water bodies and courses.[136] Such is the situation in most of the riparian towns many of which basically lack functioning sewage treatment systems to date.[137] According to a United Nations Environment Programme (UNEP) study, only 10% -15 % of the residents of the Mwanza municipality in Tanzania were, by 1999, connected to the central sewerage system. The situation was found to be worse in Bukoba and Musoma towns, where aside from lacking central sewerage systems only about 2% of their residents had septic tank systems. The remaining 98% either had no faecal depositaries or used traditional pit-latrines, which, because of being densely concentrated in the area, posed threats to the ground water sources and generally the entire hydrological system.[138] Interestingly, many of the 'functional' sewage systems have proved to be sources of pollution as several of them discharge untreated sewage into the water systems.[139] In Uganda, Kampala's main water treatment plant, which uses alum as a coagulant in the treatment of drinking water,

[135] Poor sanitary conditions, such as the sinking of latrines in water logged areas and the direct disposal of human waste in water are known to be common among some lake communities.

[136] Odada et al (2004) op. cit., n. 130, at p. 18; See also, generally, Lindenschmidt K. and others, 'Loading of Solute and Suspended Solids from Rural Catchment Areas Flowing into Lake Victoria in Uganda' (1998) 32 Water Resources 2776.

[137] For example, the towns of Mwanza, Musoma and Bukoba discharge raw waste into the Lake. The sewerage waste system of Kisumu City is bearly operational, whiles those of Kakamega and Bungoma towns and poorly maintained and overloaded. Kampala has only 50% of the capacity required to dispose the 2,800m^3 of waste generated every day. See East African Community and CODA Consulting Group, *The Economic Potential and Constraints of Developing Lake Victoria Basin as an Economic Growth Zone* (EAC, Arusha, Tanzania 2006) p. 41- 42.

[138] See UNEP/UNDP/DUTCH, 'Wetlands and Pollution on Lake Victoria ' in UNEP/UNDP/DUTCH (ed), *Report on the Development and Harmonisation of Environmental Standards in East Africa: The East African Sub-regional Project - Development and Harmonisation of Environmental Laws*, vol 1 (UNEP Nairobi, Kenya 1999) p. 111-114.

[139] See, Cosmas Butunyi and Walter Menya, 'East African Towns Polluting Lake Victoria with Sewage' *The East African* (Nairobi, 2 October 2008) and ; Candia Steven, 'Lake Victoria Choking with Sewage' *The New Vision* (Kampala, 8th June, 2010).

discharges its sludge waste into Ggaba swamp, which fringes Lake Victoria. [140] A study commissioned in the late 1990s to investigate the likely environmental consequences of discharging untreated sludge, found that *Ggaba* wetland was getting a daily waste discharge of about 20% of the total water abstracted.[141] Although the study concluded that the water treatment sludge did not appear to have immediate adverse effect on the water quality of the swamp, it observed that aluminium toxicity in the sludge was stunting vegetation growth in the wetland. [142]

Pollution from Industries

Many industries in the Lake region have been found to be a source of both point and non-point pollution. This is attested by the presence of industrial pollutants in the Region's water system.[143] Various studies have shown that many industries[144] discharge untreated or ill treated effluent into water bodies, either deliberately or out of negligence.[145] Notable among the big polluters are distilleries, breweries, bottling factories, slaughter houses, vegetable oil refineries, cotton and paper mills, leather tanneries, soap, diary and fish factories, food processors and large sugar refineries,[146] several of which are located a short distance from the Lake. While Tanzania and Kenya have made an effort towards ensuring the treatment of industrial waste,[147] their efforts can easily be compromised by the fact that not all parties sharing the water system are complying with the rules. On the other hand, however, Chege observes that although Kenya has stricter pollution laws, they are

[140] Kampala, which is located on the northern fringes of Lake Victoria, is the capital city of Uganda.
[141] R. Kaggwa et al, 'The Impact of Alum Discharges on a Natural Tropical Wetland in Uganda' (2001) 35 Water Resources 795, 796.
[142] ibid., at p. 805.
[143] See, generally, P. A. Scheren, H.A. Zanting and A. M. Lemmens, 'Estimation of Water Pollution Sources in Lake Victoria, East Africa: Application and Elaboration of the Rapid Assessment Methodology' (2000) 58 Journal of Environmental Management 235.
[144] The industries investigated in Scheren et al's study include Mwanza Tanneries; Lake Soap industries Limited; Vegetable oil industries limited and; Nyanza bottling limited. See Tables 2 and 5 in Scheren (2000) op. cit., n. 143, at pgs. 239 and 240, respectively.
[145] Ntiba et al (2001) op. cit., n. 7, at p. 214; and Scheren et al (1994), quoted in UNEP/UNDP/DUTCH (1999) op. cit., n. 138.
[146] See, generally, Scheren (2000) op. cit., n. 143; and Ntiba et al (2001) op. cit., n. 7, at p, 214.
[147] See, generally, Scheren (2000) op. cit., n. 143, at pgs. 235-248.

inadequately enforced because of the ties between some proprietors of the polluting industries and some government officials.[148] That notwithstanding, polluting industries occasionally prefer to pay a fine of Kshs.10, 000 (US$220) than install effluent treatment equipment that may cost in the excess of US$2 million.[149]

Pollution from Agricultural Activities

As agriculture intensifies, due to increasing population and decreasing soil fertility, the use of manure and agro-chemicals is steadily becoming popular in the Lake region. While agro-chemicals were, until recently, mostly used on large farms and plantations, small-scale farmers are increasingly adopting them as a matter of routine.[150] As earlier stated, the proliferation and uncontrolled use of agro-chemicals is the largest cause of agricultural based pollution. It is estimated that 50% of the pesticides used is carried away by wind and run-off and eventually finds its way into the water system.[151] Atmospheric transportation is believed to be responsible for carrying *organochlorine* pesticides from distant places to the Lake region.[152] A recent study found several of the Nile Perch in Uganda's part of the Lake Victoria to have been contaminated with *organochlorine* pesticides and *PolyChlorinated Biphenyls*.[153] Although pesticide toxicity is not considered very prevalent, toxic compounds like *dieldrin* and *aldrin*, banned in developed countries, are still in use in the Great Lakes region.[154] Irrespective of the 1993 and 1999 restrictions on their importation in Uganda, chlorinated pesticides continue to be used.[155] Also, the growing practice of

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[148] Chege Nancy, 'Lake Victoria a Sick Giant' available at <http://www.peopleandplanet.net/doc.php?id=2110> accessed 13 June 2008.
[149] ibid.
[150] Ntiba et al (2001) op. cit., n. 7, at p. 214.
[151] See "Atmospheric Concentrations of Organochlorine Pesticides in the Northern Lake Victoria Water Shed", in " in Lake Victoria Environmental Management Project, *Knowledge and Experiences Gained from Managing the Lake Victoria Ecosystem*, (LVEMP, Dar es Salaam, 2005) 80-89; See also, Scheren (2000) op. cit., n. 143, at pgs. 235-248.
[152] See John Wasswa et al, 'Organochlorine Pesticide Residues in Sediments from the Uganda side of Lake Victoria' (2011) 82 Chemosphere 130; See also, LVEMP (2005) op. cit., n. 151.
[153] F. Ejobi et al, 'Polychlorinated Biphenyls and Organochlorine Pesticide Residues in Nile Perch (Lates Nilotica) from Lake Victoria, Uganda' (2007) 2 Journal of Fisheries International 158.
[154] Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 129.
[155] Chlorinated pesticides such as Lindane and Endosulfan were found to be among those used in the Lake basin, while there are indications that others such as Dichloro-Diphenyl-Trichloroethane (DDT)

locating chemical intensive agricultural activities close to water sources is increasingly exposing the latter to high levels of pollution. It was, for instance, found in a recent study that toxic chemicals used by flower farms located on Lake Victoria's shoreline were present in the Lake.[156] Largely, the problem of agro-chemicals arises from the manner in which they are handled and used. A study carried out in part of the Lake region found that, due to ignorance, poverty and limited agriculture extension services, many pesticide safety rules and measures were being ignored by both the farmers and the local distribution chain.[157]

Pollution from Mining Activities

Although mining is generally not a wide-spread activity in the Region, it increasingly becoming a key source of pollution. Gold mining is particularly an area of concern because its extraction involves the use of sodium cyanide and mercury, both of which are strong poisons.[158] It has since been established that the mercury residue left in the river valleys after mining often finds its way into the water system and eventually into aquatic and human life.[159] Straaten estimates that the annual amount of mercury released into the environment from the small-scale processing of gold, in Tanzania's northern gold fields, is three or four tonnes,[160] posing the highest risk at the local levels, especially to the persons who are directly involved in its mining and

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and Dieldrin are also in use, especially in agriculture and in curbing mosquito breeding. See LVEMP (2005) op. cit., n. 151.

[156] Byaruhanga Achilles and Nalwanga Dianah, 'Ten Years of Continuous Waterbird Monitoring at Lutembe Bay, Lake Victoria, Uganda' in Boere G.C., Galbraith C.A. and Stroud D.A. (eds), *Waterbirds Around the World* (Scottish Natural Heritage, Edinburgh, UK 2006).

[157] K.. N. Musabila, 'Study of Agrochemical Handling and Use in Magu District Tanzania' in Lake Victoria Environmental Management Project, *Knowledge and Experiences gained from managing the Lake Victoria Ecosystem*, (LVEMP, Dar es Salaam, 2005) p. 51-59.

[158] Geita Gold Mines, the biggest gold-mine in East Africa is located 20Kms off the southern shore of Lake Victoria. For more information on the impact of gold mining in the Lake region, see World Rainforest Movement, 'Gold Mining Adds New Problems to Lake Victoria' Bulletin Issue No 39, October, 2000 available at <http://www.wrm.org.uy/bulletin/39/Tanzania.html> accessed 29 April 2009.

[159] See, generally, P. van Straaten, 'Human Exposure to Mercury due to Small Scale Gold Mining in Northern Tanzania' (2000) 259 The Science of the total environment 45.

[160] Van Straaten (2000) op. cit., n. 159, at p. 46.

processing.[161] Between 20%- 30% of this anthropologically introduced mercury ends up in soils, tailings, stream sediments and nearby water sources, mainly through rain, air and direct disposition.[162] Although it is thought that the anthropologically introduced mercury reaching the aquatic environments is generally low, possibly because much of it is retained in the soils,[163] this may not necessarily be a precursor that all is well. Ogutu-Ohwayo *et al*, for instance, caution that;

> "Although concentrations of heavy metals can initially be small, some heavy metals are biologically concentrated at different trophic levels."[164]

It is believed that the heavy metals gradually being deposited into the Lake will, at some moment, ultimately reach toxic levels that may eventually end up in the food web.[165] Notwithstanding the immediate potential risk of mercury to humans, this hazardous metal can gradually transform itself into the more harmful *methylmercury*, which can become concentrated in the aquatic food chain, through bio-magnification.[166]

Pollution from Water Transport

Although motorised traffic on Lake Victoria is currently not heavy, the fishing, passenger and research vessels pollute the Lake by discharging oil and its products.[167] It is estimated that because of their old age, the vessels plying the Lake spill up to 75 litres of oil per cruise, through bilge water, which is pumped directly into the Lake.[168]

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[161] See, generally, Van Straaten (2000) op. cit., n. 159.
[162] Van Straaten (2000) op. cit., n. 159, at p. 46.
[163] See, generally, Machiwa (2003) op. cit., n. 60
[164] Ogutu-Ohwayo (1997) op. cit., n. 103, at p. 129.
[165] See, generally, Van der Knaap et al (2002) op. cit., n. 106; See also, J. R. Ikingura and H. Akagi, 'Monitoring of Fish and Human Exposure to Mercury due to Gold Mining in the Lake Victoria Goldfields, Tanzania' (1996) 191 The Science of the Total Environment 59.
[166] See Ikingura (1996) op. cit. n. 165.
[167] Ogutu-Ohwayo, et al (1997) op. cit., n. 103, at pgs. 127 and 129.
[168] Lake Victoria Environmental Management Programme (ed) *Waste Water Report: Study on Toxic Chemicals/oil Products Spill Contingency Plan for Lake Victoria*, Vol. V (RFP#LVEMP/RCON/003, Toxic Chemical/ Oil Products Spill Contingency Plan, LVEMP 2001) p. 27.

With the recent discovery of vast oil well in Uganda, it is highly anticipated that the Lake is likely to be a major medium in the transportation of the oil and its products, thus raising the pollution risks. Indeed, the revival for water transport is being reconsidered, especially on Lake Victoria. As mentioned, the EAC has put in place at least three legal instruments on inland transportation, but their implementation is yet to be effected.[169]

Despite the various sources and immediate causes, the continued pollution in the Lake region significantly arises from the lack of enforcement of existing regulations concerning chemicals use and disposal and also the out-datedness of the current legislation.[170] Considering that pollution can arise from various activities cutting across sectors, the pollution control regime is similarly diversely scattered in several laws including those that concern water management, fisheries, agriculture, mining, manufacturing, and physical planning. Aside from the challenge of cross-sectoral coordination, the enforcement of the pollution control laws is drawn back by the fact that most of the concerned laws are centrally enforced. We shall later return to the issue of central enforcement of laws as we, in Chapter Four, assess the major underlying factors responsible for environment degradation in the Lake region.

Decrease in Water Levels

The decrease in Lake Victoria waters has recently become a major national and international concern. While the maintenance of water balance is ideally an ecological process that occurs in natural water bodies, human activity has significantly interfered with such processes. Notwithstanding the indirect human factors, such as deforestation which are believed to precipitate drought which in turn impacts on the amount of rainfall, Lake Victoria's apparent receding has been partially blamed on the interference with its natural drainage system. The recent

[169] The instruments are: The Tripartite Agreement on Inland Waterway Transport (November 2002); Search and Rescue Agreement (September 2003) and; The Lake Victoria Transport Management Act (2007).
[170] Odada et al (2004) op. cit., n. 130, at p. 18.

diversion of the Nile to supply water to a new hydropower plant at Jinja, Uganda, has for example been blamed for the recent drastic decrease in the Lake water level. In disregard to expert advice, a canal was constructed to divert water that was thought to be in excess of what the then existing power plant required.[171] It is believed that this development rather than drought is largely responsible for the recent recession of the water level,[172] which has *inter alia* impacted on power generation.[173] It is further feared that the apparent drop in water level is a precursor for the various challenges to follow.[174] Aside from water over-draw, ill-planned hydro-power projects are known to cause adverse environmental impacts in both the aquatic and terrestrial ecosystems.[175]

Wetlands Degradation

Steadily, human activity has greatly contributed to the degradation and in some cases, the total destruction of the Lake region's wetlands,[176] leading to devastating effects, especially in the areas that receive unreliable rainfall.[177] Wetlands degradation has been manifested in various forms including: vegetation clearance and the burning of macrophytes for purposes of land reclamation; discharge of waste and toxic elements; illegal and improper fishing practices; grazing and the

[171] It is estimated that under natural conditions, 76% of Lake Victoria's water loss and outflow is through evaporation and 24% as a discharge to the Nile. Discharge through the Nile was, however, estimated to have increased to 32%, following the construction of another water channel to supply a new power station. See Hilary Onek, 'Victoria Levels Might not Recover' *The New Vision, Uganda* (11 October, 2004); and 'Activists blast World Bank over Bujagali' *The New Vision* (22 December 2001).
[172] Editorial, 'Uganda, Greatest Risk Facing Uganda' *The New Vision*, (Kampala, 27th January, 2005).
[173] *The New Vision*, "Uganda, Use Small Dams for Power" (Editorial), Saturday, 1st January, 2005.
[174] It is estimated that while operating at capacity, the two power stations require a water flow rate of 1,800 cu.m/sec, which is far above the 1899-2004 average of 800 cu.m/sec and almost twice the Nile's capacity at Jinja. It is, therefore, feared that, if the flow rate is not controlled, the Lake Victoria water level will within 5 to 6 years, be reduced to the 1954 pre-dam levels and thus causing serious climatic and environmental consequences. See Hilary Onek, 'Victoria Levels Might not Recover' *The New Vision, Uganda* (11 October, 2004).
[175] Daniel Kull, 'Connections between Recent Water Level Drops in Lake Victoria, Dam Operations and Drought' available at <http://www.internationalrivers.org/files/060208vic.pdf> accessed 12 May 2008.
[176] See G. R Kassenga, 'A Descriptive Assessment of the Wetlands of the Lake Victoria Basin in Tanzania' (1997) 20 Resources, Conservation and Recycling 127; See also, Bugenyi (2001) op. cit., n. 59.
[177] Machiwa (2003) op. cit., n. 60

introduction of non-traditional or alien species such as the water hyacinth into wetlands.[178] Owing to the chain of relationships within the Region's ecosystem, the degradation of wetlands has not only threatened the Lake but its entire ecosystem and also the lifestyle and livelihood of the local community.[179] A recent study in one of Lake Victoria's sub-basins has, for instance, found that cultivation or vegetation clearing in wetlands had significantly reduced its buffering capacity and thus off-setting a chain of environmental problems.[180] Increased human encroachment on wetland resources is mainly being precipitated by: the scarcity of agricultural land; search for alternative sources of livelihood; poverty that overshadows sustainable natural resource use; ill defined wetland boundaries; and laxity in enforcement of regulation.[181]

Eutrophication and Anoxia

Eutrophication is defined by the United States Geological Survey as "[t]he process by which water becomes enriched with plant nutrients, most commonly phosphorus and nitrogen, thereby causing excessive growth of aquatic plants."[182] Anoxia, which is often a result of eutrophication, is the state of lack of or decrease in oxygen levels. Although these states can occur naturally in water bodies, they are often accelerated by human activity.[183] In a study on human impact on Lake Victoria, Verschuren *et al* established a strong chronological relationship between historical land use and algae production, which they concluded to be the major cause of eutrophication in the Lake.[184] Nutrient loading in the Lake mainly arises from atmospheric sources,

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[178] Hongo and Masikini (2003), op. cit., n. 79, at p. 1002.
[179] J. K. Kairu, 'Wetland Use and Impact on Lake Victoria, Kenya Region' (2001) 6 Lakes and Reservoirs: Research and Management 117, 118.
[180] S. N Wanjogu and C.R.K Njoroge, 'The Distribution, Characteristics and Utilisation of Wetland Soil in Sio Basin, Westem Kenya in the Lake Victoria Basin, Uganda' in LVEMP, *Knowledge and Lake Victoria Environmental Management Project, Experiences Gained from Managing the Lake Victoria Ecosystem* (Dar es Salaam 2005) pgs. 51-59.
[181] Kairu (2001) op. cit., n. 179, at p. 123.
[182] See 'United States Geological Survey', at <water.usgs.gov/pubs/circ/circ1144/nawqa91.11.html.> accessed on 28th January 2005.
[183] Scheren (2000) op. cit., n. 143.
[184] Verschuren D. and others, 'History and Timing of Human Impact on Lake Victoria, East Africa' (2002) 269 Proceedings of the Royal Society B: Biological Sciences 289, 293.

industrial and domestic sewage, agricultural run-off and soil erosion.[185] The deterioration of Lake Victoria's deep-water oxygen regime was first detected in the early 1960s and the trend has since been on the increase, with seasonally persistent eutrophication-induced occurrences. Aside from the water abstraction and health related problems, anoxic waters barely support plant and animal life. [186] Additionally, the fishes and other water organisms that use deep water mud habitats are forced to flee their anoxic refuge and, therefore, exposed to predation.[187] This condition probably facilitated the Nile perch to decimate the demersal *haplochromine* fish stocks. Excessive nutrient loading is also a major cause for changes in phytoplankton productivity and composition in aquatic systems.[188] Phytoplanktons normally control algae growth which is usually accelerated by excess nutrients.[189] Also, although not the main cause of eutrophication, the introduction of the Nile perch has disrupted the food web in the Lake, by feeding on *haplochromines*, which are believed to be critical in maintaining an efficient flow of the Lake system's organic matter.

Deforestation and Loss of Vegetation Cover

Deforestation and generally, the extensive loss of vegetation cover remains a major environmental problem in the Lake region. At an average annual deforestation rate of 1.76%, Uganda lost an estimated 1,297,000 hectares of its forests cover, between 1990 and 2005, which translates to about 26.3% of the then total forest cover.[190] While In Tanzania and Kenya the forest cover fell by 15% and 5%, respectively, over the same period.[191] The degradation and in other cases total destruction of the

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[185] Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 129; See also, Odada, et al (2004) op. cit., n. 130; Ntiba, et al (2001) op. cit., n.7; and Geheb (1997) op. cit., n. 67.

[186] National Council for Science and the Environment at <http://www.cnie.org/nle/AgGlossary/letter-e.html> accessed 28th January 2005.

[187] See Dirk Verschuren, et al (2002) op. cit., n. 184, at p. 292.

[188] This is because there is excessive production of algal biomass, due to loss of phytoplanktivores, which consume accumulated nutrients. Verschuren et al (2002) op. cit., n. 184, at p. 292; See also, Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 127.

[189] ibid.

[190] See 'Mongabay Forest Database' available at <http://rainforests.mongabay.com/deforestation/2000/Uganda.htm> accessed 16 June 2007.

[191] See 'Mongabay Forest Database' available at <http://rainforests.mongabay.com/20kenya.htm> and <http://rainforests.mongabay.com/20tanzania.htm> accessed 16 June 2007.

forests is mainly caused by vegetation clearance and burning in search of agricultural land, settlement, timber, charcoal and firewood. In the gold mining regions of Tanzania, deforestation has been exacerbated by the high demand of wood in the gold mining and processing activities.[192]

While the exact impact of deforestation has not been fully established and quantified in the case of the Lake Victoria region, Uganda's National Forestry Authority (NFA) based on the strength of chronology, believes that there is a link between deforestation and the water balance of the Lake. It thus argues that since forests are important entities in the hydrological systems, deforestation, whose impacts include siltation and precipitation of drought, inevitably impacts on the quantity of water in the water bodies and courses.[193]

Generally, deforestation has led to both simple and complex impacts. In the Gwassi Hills of Kenya, for example, it is believed to be a major contributing factor to changes in the local climatic conditions and a precursor for soil erosion and reduced water flow, which has resulted into rivers and springs becoming seasonal.[194] Like other components of the basin's ecosystem, degradation of forests also impacts on other natural resources. For example, since forests are known to be 'water reserves', their degradation inevitably imparts a cascading effect on the entire hydrological system of which they are part. As is the case with other natural resources, population growth, poverty incidence and the drive for socio-economic development are believed to be the main precipitators for deforestation in the Lake region.

[192] UNEP/UNDP/DUTCH (1999) op. cit., n. 138.
[193] Verschuren et al (2002) op. cit., n. 184, at p. 289; See also, Drichi Paul, 'Deforestation and Dropping Water Levels in Lake Victoria' (National Association of Professional Environmentalists: Multi-Stakeholder Workshop on the Decline of Lake Victoria Water Levels, Kampala,15 August, 2006).
[194] Ong´ang´a Obiero et al, *Gwassi Hills Bulletin* (Osienala Friends of Lake Victoria, undated) p. 8.

Water Hyacinth Infestation

Despite its positive attributes,[195] the water hyacinth (*Eichhornia crassipe*) is now ranked high among the environmental threats of the Region.[196] While it is largely believed that the weed got into Lake Victoria mainly through natural processes, it is argued that its growth and spread rates have been boosted by the high level of nutrients in the Lake, a condition that has been majorly anthropologically precipitated.[197] Since its recent occurrence on Lake Victoria in 1989, the weed has not only proved to be an environmental threat but also a socio-economic problem. The weed is capable of disrupting breeding and juvenile feeding grounds for fish, because of its tendency to thrive in shallow and sheltered bays where such activities take place. It also forms dense floating mats that hamper navigation, block irrigation channels and intakes for water treatment and power generation plants.[198] Further, it provides breeding grounds for mosquitoes and snails which cause malaria and *schistosomiasis*, respectively.[199] In addition, presence of the weed reduces habitable space for aerobic organisms, as there is not normally enough oxygen below its mats. It also accelerates the evaporation of water, by three and a half above normal, therefore leading to rapid loss of water.[200] These impacts have severely affected not only the riparian communities but also the other parties that use the Lake and its resources.[201]

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[195] See Christine Mathenge, 'Securing local livelihoods in the Lake Victoria region: An alternative approach to the water hyacinth problem', at http//www.acts.or.ke/LV%20%20Secure%20livelihood.htm> accessed 23 July 2007.

[196] In 1995, about 80% of the Ugandan's shoreline was estimated to have been covered by 2, 200 hectares of stationary weed and its mobile chunks constituted another 1,800 hectares. In 1998 the total coverage of the weed was, in Kenya's and Tanzania's part of the Lake, estimated at 6000 ha and 2,000 ha, respectively.

[197] Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 129; See also, Odada, et al (2004) op. cit., n. 130; Ntiba, et al (2001) op. cit., n.7; and Geheb (1997) op. cit., n. 67.

[198] Wilfred M. Osumo, *Effects of Water Hyacinth on Water Quality of Winam Gulf, Lake Victoria* (The United Nations, UNU-Fisheries Training Programme 2001) p. 7.

[199] Ogutu-Ohwayo et al (1997) op. cit., n. 103, at p. 126.

[200] ibid., at p. 25-27.

[201] A.M. Mailu., 'Preliminary Assessment of the Social, Economic and Environmental Impacts of the Water Hyacinth in the Lake Victoria Basin and the Status of Control' in M.H. Julien, M.P. Hill and T. D. Center (eds), *Biological and Integrated Control of Water Hyacinth, Eichhornia Crassipe: Proceedings of the Second Meeting of the Global Working Group for the Biological and Integrated Control of Water Hyacinth* (ACIAR 2001) p.131

To contain its spread the East African countries under auspices of the Lake Victoria Environmental Management Programme (LVEMP), concerted efforts and successfully tackled the hyacinth problem.[202] By 1999, the weed had been controlled in Uganda and by the end of 2000 it had almost disappeared in Tanzania and Kenya. While it appears that the weed has been contained,[203] some of the methods applied in its control have raised environmental concerns. Although it was basically controlled through mechanical and biological methods, the use of chemicals has been experimented with and it indeed remains an option. The biological method has been criticised for its potential to create one problem whilst solving another, [204] as it is feared that if not controlled, the weevils used in this method may resort to eating crops after diminishing the weed.[205] Although the water hyacinth remains a potential problem, the regional effort to control it presents a landmark success story of regional cooperation in environmental management.

[202] James A. Ogwang and Richard Molo, 'Threat of Water Hyacinth Resurgence after a Successful Biological Control Programme' 14 Biocontrol Science and Technology 623; See also, Kelley Lubovich, *Cooperation and Competition: Managing Transboundary Water Resources in the Lake Victoria Region* (Working Paper No. 5, Foundation for Environmental Security and Sustainability 2009) pgs. 5-7.

[203] Although not at significant levels, the hyancith has seldom re-occurred in some parts of the Lake. See G. W. Howard and S.W. Matindi, *Alien Invasive Species in Africa's Wetlands: Some Threats and Solutions* (IUCN Eastern African Regional Programme, Nairobi, Kenya 2003).

[204] The *Neochetina bruchi* and *Neochetina eichhorniae* species of weevils, imported from the Republic of Benin, were used to eat up the weed. See Knaap et al (2002) op. cit., n. 106.

[205] To allay such fears it is argued that the weevil population naturally crashes with the disappearance of the weed and then builds up with the re-occurrence of the weed. Such a trend is expected to continue until an ecological balance is struck between the two. See James A. Ogwang and Richard Molo, 'Threat of Water Hyacinth Resurgence after a Successful Biological Control Programme' 14 Biocontrol Science and Technology 623.

Conclusion

As has been demonstrated, the Lake region is already experiencing various environmental problems, mostly resulting from unsustainable human practices. Such practices will not only exacerbate the existing problems but are also likely to create new ones. The ecological and socio-economic impacts resulting from the degradation has triggered problem cycles that are affecting several interests both within and outside the Lake region. Likewise, the Lake region's environmental state should be a concern of many interests. As will be discussed in Part IV and V, however, such synergy is lacking as the ENRM regimes have failed to sufficiently address the historic problem of state-centrism discussed in Part III, that has persisted since the colonial era. It is in the light of this that the thesis argues that the rethinking an appropriate ENRM regime, or rather, the search for the solutions to the environmental problems in the Lake region is more than a local affair. This would, in other words, require a good understanding of the root causes to the problems and a concerted effort of the major stakeholders at the various levels of interest. This Chapter has explored the immediate or direct causes of the degradation, which may be considered to be symptoms to other major problems. The following Chapter discusses the factors believed to be the major underlying causes behind environmental degradation in the Lake region.

CHAPTER FOUR

The Underlying Causes of Environmental Degradation in the Lake Region

Following the review of the importance and state of various natural resources in the Lake Victoria region, in Chapter Three, this Chapter discusses the major underlying factors that are believed to precipitate the myriad immediate causes responsible for environmental degradation in the Lake region. Despite the close relationship between them, the underlying factors can broadly be said to be occurring at different levels. These include: the externally influenced factors such as those relating to macro-economic policies; those inherent in the broader socio-economic state of the Region, such as poverty and population pressure; and those accruing from within the management regimes, such as the property rights and institutional failures. While we shall be exploring each of these three categories, our major interest is on the latter two, which unlike the former, are reasonably within reach of state control. An effort will be made to demonstrate that notwithstanding the individual contribution of each underlying factor towards environmental degradation, their prevalence results from state-centralism, which has continued to stifle effective participation and coordination across parties at various levels.

It will be argued that, since the Lake Victoria region is shared among sub-national and national governments, a multi-level government model that rationalises ENRM powers and functions among the local, national and regional government levels, is likely to offer a robust framework through which the underlying causes for environmental degradation in the Lake region can be concertedly addressed. An attempt will also be made to demonstrate that while the factors of population pressure and poverty are inherent in the broader socio-economic state of the Lake region, their manifestation as underlying factors for environmental degradation is partly due to the lack of an institutional arrangement capable of facilitating the

participation of local people, who are often most affected by the problems associated with poverty and population pressures.

Drawing on the argument that environmental degradation is not entirely a human construction, we shall, as an example, first discuss one of the instances through which nature can be self-destructive.

Natural Causes

While Chapter Three suggests that environmental degradation in the Lake Victoria region is largely a result of human activity, several studies have pointed to the contribution of natural causes to environmental degradation in the Region. Taking the decrease in water levels as an example, recent geological studies suggest that the state of Lake Victoria is prone to natural cycles. It is believed that as a result of natural causes, the Lake has ever desiccated between 10 and 14 millennia ago, during the late *Pleistocene* period.[1] Basing on the fact that its water mostly arrives and is also drained through precipitation, the Lake is said to be extremely sensitive to changes in climatic conditions especially, rainfall, temperature and humidity. *Paleo-climatic* studies show that the Lake basin has periodically been subjected to long-term climate variability. The studies look at *Croll-Milankovitich* (orbital insolation and forcing) and *El Nino/La Nina* (global ocean and atmospheric circulation) cycles as some of the natural factors that have for long been influencing the water levels of Lake Victoria.[2]

As for the recent times, the surging water levels of the Lake, between 1960 and 1964, is believed to have been a result of El *Nino* rains that may have experienced climate

[1] Johnson C. Thomas et al, 'Late Pleistocene Desiccation of Lake Victoria and Rapid Evolution of Cichlid Fishes' (1996) 273 Science 1091: See also, Philip Barker and Françoise Gasse, 'New Evidence for a Reduced Water Balance in East Africa during the Last Glacial Maximum: Implication for Model-Data Comparison' (2003) 22 Quaternary Science Reviews 823.

[2] See Thomas C. Johnson, Kerry Kelts and Eric Odada, 'The Holocene History of Lake Victoria' (2000) 29 Ambio 1; See also, Stefan Hastenrath, 'Variations of East African Climate during the Past two Centuries' (2001) 50 Climatic Change 209.

driven analogues over the last hundreds of years.[3] During the unusually high rains of the 1960s, the Lake level hit the highest ever known and recorded height of 13.5 meters, which was a rise of about 2 meters. Since mid-2003, however, the Lake has experienced a constant and drastic recession of its waters, which reached the pre-1960 levels in 2005 and was tending towards the historic lowest of 10.13 meters, recorded between 1948 and 1949.[4] Indeed, historical information suggests that the Lake level has, in the last century, never been close to the 1880 level, which was 3 metres above the current level.[5] Such scientific evidence has nonetheless not under-estimated human contribution to environmental degradation. Interestingly, the issue of climate change, which is said to be instrumental in the Lake's water balance, is increasingly being blamed on human activities. As such, there appears to be human visibility in the causal-effect relationship that underpins some of the cases of environmental degradation believed to be naturally induced. In other words, some natural conditions that may eventually lead to degradation can be avoided through human intervention. Let us now turn to the underlying factors believed to be a direct result of anthropologically driven causes.

Macro-Economic Policies and Environmental Degradation

Although economy-wide strategies such as macro-economic policies are not usually targeted at specific environmental objectives, they often have major impacts on the environment. These policies can lead to policy distortions, market failures and institutional constraints, leading to short and long term environmental consequences.[6] The purpose of macro-economic policies can also stimulate

[3] See, generally, the discussion on various studies on Lake Victoria's water balance in, Yin Xungang and Sharon E. Nicholson, 'The Water Balance of Lake Victoria' (1998) 43 Hydrological Sciences Journal 789.

[4] Holli Riebeek, 'Lake Victoria's Falling Water' *NASA Earth Observatory*, (13 March 2006) p.5, available at <http://earthobservatory.nasa.gov/Features/Victoria/> accessed 31 July 2007.

[5] See Fig. 1 in Xungang (1998), op. cit. n. 3 at p.790. See also S. E. Nicholson, 'Historical Fluctuations of Lake Victoria and Other Lakes in the Northern Rift Valley of East Africa' in J. T. Lehmand (ed), *Environmental Change and Response in East African Lakes* (Kluwer, Dordrecht, The Netherlands 1998) p. 7-35.

[6] Mohan Munasinghe, 'Is Environmental Degradation an Inevitable Consequence of Economic Growth: Tunneling through the Environmental Kuznets Curve,' (1999) 29 Ecological Economics 89, 91-92.

environmental sustainability.[7] As Munasinghe observes, however, finding solutions to such unintended impacts does not necessarily call for a reversal of the policies but rather the institution of mitigation measures.[8] In other words, the actual or potential threat of a macro-economic policy on the environment should stimulate a change in the management of the resources in question.

As we continue to blame the states for their state-centrism that has impacted on natural resource management, it is important also to ask ourselves why states prefer the status quo. The answer partially lies in our understanding of the macro-economic issues at play. This is certainly a wide area of study but we shall focus on four selected issues. We shall later argue that although macro-economic policies in developing countries are often 'externally' influenced and thus often not under the full control of the state, their impact on the environment can be avoided or mitigated, given the right ENRM regime. Prior to a more elaborate exploration on the four macro-economic issues of the Structural Adjustment Programmes, trade liberation and donor aid and state-indebtedness, we begin below with a brief overview of the economic development - environmental degradation nexus.

Economic Development -Environmental Degradation Nexus

While the link between economic development and environmental degradation is undisputable, the debate appears to shift on the extent to which the former can negatively or positively impact on the latter. As such, the concept of economic development remains central in the understanding of ENRM regimes. We shall examine the theoretical and conceptual issues relating to the economic development-environmental degradation nexus, with a particular focus on the developing economies, where the nexus is believed to be most vivid and inherent.[9]

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[7] ibid., at p. 91.
[8] ibid., at pgs. 89-109.
[9] Jane Roberts, *Environmental Policy* (Routeledge, New York 2004) p.164; Maurice Strong, 'Environment and Sustainable Development in Africa' in Dharam Ghai (ed), *Renewing Social and Economic Progress in Africa* (Macmillan Press, London 2000) p. 152.

Developing economies continue to be strongly affected by environmental degradation that has often resulted in devastating ecological and socio-economic impacts.[10] While such impacts extend to both the individual and the economies in general,[11] for economic reasons, this fact has not deterred the unsustainable use of the resources in the developing countries. Panayotou argues that because natural resource exploitation is the engine for economic growth in the developing world, it is not possible for them to divorce environmental policy from economic policy and the development strategy, in general.[12] As a result deliberate efforts of sustainable development have often been frustrated by institutional, attitudinal, economic and political factors, leading to continued deterioration of the environment.[13] This probably explains the reason many African countries are said to be having an 'environmental debt', where the cost for remedial action greatly exceeds that for preventive action.

To avert the problem, several attempts have been made to develop models that promote the harmonious co-existence of environmental and developmental interests, where the two should be conscious and accommodative of each other, thus the recent coining of the term 'sustainable development'. In disagreement with more extreme environmental fundamentalism, the Brundtland Report recognises the need for compatibility between economic growth and environmental protection – a 'win-

[10] According to the United Nations Environment Programme, Africa has of recent seen various forms of environmental degradation including: soil erosion, which is believed to have affected an estimated 500 million hectares of land, since 1950; degradation of approximately 65 per cent of agricultural land; loss of approximately 39 million hectares of tropical forest during the 1980s, and another 10 million hectares by 1995; water stress and scarcity, which has affected fourteen countries and a further eleven expected to be affected by 2025. Facts extracted from United Nations Environment Programme (UNEP), *Global Environmental Outlook 2002* (Earthscan 2000), and particularly, Chapter Two on the State of the Environment in Africa.

[11] Strong (2000) op. cit., n. 9, at p. 152.

[12] Theodore Panayotou, *Economic Instruments for Environmental Management and Sustainable Development* (United Nations Environment Programme - Environment and Economic Unit 1994) p. 2.

[13] Strong (2000) op. cit., n. 9 at p. 152; and Roberts (2004) op. cit., n. 9, at p. 164.

win' situation.[14] The report is generally more emphatic on the 'quality of growth', where the individual and institutions are seen as part of the environment so as to facilitate an inter-dependent co-existence.[15]

Partially due to the aforementioned, development economics is increasingly becoming an area of interest in environmental studies. Unlike poverty, which is commonly seen as a catalyst for individual human behaviour, the failures castigated by economic development reasons are usually blamed on the state. This is so because the development and enforcement of both the economic development and environmental management policies is largely State mandate. The next section examines four of the major economic development related issues believed to influence state action or inaction in environmental management in the developing world.

The Structural Adjustment Programmes and their Legacy

In the 1980's, many developing countries adopted the International Monetary Fund (IMF)/World Bank's Structural Adjustment Programmes (SAPs), which were basically designed to address their balance of payments and structural inefficiency problems. The SAPs typically involved currency devaluation, trade liberalisation, privatisation and public spending reductions. The issue of trade liberalisation is separately discussed in the following section.

Generally, the adoption of the SAPs was conditionality for accessing loans, especially from the IMF and the World Bank.[16] While the impact of these programmes on the environment can best be assessed on a case-by-case basis, they have generally been

[14] See Gro H. Bruntland (ed) *Report of the World Commission on Environment and Development: Our Common Future* (Annex to document A/42/427 - Development and International Co-operation: Environment, UN General Assembly 1987).
[15] ibid.
[16] Oliver Morrissey, 'Trade Policy Reforms in Sub-Sahara Africa: Implementation and Outcomes in the 1990s' in Deryke Belshaw and Ian Livingstone (eds), *Renewing Development in Sub-Saharan Africa: Policy, Performance and Prospect* (Routeledge, London, 2002) p. 339 – 353.

criticised for their tendency to shift priorities from development and equity to macro-economic stability and economic growth, and in the process impacting on the proper management of the natural resources.[17] Among the most direct impacts was the restructuring of the public service sector in a manner that dramatically decreased personnel without much regard to its effects on the environmental and other sectors.[18] The reduction in manpower and resources has, to date, impacted on the capacity of many governments to effectively implement their mandate in natural resources management.[19] That aside, the SAPs also entailed a cut back on various government undertakings including many conservation programmes.

As for currency devaluation, studies show that it has had both negative and positive impacts on the environment. Davidson *et al*, for instance, note that the resultant rise in agro-chemical prices was, in Zambia, an incentive for a return to organic farming while, in Chad, the same situation forced cotton farmers to open up more acreage of land in order to maintain the same earnings.[20] In some cases, the SAP policies were found to have distorted bio-diversity. Based on examples of failed forestry projects in Tanzania, Pinkney argues that the SAPs pushed for increased agricultural production without due regard of its effects on the environment by, for example, encouraging the mass growing of exotic plants and trees, most of which were not suitable for the African soils and climate.[21]

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[17] Dalal-Dayton, David Dent and Oliver Dubois, *Rural Planning in Developing Countries: Supporting Natural Resource Management and Sustainable Livelihoods* (Earthscan, London 2005) p.158.
[18] Robert Pinkney, *The International Politics of East Africa* (Manchester University Press 2001) pgs. 46-47.
[19] James Keeley and Ian Scoones, *Understanding Environmental Policy Processes: Cases from Africa,* (Earthscan, London 2003) pgs. 1-13.
[20] Joan Davidson, Dorothy Myers and Manab Chakraborty, *No Time to Waste: Poverty and the Global Environment* (Oxfarm, Oxford 1992) p. 166; See also, Allen Blackman, Mitchell Mathis and Peter Nelson, *The Greening of Development Economics: A Survey* (Discussion Paper 01-08, Resources for the Future 2001) p. 13.
[21] Pinkney (2001) op. cit., n. 18 at pgs. 46-47.

Generally, it is argued that because environmental issues were not systematically integrated into the SAPs, their interrelationship was often inconsistent.[22] Notwithstanding the fact that many recent macro-economic strategies are increasingly being designed with environmental interests in mind,[23] the SAPs left a big footprint as several of their legacies continue to dominate public sector management. As noted by Pinkney, the impact of such external pressure on African governments has had tremendous effects on the environment.[24]

Trade Liberalisation

The framework for trading is usually implemented or influenced or bound by circumstances, laws, policies or commitments occurring at three levels – the nation-state, regional or international levels.[25] While Morrissey observes that because trade reforms are often part of a wider package, their impact cannot be easily measured in isolation,[26] trade policies remain a major underlying factor for environmental degradation among the developing countries. Since the 1980's, there has been a mass shift in trade policy among the developing countries. Many have opted trade liberalisation,[27] which is export-led growth as opposed to the earlier import-substitution-industrialisation strategy,[28] which faced stiff competition from the already industrialised countries.

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[22] Blackman (2001) op. cit., n. 20 at p. 13.

[23] See, for example, the Poverty Reduction Strategy Papers (PRSPs): Government of Kenya, *The Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 (ERSWEC)* (GOK 2004); The United Republic of Tanzania, *National Strategy for Growth and Reduction of Poverty (NSGRP)* (Vice-Presidents Office, URT 2005); and The Republic of Uganda, *Poverty Eradication Action Plan 2005/06 - 2007/08 (PEAP)* (Ministry of Finance, Planning and Economic Development 2004).

[24] Pinkney (2001) op. cit., n. 18, at pgs. 46-47.

[25] Blackman (2001) op. cit., n. 20, at p. 7.

[26] Morrissey (2002) op. cit., at pgs. 339-353.

[27] Trade liberalisation was in some cases adopted voluntarily, but in most cases imposed on the Developing Countries by the International Monetary Fund/ World Bank's Structural Adjustment Programmes (SAPs). See Blackman (2001) op. cit., n. 20 at p. 8.

[28] ibid.

It is argued that since developing countries rely on the production of primary commodities, unchecked trade liberalisation policies propagate over-exploitation of the countries' natural resources.[29] Depending on the targeted sectors, trade liberalisation may have different impacts on the environment. It is, for instance, said to have exacerbated the hunting of wild animals in Tanzania.[30] Trade liberalisation for agriculture export may result in impacts such as soil erosion, while liberalisation of the manufacturing industry may be a cause of industrial pollution.[31] Davidson *et al* believe that export led trade fails to adequately address key issues in the poverty, rights, livelihood and the environment matrix as advocated for by sustainable development.[32]

When viewed from the sustainable development point of view, the critical issue here is not to denounce trade liberalisation but rather the manner in which policy balances it against environmental interests.[33] As observed by Blackman, many empirical studies have found that, apart from a few exceptions, environmental regulations of many countries do not impose environmental costs on industries for fear of impacting on their competitiveness and more generally on the trade partners.[34] Also, the need for trade competitiveness potentially forces policy direction irrespective of any known impact. For example, while some agro-chemicals, such as *dichlorodiphenyltrichloroethane* (DDT), are known to have adverse environmental impacts, their continued use becomes integral of the development process sanctioned and financed by development partners. The trading in banned

[29] See H. Daly, 'The Perils of Free Trade' (1993) 269 Scientific American 50; See also, M. Kothari and A. Kothari, 'Structural Adjustment vs. Environment' (1993) 28 Economic and Political Weekly 473, both quoted in Blackman (2001) op. cit., n. 20 at p. 9.
[30] See H.I. Mujamba, *Regulating the Hunting Industry in Tanzania: Reflection on the Legislative, Institutional and Policy Making Frameworks* (LEAT Publication 2001).
[31] Raghbendra Jha and John Whalley, 'The Environmental Regime in Developing Countries' National Bureau of Economic Research; Working Paper 7305 available at <http://www.nber.org/papers/w7305> accessed 17 September 2005.
[32] Davidson (1992) op. cit., n. 20.
[33] ibid.
[34] See the various studies quoted in Blackman (2001) op. cit., n. 20, at p. 4.

and unregistered pesticides by big multi-national business has, for instance, continued unabated.[35]

The other problem with international trade is the unfair terms of trade, making poor countries earn less than expected, therefore forcing them to exploit their resources further in order to increase their export earnings.[36] On the whole, Oxfam, which advocates for 'people centred development',[37] stresses that export-led economic development,

> "…damages poor people - threatening their rights, their livelihoods and their environment, offering few short-term benefits and no long term employment."[38]

As seen, the developing countries are not solely to blame. As argued by Davidson *et al* many other countries are indirectly responsible for environmental damage in the developing world.[39] At times, irresistible incentives are extended to influence policy in developing countries towards export-led growth that is not favourable to their place-based natural resources.[40]

Indebtedness of the Developing Countries

Over the last two decades, the level of indebtedness in the developing world has increasingly become a big concern to both the lenders and borrowers. It has been

[35] W. M, Adams *Green Development: Environmental and Sustainability in the Third World* (2nd edn, Routeledge, London 2001) pgs. 299 – 308.
[36] Davidson (1992) op. cit., n. 20, at p. 167.
[37] ibid.
[38] ibid.
[39] Ibid., at p.16.
[40] Oran Young, 'Environmental Governance: The Role of Institutions in Causing and Confronting Environmental Problems' (2003) 3 International Environmental Agreements, Politics, Law and Economics 377

argued that debt is one of the factors negatively affecting a multitude of sustainable growth issues in developing countries, of which environmental protection is among.[41] Davidson *et al* note that

> "As people are pushed further into poverty, in part by government measures to deal with debt…the daily struggle for survival forces poor people to exploit ecologically fragile areas…" [42]

Broadly, the relationship between indebtedness and environmental degradation can be seen from two perspectives. First, is the situation where the pressure for debt servicing forces the countries to raise the required foreign exchange through unsustainable practices like over exploitation of the natural resources,[43] and secondly, where environmental protection assets are diverted to debt-servicing.[44] This is aside from the fact that many developing countries budget and spend little on environmental protection, mostly because they find the marginal costs of doing so far exceeds the marginal benefit.[45] Although debt-for-nature swaps are also increasingly being fronted as an option, their adoption remains low,[46] partially because they have often proved to be inequitable in value and hard to monitor.[47] The positive impact of the recent major debt relief programme – the Heavily Indebted Poor Country (HIPC) Initiative,[48] one of whose aims is to facilitate the beneficiary countries to move on the path of sustainable development, is yet to be

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[41] Young (2003) op. cit., n. 40.
[42] Davidson (1992) op. cit., n. 20, at p. 163.
[43] F. Korten, 'Questioning the Call for Environmental Loans: A Critical Examination of Forestry Lending in the Philippines' (1994) 22 World Development 971.
[44] Davidson (1992) op. cit. n. 20, at p. 163.
[45] Blackman (2001) op. cit. n. 20, at p. 11.
[46] ibid., at p. 12.
[47] See M. Sher, 'Can Lawyers Save the Rain Forest? Enforcing the Second Generation of Debt-for-Nature Swaps' (1993) 17 Harvard Environmental Law Review 151, quoted in Blackman op. cit., n. 20, at p. 13.
[48] The Heavily Indebted Poor Country (HIPC) Initiative is an agreement, among official creditors, designed to reduce the debt burden of the most heavily indebted poor countries by writing off most of their big debts. The indebted countries are, in return, obliged to refocus their strategies on building the policy and institutional foundation for sustainable development and poverty reduction.

seen. Interestingly, most of the loans from which the indebtedness accrues were used to fund development projects, such as dams and factories, a good number of which continue to harm the environment.

Donor Aid

Developing countries have for a long time been recipients of different kinds of aid from foreign governments, organisations, firms and even individuals. Every kind of aid aims at achieving a set of objectives. Aid may, therefore, be targeted to directly address environmental problems or aimed at other issues that may indirectly have a bearing on the environment. Since the 1990s, there has been a considerable increase in aid explicitly aimed at protecting the environment in developing countries.[49]

Infrastructural development and sectoral policy reforms are among the major sectors that consume most aid in the developing world. Strong, however, observes that several infrastructural projects like dams and roads and policy reform programmes in sectors like agriculture and forestry, have had adverse effects on the environment, as accomplices in unsustainable patterns of development.[50] The situation is made worse when such projects are mismanaged and thereby putting resources to waste.[51] On a positive note, though, foreign aid is among the single major sources of funds that have directly tackled the problem of environmental degradation. This has taken many forms including: financing of restoration programmes; capacity building for various stakeholders; lobbying various power centres; technical support; and influencing policy decisions.

With the support and encouragement of various players at international, national and local levels, the amount of aid from developed countries and international organisations, specifically for environmental programmes, has increased

[49] Blackman (2001) op. cit., n. 20, at p. 11.
[50] ibid., at p. 10.
[51] Strong (2000) op. cit., n. 9, at p. 162

tremendously since the 1990s.[52] Partially, this development is founded on the two arguments that entail the 'common but differentiated responsibility' principle. First, that developed countries are more responsible for the major global environmental problems. Secondly, is that developed countries have the financial capacity to offer substantial amounts in form of aid. Further, it is increasingly becoming a standard for aid eligibility to be tied to the fulfilment of given environmental conditions. Aid seeking countries may, for example, be required to first put in place legislation on Environmental Impact Assessment (EIA).[53] The major concern does remain, however, as to whether such commitments are genuine or outside the recipient's capacity to implement. Indeed, some writers are sceptical as to whether the environmental consciousness embedded in aid may not be outstripped by the limited local institutional capacity and will for regulation.[54]

Population and Environment Degradation

Having noted, in Chapter Two, that the Lake region has a high and dense population, we now review some literature concerning the population-environmental degradation nexus. This nexus has basically led to two opposing schools of thought. To the neo-Malthusians, whose arguments are largely inspired by Hardin's work, high populations exert pressure on the environment, which eventually results into environmental degradation.[55] On the other side is the group inspired by Boserup, which believes that a growing population often offers more solutions than problems to environmental management.[56] Increasingly, however, scholars in various disciplines, many of them employing empirical evidence, have come to argue that

[52] For instance, the World Bank's Global Environment Facility (GEF) established in 1991 is, inter alia, intended to assist developing countries to fund projects and programs that protect the global environment.
[53] Blackman (2001) op. cit., n. 20, at p. 11.
[54] See, generally, Barbara Connolly and Robert Keohane, 'Institutions for Environmental Aid: Politics, Lessons, and Opportunities' (1996) 38 Environment 12; See also, Korten (1994) op. cit., n. 23.
[55] See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243
[56] See the various works of Boserup and particualry: Ester Boserup, *The Conditions of Agricultural Growth: The Economics of Agrarian Change under Population Pressure* (George Allen and Urwin Ltd, London 1965).

Boserupian and Malthusian processes can coexist rather than conflict.[57] In other words, much as it is a threat to natural resources, population growth can also be an incentive for sustainable practices.

With a population density of 249 people per 1000 hectares and compared to the world average of 442, Africa is generally considered to be under-populated.[58] This should not, however, blind us from the fact that population is normally concentrated in particular areas, especially those that are productive. Population threats to the environment go beyond numbers. It is actually the other attributes such as population structure, distribution, quality and consumption behaviour that paint a more realistic picture on the demographical threats to the environment. The extent and form of stress exerted on the environment is, therefore, highly dependent on the manner in which a particular population relates with its environment.[59]

As already noted, the issue of population pressure is believed to be major underlying cause for environmental degradation in developing countries. At the core of the argument is the contention that since the greatest percentage of the populations in the developing world significantly depend on natural resources for their livelihood, this inevitably impacts on the state of the environment as their scale and mode of resource consumption exceeds the environmental carrying capacity.[60] Population, resources and environmental problems are, therefore, closely associated. However, the manner in which this association is perceived has continued to change in recent literature.

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[57] See M. Demont and others, 'Boserup versus Malthus Revisited: Evolution of Farming Systems in Northern Côte d'Ivoire' (2007) 93 Agricultural Systems 215.

[58] United Nations Environment Programme (UNEP), *Global Environmental Outlook 2002* (Earthscan 2000).

[59] See Roberts op. cit., n. 9, at p.28 -30

[60] Environmental carrying capacity is the maximum population any given environment can sustain in its natural state. See R. J. M. Crawford et al., 'An Altered Carrying Capacity of the Benguela Upwelling Ecosystem for African Penguins (*Spheniscus Demersus*)' (2007) 64 ICES Journal of Marine Science 570.

Considering that all the three East African countries are listed as part of the developing world, the Lake Victoria region should certainly be of no exception. On the face of it, a high population that is greatly dependent on natural resources would imply, for instance, the ravaging of forests, wetlands and land in search for vast amounts of food, firewood, settlements and space for other socio-economic amenities. Human beings would also have to compete for space with wild animals, with the latter being hunted or rather 'poached' for food and business. The high population would, on the other hand, also generate a lot of waste that is eventually released into the environment. It is from this perspective that, Ntiba, for example, observes that the rise in population in the Lake region has equally increased the demand for fish leading to higher prices, which in turn encourage increased fishing effort on the Lake.[61] The list may be endless.

Since agriculture is largely the backbone for socio-economic development in East Africa, let us consider the example of food production. It may be arguable that as demand for food increases with the increase in population, a commensurate increment in food production has to follow. The increased demand for food could be realised either through agricultural extensification, where more farm land has to be opened up, or intensification, where technologies such as pesticides and fertilisers are applied to boost production within a smaller area.[62] While agriculture intensification is mostly found in areas with low population growth rates and extensification in places with rapid population growth rates,[63] the choice of a farming system can be dependent on several other factors, including: land arability; production costs; market competitiveness; availability of technologies; culture and tradition; and security matters. Notwithstanding this, the policy, legal and

[61] See M. J. Ntiba, W. M. Kudoja and C. T., Mukasa 'Management Issues in the Lake Victoria Watershed' (2001) 6 Lakes & Reservoirs: Research and Management 211.
[62] Blackman (2001) op. cit., n. 20, at p. 15.
[63] E. Boserup 'Population and Technological Change'; and S. W. Stone 'Population Pressure, the Environment, and Agricultural Intensification: Variations on the Boserup Hypothesis', quoted in Blackman (2001) op. cit., n. 20, at p. 15.

institutional frameworks remain crucial in ensuring that the opted farming system is sustainable. Although both systems may be practised in a sustainable manner, they have been found to be major immediate causes of environmental degradation.[64] Extensive farming has, for instance, been associated with deforestation and desertification. Also, because of activity intensity and the use of chemicals, agricultural intensification has been found to cause soil erosion, nutrient depletion, soil structure destruction, salinisation, water logging and various forms of pollution.[65]

On the other hand, however, although overpopulation and high population growth rates have been blamed not only for suppressing opportunities for sustainable systems[66] but also for their being direct contributors to environment degradation,[67] they are also believed to be instigators of sustainable practices. It was, for example, found that because of population pressure, the inhabitants of Ukerewe Island on Lake Victoria initiated community soil conservation measures such as tie-ridging and terracing, fencing of gullies and banking of streams.[68] It has also been demonstrated by Tiffen *et al* that Machakos District in Kenya, despite steep increases in population, was 're-greened', since the 1930s, after experiencing adverse soil erosion and other associated environmental problems.[69] To Tiffen *et al*, population growth offers more labour for conservation, a market demand for incentives and generally, 'wise' development initiatives that provide a benchmark for environmental conservation.[70] Adams believes that such arguments have been significant in shaping development

[64] Strong (2000), op. cit., n. 9, at p. 153
[65] Blackman (2001) op. cit., n. 20, at pgs. 15-16.
[66] It is, for instance, argued that the Citemene system in Zambia, where trees are burnt to form a rich ashbed for millet production, became unsustainable because population increase could no longer support such a system. Allan William, *The African Husbandman* (Oliver and Boyd, Edinburgh 1965).
[67] See, generally, Ester Boserup, *The Conditions of Agricultural Growth: The Economics of Agrarian Change under Population Pressure* (George Allen and Urwin Ltd, London 1965).
[68] Thornton and Rounce, quoted in Len Berry and Janet Townshend, 'Soil Conservation Policies In The Semi-Arid Regions Of Tanzania, A Historical Perspective' (1972) 54 Geografiska Annaler Series A, Physical Geography 241, 247
[69] Mary Tiffen, Michael Mortimore and Francis Gichuki, *More People, Less Erosion: Environmental Recovery in Kenya* (John Wiley, Chichester 1994).
[70] ibid.

policy in African agriculture.[71] Basing on Wiggins' comparative study, which found an increment in agricultural output per head as the population increased, and Lindblade *et al's* study which found that over-population can enhance sustainable land-use, Adams concludes that:

> "As more careful studies have been undertaken, it has become clear that under some circumstances population growth in sub-Saharan Africa is leading to sustainable intensification of agriculture, not degradation." [72]

Irrespective of the differing arguments, Davidson *et al* believe that the relationship between environmental degradation and population increase is a complex one and not yet fully understood. They agree, however, that together with other interacting social, economic, political and ecological factors, increase in population contributes to environmental degradation.[73] Subsequently, they argue that the problem of population growth rates and its related problems can best be addressed through integrated approaches.[74] Implicitly, an environmental management strategy is more likely to be effective if it is considerate of other development issues in an integrative manner.

It has been actually argued by several writers that irrespective of the potential impacts of population growth on the environment, it is in most cases the poorly designed policies that are responsible for environmental problems in the developing world.[75] In this respect Strong believes that while some catastrophes such as drought are inevitable, others such as famine are the avoidable results of human induced actions or inactions such as policy failures and misallocation of resources.[76]

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[71] Adams (2001) op. cit., n. 35, at p. 198.
[72] ibid., at p. 194.
[73] ibid.
[74] Davidson (1992) op. cit., n. 20, at pgs. 142 – 158.
[75] See Blackman (2001) op. cit., n. 20, at 16
[76] Strong (2000) op. cit., n. 9, at Pg. 154

Our interest is the population-environment debate is neither to undermine the fact that the effects of population pressure are evident in the Lake region nor to suggest that the pressure should be left to reach a stage that will naturally ignite sustainable practices. Rather, since it has been shown that local communities can organise themselves to fend off the vices of population pressure, this discussion brings to light the fact that the threat of population pressure on natural resources is a manageable affair. In the main, it requires the right platform and authority, to enable effective multi-stakeholder participation, with a view of cultivating consensual decision making and implementation processes. We shall be referring back to the population debate as we conclude this Chapter.

Poverty and Environmental Degradation

Our interest in the poverty and environmental degradation nexus stems from the fact that, as was seen in Chapter Two, the incidence of poverty is high in the Lake region. As with the situation in most developing countries, poverty remains a major socio-economic challenge in the Lake Region and East Africa in general. Unfortunately, a United Nations Development Programme (UNDP) study, which found that over 40% of the people living in sub-Saharan Africa were below the poverty line, believes that the situation is unlikely to improve for decades.[77]

The debate on the poverty and environmental degradation nexus is commonly underpinned by the chorus of poverty being a major underlying factor for environmental degradation in the developing world.[78] Often, this nexus has been perceived to be occurring within a causal-effect relationship. It has actually also been theorised as a complex relationship resulting from a vicious circle that embeds the

[77] United Nations Development Programme (UNDP), *Human Development Report 1997* (Oxford University Press, New York, United States 1998).

[78] See Partha Dasgupta, 'Population, Poverty, and the Natural Environment: Environmental Degradation and Institutional Responses' in Karl-Goran Maler and Jeffrey R. Vincent (eds), *Handbook of Environmental Economics*, vol 1 (Elsevier 2003). See also, Ayoub S. Ayoub, 'Examining the Impact of Natural Resources Scarcity and Poverty on Population Growth in Honduras, Nepal, and Tanzania' (The XXVI International Population Conference , Marrakech, Morocco, September 27 - October 2, 2009)

aspect of population growth.[79] Indeed, poverty juxtaposed with the issue of population growth, is believed to be both a cause and consequence of environmental degradation in the Lake region.[80] Whichever came first is another 'chick and egg' debate. Since poor populations substantially depend on the wealth of the natural environment for a living and in extreme cases for survival,[81] they are usually hit hardest by the impacts of environmental degradation. Adams notes that:

> "The poor are not only frequently blamed for their role in causing environmental degradation [...], but are often chief among its victims, and frequently the losers in the game of balancing costs and benefits of major developments, environmental refugees in the face of anthropogenic environmental transformations." [82]

From a critical view, placing the blame for environmental degradation on poverty is another way of pointing the finger to the poor and more precisely, the rural poor.[83] We should not forget, however, that most of the natural resources are found in rural settings. As these resources attract several interests, rural environmental degradation cannot be blamed squarely on the rural poor. For example, while the rural poor are engaged in environmentally degrading practices like subsistence agriculture, charcoal and fuel wood gathering, large scale activities such as logging, industrial agriculture and ranching are essentially undertaken by big commercial interests.[84] Often, most of these commercial interests are in hands of the elite class who live in towns and at times the people in decision making positions.

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[79] ibid.
[80] This argument is well presented in Ong'ang'a Obiero, *Lake Victoria and its Environs: Resources Opportunities and Challenges* (2nd edn, Osienala, Kendu Bay, Kenya 2005); and also L. J. Awange and Ong'ang'a Obiero, *Lake Victoria Ecology, Resources, Environment* (Springer Berlin Heidelberg, New York 2006).
[81] Davidson (1992) op. cit., n. 20, at p. 8.
[82] Adams (2001) op. cit., n. 35, at p. 250.
[83] ibid., at p. 176.
[84] ibid., at p. 257.

In other instances, the rural poor are engaged in unsustainable practices not out of self will but because of ill-designed policies passed on to them. In Tanzania, for example, the poor have been usurped into the rapid expansionism of small-scale gold mining, which, in the name of poverty alleviation, has eaten away farmland and communal grazing land. This has not only posed environmental dangers of pollution and soil erosion, but also raises issues of food insecurity, landlessness and inequity,[85] which in return impacts on the socio-economic well-being of the population and eventually the environment. Indeed, Jagannathan cautions that the relationship between poverty and environmental degradation is not a simplistic one but rather a more complex issue influenced by many other factors.[86]

From a contextual perspective, we may need to question ourselves on the extent to which poverty is a major underlying factor in the environmental degradation of the Lake region. In other words, what fraction of the degradation is attributed to the poor? This is certainly a difficult question to answer in the absence of quantitative data. We can, however, get indications by reflecting back to the discussion in Chapter Three, where it was seen that the immediate causes for environmental degradation vary in form, extent and source.

The major degrading activities such as commercial logging and fishing, pesticide use, industrial and municipal pollution, water over-drawing and large scale mining are largely activities undertaken or instigated by the 'non-poor'. It can be seen that most of these activities are capital intensive, and as such not significantly poverty related. This analysis is not intended to down play the contribution of the poor to environmental degradation in the Region. Rather it brings to light the fact that

[85] See Ndalahwa F. Madulu, 'Impact of Population Pressure and Policy Changes on Common Property Resource Availability in Rural Tanzania' (Conference on Promoting Common Property in Africa: Networks for Influencing Policy and Governance of Natural Resources, Cape Town, South Africa 6 - 9 October, 2003).

[86] See, for example, N. Jagannathan and A. Agunbiade, *Poverty Environment Linkages in Nigeria: Issues for Research* (Working Paper 1990-7, World Bank, Environment Department, Washington, DC 1990); and also N. Jagannathan, *Poverty-Environment Linkages: Case Study of West Java*, World Bank, Environment Department, Washington DC (Working Paper 1990-8, 1990).

beyond the poor, environmental degradation depends on many other factors. As earlier mentioned, however, the poor are hardest hit by the consequences of environmental degradation irrespective of the magnitude of their contribution towards its occurrence. From that perspective, the relationship between poverty and environmental degradation can be seen as a result of resource management failures. Since these two issues are bound up in a causal-effect relationship, the implication is that the poverty problem can be partly addressed through control of environmental degradation.

Failures Inherent in the Environment and Natural Resource Management Regime

Bromley defines an environment management regime as:

> "[A]structure of rights and duties characterising the relationship of individuals to one another with respect to a particular environmental resource;"[87]

He goes further to argue that rights are meaningless if an authority system does not step in to ensure compliance of these rights and duties.[88] It is for this reason that laws and institutions are established to allocate, regulate and enforce rights and duties among various interests. The purpose of this section is, therefore, to examine the extent to which the allocation, regulation and enforcement of rights and duties have, through successive ENRM regimes, led to environmental degradation in the Lake region. We shall particularly consider the issues of property rights and the coordination and enforcement of regulation.

The Property Rights Failures

Property rights have become central in the literature that concerns natural resource management regimes. The failure of property regimes is increasingly being listed

[87] Daniel W. Bromley, *Environment and the Economy: Property Rights and Public Policy* (Basil Blackwell, Oxford, UK 1991) p. 22.
[88] ibid.

among the major underlying causes for environmental degradation, especially in the developing world.[89] Indeed, the property rights question has prominently featured in our discussion on the natural resource management regimes, since the pre-colonial era.

Theoretical Overview

According to Bromley *et al*, property rights can be defined as 'the relationship among actors in respect to things such as natural resources.'[90] In that light, the property rights regime is often important in providing the means through which power is distributed among actors and institutions.[91] It is often argued that the assigning of strong property rights establishes clear incentives for sustainable development.[92]

The concept of property rights is often perceived as a bundle of rights, entailing the rights to *own*, *use or withdraw* and *manage* natural resources, and the right to *transfer* or *alienate,* by way of assigning or reassigning, management and use rights.[93] It is the variability in the allocation or enjoyment of these rights that gives rise to the differentiation in property rights regimes. Often, property rights or resource regimes are defined, through distinctive categories, on the basis of the type of right that users hold.[94] Bromley indentifies four categories of property rights regimes. First is the *open access* regime where there is no ownership and control, which according to him is a state denoted by lack of property.[95] To Bromley, property is actually the benefit stream of rights and duties, therefore their absence equates to a property-less

[89] The other factors are: Market failures (externalities); government failures; and population growth. See Rasmus Heltberg, 'Property Rights and Natural Resources Management in Developing Countries' (2002) 16 Journal of Economic Surveys 189.
[90] Daniel Bromley et al., eds., Making the Commons Work: Theory, Practice and Policy (San Francisco: Institute for Contemporary Studies Press, 1992); See also, Daniel W. Bromley and Michael M. Cernea, *The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies* (World Bank Discussion Papers WDP-57, Washington D.C, 1989) p.5.
[91] Arun Agrawal and Elinor Ostrom, 'Collective Action, Property Rights, and Decentralization in Resource use in India and Nepal' (2001) 29 Politics and Society 485, 488.
[92] ibid., at p. 492.
[93] See, for example, Agrawal (2001) op. cit., n. 91, pgs. 488-489.
[94] See, for instance, Heltberg (2002) op. cit., n. 89 at p. 192.
[95] Bromley (1991) op. cit., n. 87, p. 30.

regime. He thus contends that *open access* regimes arise out a lack of social regulation or when an institutional failure undermines the former regime.[96] Second is the *common property* regime where ownership rights are vested in a group of individuals that has rights and duties over the property.[97] The terms *commons* or *common-pool resources* are often used to jointly refer to open access and common property.[98] Third is the *state property* regime, under which, property ownership and control over its use is vested in the State.[99] Fourth is the *private property* regime where property ownership is bestowed to an individual or group of persons.[100] Unlike in the first case the exercise of bestowed rights in the latter three types is governed by defined obligations and duties.

While private property regimes have always been fronted as a remedy to resource overexploitation and generally, environmental degradation,[101] recent studies have shown that resource use sustainability does not necessarily depend on a single type of property rights regime.[102] Property rights regimes are affected by several factors including: ecological characteristics; social and economic objectives; heterogeneity of the resource; and resource management institutional structures.[103] As such, the appropriateness of any given property rights regime is best arrived at on a case by case basis. Additionally, choice of a property rights regime can also be challenged by the physical and spatial nature of the resource(s). As for the case of our geographical area of interest – the Lake Victoria region - it is extremely challenging to harmonise the property rights of a population that spans over varying socio-economic interests, cultures and national boundaries. Since various studies have demonstrated that

[96] ibid.
[97] Bornie J. McCay, 'Property Rights, the Commons and Natural Resource Management' in Kaplowitz D. Michael (ed), *Property Rights, Economics and the Environment* (JAI Press, Connecticut 2002) p. 71.
[98] See Heltberg (2002) op. cit., n. 89.
[99] Bromley (1991) op. cit., n. 87, at p. 23
[100] ibid., at p. 24.
[101] See, for instance, the core argument in Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
[102] Hanna Susan, *Researching Property Rights and Natural Resources* (The Common Property Resource Digest, No.29, IASCP/ Winrock/ ICRISAT 1994) p. 1.
[103] ibid.

property rights regimes are most resilient in a small-scale system,[104] it may be extremely challenging to upscale any given small-scale property rights regime to the trans-boundary level, without losing its attractive attributes. This challenge is also likely to be faced with the problem of varying or even conflicting legal and institutional frameworks among States.

The Property Rights Question in East Africa's ENRM Regimes

As shall be seen in Part III and also Part IV, a significant percentage of the natural resources in East Africa have been owned or vested, since colonial times, in the state. Unlike the water, fisheries, wildlife and forestry resources, private property rights have mostly been recognised and indeed encouraged in land tenure. That notwithstanding, significant pieces of land remain under state control and in Tanzania, all land belongs to the state.

A major point of departure between the pre-colonial and colonial ENRM regimes was centred on the redefinition of the property rights' regimes.[105] Most of the natural resources that had been communally owned and managed were vested in the State, which restricted the natives from accessing and managing them. This redefinition actually stood at the centre of the conflicts and animosity that ensued between the colonial establishments and the native populations, leading to various forms of environmental degradation. As will be seen in Chapter Seven, the property rights question, despite the high expectations, was hardly addressed by the post-independence governments, which instead moved to place more resources under direct state ownership and control. As will be discussed in Chapter Nine, the property rights' question over state-property remains a crucial matter.

[104] ibid., at p. 2.
[105] See discussion, in Chapter Three, on the impact of colonialism on the pre-colonial natural resources management regimes.

Heltberg attempts to distinguish resource management rules from the general concept of property rights regimes in a manner that is helpful to our discussion. He identifies two types of management rules. First are the *access rules*, which define the rules that regulate access to a resource and the sharing of the accruing output. The second type is the *conservation rules*, which dwell on the limitation of total resource output, resource maintenance and undertaking of investments.[106] It is important to remind ourselves that our specific interest is on the natural resources under the trusteeship and management of the state – State property. The word 'state' in this regard includes not only the central government and its agencies, but also local structures that have the mandate to define or enforce property rights and management rules.[107]

The observation that the state property regimes have in some cases failed is not intended to suggest this thesis stands for a redefinition of ownership rights. Rather, while it is argued that decentralised ENRM can only be said to have occurred if accompanied by extensive devolution of property rights,[108] we take interest in the management and conservation rules. As Hannah notes, natural resources can be overexploited or sustainably used irrespective of whether they are vested with the state, communities or individuals.[109] More so, given its historical centrality in the politics of power and the socio-economic complexity of the Region, dismantling the state-property regimes, even if possible, may create more problems that it can solve. As such, the argument is that the property rights' failures can be tackled by addressing gaps in the management and conservation rules. What may matter, in this case, is the level at which the resource management rights and duties are honoured by both the regulators and regulated. For this to be attained, however, the development and enforcement of the rights and duties has to be done through

[106] See Heltberg (2002) op. cit., n. 89, at p. 192
[107] See, for instance, usage of the word 'State' in Daniel Bromley, 'The Commons, Common Property and Environmental Policy' (1992) 2 Environmental and Resource Economics 1.
[108] Agrawal (2001) op. cit., n. 91, at p.492.
[109] Susan (1994) op. cit., n. 102 at p. 1.

frameworks and processes that embody the participation of both parties. In the case the Lake Victoria region, which is sub-nationally and internationally shared, these parties can be found at the local, national and regional levels.

The Legal and Institutional Failures

While the debate remains open on whether environmental degradation is largely a result of natural processes, insurmountable evidence has been adduced to the effect that human activity is to largely blame. The discussion in Chapter Three attests to the fact that the severity of environmental degradation in the Lake region is largely a result of unsustainable human activity. Interestingly, irrespective of their shortcomings, there are, at the local, national and regional levels, policies, laws and institutions that *inter alia* concern the management of the Lake region's natural resources. These legal and institutional frameworks have remained ineffective, however, in controlling the continued environmental degradation in the Lake region. Does this imply that the nature and enforcement of these frameworks have come to terms with the socio-economic realities that underlie the unsustainable manner in which human activity continues to impact on the resources? In the discussion that follows, our answer to this question is emphatically no. Rather, there have been deliberate and unintended, legal and institutional failures. The remedy to environmental degradation does not only reside in the existence of policies, laws and institutions, but also the manner in which they are developed, implemented and maintained. In other words, as has been the case in East Africa in the recent past,[110] government may succeed in putting a regulatory regime in place but fail to effectively implement it. In the case of Tanzania's ENRM regime for example, Kallonga *et al* observe that:

[110] See discussion in Parts IV and V, where it is shown that the natural resources management sector has, in the recent past, been marked by various legal and institutional reforms.

> "…natural resource management challenges are not so much of problem of policy as they are of implementation."[111]

As discussed in Part III and later in Part IV, the major implementation challenge in natural resource management since colonial times, is the high level of centralism through the successive ENRM regimes. The regimes have often been perceived by local stakeholders to be illegitimate. Secondly, the regimes have at times been inappropriate due to insufficient knowledge on the part of their framers. Thirdly, central government has often lacked sufficient resources to solely and efficiently manage the vast natural resources as required. Fourthly, the will to enforce the regimes, has been low at times, especially in the post-colonial era. Arguably, the presence of all these factors accrues from the lack of an institutional mechanism capable of: enhancing the legitimacy aspect; reinforcing the knowledge base; complementing the requisite resources; and boosting the will to enforce the regimes. As shown in Chapter One and variously argued in this thesis, the application of a multi-level government approach in ENRM is intended to deliver such benefits.

Lack of Coordination at National and Regional Level

Given the fact that the Lake Victoria region is shared among various governments at both the sub-national and national level, the crucial need for coordination in the management of its natural resources cannot be overstated. The need for coordination is further reinforced by yet another fact that management of the Lake region's resources involves several sectors. As shall variously be seen, however, the aspect of coordination has often been weak, through the successive ENRM regimes.[112] Aside from some recent changes, which are nonetheless still lacking, natural resource management has been virtually a state matter. The coordination

[111] Emmanuel Kallonga et al, 'Reforming Environmental Government in Tanzania: Natural Resource Management and Rural Economy, 'Good Governance and the Rule of Law: Utopia or Reality?'' (The Inaugural Tanzanian Biennial Development Forum, Dar es Salaam Tanzania, 24th -25th April 2003) p. 11.

[112] See especially, discussion in Part IV and V.

problem, which persists to date, may not be better summarised other than in the words of the Lake Victoria Basin Commission, whose basic mandate is coordinate the various interventions in the Lake Basin. It states that:

> "National policies and legal frameworks in the Partner States are at variance. Resource management in fisheries as well as in forest and agriculture suffers from predominantly sectoral perspectives and approaches. Present policies and laws are typically addressing various sector specific issues, and some laws are weak and enforcement measures are wanting. Some policies and legislation are overlapping or even conflicting making coordination and implementation sometimes difficult. The planning process is often from top to bottom and development actors including civil society organisations are at liberty to undertake any development intervention."[113]

It goes on to say:

> "The existing regional institutions like Lake Victoria fisheries Organisation (LVFO) and Lake Victoria Environmental Management Programme (LVEMP) have narrow range and limited mandate for taking Trans-boundary policy initiatives and implementing action. For example there are no common, harmonised policies of poverty alleviation, HIV/AIDS and, more generally, policies directed towards sustainable development."[114]

Clearly, not only do these two quotations highlight the coordination problem but also point out some of its origins, within both the legal and institutional frameworks.

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[113] The East African Community, *Popular Version of the Shared Vision And Strategy Framework For Management and Development of Lake Victoria Basin* (EAC Secretariat, Arusha, Tanzania 2006) sec. 2.10.
[114] ibid., at sec. 2.11.

We have seen that the failures inherent in the ENRM regimes can be significantly attributed to the lack of an institutional mechanism that embodies the participation of various interests at different levels. We shall now return to the underlying factors of poverty and population pressures with a view of demonstrating that their prevalence can also be precipitated by the lack of such a mechanism.

Failure in Addressing the Major Inherent Challenges of the Lake Region

As mentioned earlier, poverty and population pressures are inherent in the general socio-economic state of the Lake Region and, therefore, not necessarily products accruing from failed ENRM regimes. We shall, however, attempt to demonstrate that their manifestation, as underlying factors for environmental degradation, can be mitigated through natural resource management measures. Since they relate to environmental degradation in a cyclic manner, their mitigation is likely to translate into addressing the latter. We will briefly recollect our earlier discussion on population pressure and poverty with a view of demonstrating that these can be mitigated, given the appropriate framework for decision making and implementation.

While there is no doubt that population pressures may have a bearing on the state of the environment, it has also been seen that high population can precipitate the initiation of sustainable practices. In view of the examples discussed, the converging point is that the communities took it upon themselves to appreciate their problems, and addressed them through self regulation. Such initiatives embody the important aspects of awareness, local participation and generally, commitment on part of the resource users, which have been variously indentified as a missing link in successive ENRM regimes. It was seen that the communities instituted sustainable practices because they actually envisioned the benefits and most importantly the hope of enjoying them. However, while these examples provided us with enlightening experiences, such cases remain isolated and informal and thus vulnerable to various

threats. Drawing on the theoretical and conceptual discussion in Chapter One, the mentioned missing links are the very reasons why multi-level government and decentralisation in particular, is instrumental in natural resource management. As was concluded in our discussion on the population and environmental degradation nexus, given the right framework for decision making and implementation, the impact of population pressure on the environment can be mitigated through resource management measures.

In the study of environmental management in the developing world, the issue of poverty has often been discussed alongside that of population pressure. Notably, their manifestation as underlying factors for environmental degradation often arises from similar issues, such as lack of local participation and awareness. As we have argued in the case of population, the issue of poverty and its impact on the environment can better be understood, appreciated and addressed through a decision making and implementation structure that embodies the key stakeholders – the poor. Since environmental degradation can cause poverty and *vice-versa*, poverty is an environmental management challenge. However, mitigating the poverty aspect of environmental degradation should also concern those who contribute to it, other than the poor.

We have seen that other than the factors that directly arise from the failures within the ENRM regimes, the manifestation of poverty and population pressure, as underlying factors for environmental degradation, can also be brought about by the lack of a participative institutional framework for ENRM. The following section briefly discusses the key findings of a field research conducted among various government and non-government officials with an interest in the management of the Lake Victoria region. The findings reveal the extent to which the issue of institutional failure is perceived, by the interviewees, to be a major precursor for environmental degradation in the Lake region.

The Research Findings and the Central Issue among the Underlying Causes

As stated in Chapter One, the presented field research was conducted neither for the purpose of drawing conclusions based on quantitative findings nor is it the primary source of the information used in the thesis.[115] The field research results may collaborate the arguments presented here, but the main body of the thesis is based on documentary review. As intended, however, the field research has contributed to the thesis, especially in backing up some of the arguments.

Owing to the diversity in their jobs, roles and socio-economic background of the respondents, the interviews were semi-structured. The questions were, however, focussed on some broad topical issues and it has been possible to generally categorise the responses, as presented in Appendix 2. Of much relevance to our discussion is the topical issue of the management challenge.

As can be seen from the summary of the field research findings presented in Appendix 2, according to most interviewees, the major underlying causes for environmental degradation relate to failures within the legal and institutional framework of the ENRM regimes. Although the inherent challenges of poverty and population pressures were mentioned, most of the challenges mentioned suggest the failure of various parties in either meeting their obligations or exercising their rights. As in regard to the regional level, the issues that came out strongly include: the prioritisation of sovereign interests; weakness in the nature and enforcement of Community law; a non-harmonised legal regime and the slow decision making process. With regard to the national level, the issues of over-centralisation, lack of coordination among sectors, political interference and an oppressive legal regime came out strongly. For the local level, the issues that came out strongly include: political interference, budgetary limitations and low levels of community participation.

[115] See section on methodology in the Introduction.

Based on this selection, we can see that most of the issues raised tend to show the fact that state-centrism has had a far reaching impact on natural resource management of the Lake region. Also, we see that the issues of participation and coordination remain weak or lacking. The need for a multi-level government approach suggested by the given failures at each level tends to imply that each level has a role to play. It is also apparent that while some roles cut across levels, others are peculiar to one particular level.

Conclusion

The underlying causes for environmental degradation are largely man-made, and thus within man's reach to address. The manifestation of these factors as precipitators for environmental degradation is an indication of failure on the part of the management regimes. The ENRM regimes are significantly at fault for their own failures. However, some underlying causes accrue from outside the ENRM regime. Such causes can be avoided or mitigated through direct or indirect intervention, either from within or outside the ENRM regime. The issue that drives the underlying causes for environmental degradation is the lack of an institutional framework capable of providing an enabling environment through which such causes can be avoided or mitigated. Instead, the ENRM regimes remain highly state-centric.

As shown in Chapter One, both the advocates for decentralisation and regionalism in natural resources management are bound together by the argument that the effectiveness of natural resource management regimes significantly depends on the manner in which decisions are made and implemented. They thus argue for the regimes that are capable of dispersing authority with the intention of engaging wider participation on the one hand, and, on the other, providing mechanisms for coordination, regulation, oversight and arbitration at various levels. It is against this backdrop that we argue for a multi-level government framework. Since the Lake

Victoria region is shared at both the sub-national and national levels, then such a framework should in addition to the national also embody the local and regional levels. The downward dispersal of authority brings on board the local institutions, while an upward shift ensures the involvement of supra-national institutions with varying mandates and capabilities.

In regard to research question (2), we have identified the central issue in the environmental degradation in the Lake region as being state-centrism and the lack of an effective multi-level institutional arrangement. In Part III, which follows, we explore the ENRM regimes from a historical perspective, with a view of tracing the roots of this issue.

PART III

As was seen in Chapters Two and Three, the Lake Victoria region is richly endowed with natural resources of invaluable ecological and socio-economic importance. These natural resources have continued to be severely degraded, largely through human activity. It has been argued in Chapter Four that although this degradation is attributed to several underlying factors, state-centrism remains a major underlying factor as it subdues the participation of other interested parties and, in the process, exacerbates the other factors.

This Part is subdivided into three Chapters, all of which give a historical account of the Environment Natural Resources Management (ENRM) regimes in East Africa. Specific attention is drawn to the issue of state-centrism and how this has impacted on natural resources management. As this study is about multi-level government, the discussion is more focused on how successive governments have embodied the concepts of local government and regionalism in ENRM and most particularly in the management of the Lake Victoria region. For purposes of setting a starting point, especially in lieu of availability of documentation, the historical account is traced from the late 19th Century, which is the period shortly before colonisation of the three East African countries. This period is here after referred to as the pre-colonial era and the human settlements of that time are labelled the pre-colonial communities.

Chapter Five introduces us to the pre-colonial and colonial institutional structures concerning ENRM. The colonial environmental laws and policies are then discussed in Chapter Six. Chapter Seven discusses the post-independence ENRM regimes. The purpose of this Part of the thesis is to single out and demonstrate that state-centrism, and the lack of effective multi-level government in ENRM is a deeply historical problem. Also, by offering us an insight into the persistent problems in natural resources management, and why these re-occur, this Part provides us with

lessons to learn for the betterment of the current natural resources management regimes. As shall be seen, tracing the historical roots of the central issues in this thesis is crucially important in enriching our understanding of the current ENRM regimes and how they could be improved. As later shown in Chapter Twelve, such an understanding reinforces our central argument that the recent strides towards the redefinition of the Lake region's ENRM are likely not to yield much without the mitigation of the centralist paradigm through the dispersal and rationalisation of powers and functions between the local, national and regional levels.

CHAPTER FIVE

Colonialism and its Legacy in the Management of the Environment and Natural Resources in East Africa

This Chapter presents a historical account on East Africa's Environment and Natural Resources Management (ENRM) regimes, during the pre-colonial to the colonial era. It begins with a brief discussion of the concept of Traditional Natural Resources' Management (TNRM) systems and its application among some of pre-colonial East African societies. This discussion is not, however, intended to affirm that all pre-colonial societies practised TNRM but rather to point to the fact that ENRM was not necessarily a colonial 'invention'. The second section outlines the roots of colonialism in Uganda, Kenya and Tanzania, where it is striking that the three East African countries closely share their colonial and nation-building political history. This thesis looks at such historical roots as being a strong precursor for the feasibility of regional cooperation in environmental management. The third section, delves into the colonial administrative, executive, legislative and judicial structures, with a particular interest in ascertaining how powers and functions were distributed among them. Since this study is about multi-level government, the last section examines how the concepts local government and regional cooperation were embraced by the colonial administrations, especially in lieu of natural resources management. As there was no particular framework that concerned the specific environmental management of the Lake Victoria region, we shall be discussing and deriving our conclusions from a general overview of the colonial structures of government at the local, national and regional levels.

Natural Resource Management among the Pre-colonial African Communities

As observed by Beinart, human beings are part of the natural environment, and as such, their appropriation and interaction with other components of the environment is central in the history of mankind.[1] The wellbeing of the environment and of natural resources has continued, from time immemorial, to be significantly dependent on human activity, in terms of both resource utilisation and management.

Although much scholarly work tends to stress that African pre-colonial societies had their own rules through which they sustainably managed their natural resources,[2] there remained outstanding contradictions among the several accounts and theories that attempt to explain the pre-colonial natural resources management regimes.[3] There is, nonetheless, general consensus that pre-colonial Africa's natural resources were largely abundant and less interfered with by man. Parker, for instance, observes that:

> "Primitive conditions in Africa have sometimes been described in idyllic terms but the fact is that East Africa's state of nature was by no means a primeval paradise."[4]

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[1] See, generally, William Beinart, 'African History and Environmental History' (2000) 99 African Affairs 269.

[2] For examples of the natural resources management systems among the pre-colonial East African communities, see Benjamin J. Richardson, 'Environmental Management in Uganda: The Importance of Property Law and Local Government in Wetlands Conservation' (1993) 37 Journal of African Law 109 at 112; Ong'ang'a Obiero, *Lake Victoria and its Environs: Resources Opportunities and Challenges* (2nd edn, Osienala, Kendu Bay, Kenya 2005) at p. 57. See also, Robin Barr and Jacob McGrew, *Landscape-Level Tree Management in Meru Central District, Kenya* (Agroforestry in Landscape Mosaics Working Paper Series, World Agroforestry Centre, Tropical Resources Institute of Yale University, and The University of Georgia 2004); Victor Orindi and Chris Huggins, 'The Dynamic Relationship Between Property Rights, Water Resource Management and Poverty' (The Lake Victoria Basin, International Workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, Johannesburg, South Africa, 26-28 January 2005).

[3] See, for examples, the arguments in Richardson (1993) op. cit., n. 2, at 114; Charles Odidi Okidi and Patricia Kameri-Mbote, *The Making of a Framework : Environmental Law in Kenya* (UNEP-ACTS Publication Series on Environmental Law and Policy in Africa: ACTS Press, Nairobi Kenya 2001); James C. Murombedzi, 'Pre-colonial and Colonial Conservation: Practices in Southern Africa and their Legacy Today' available at <http://dss.ucsd.edu/~ccgibson/docs/Murombedzi%20-%20Precolonial%20and%20Colonial%20Origins.pdf> accessed 27 April 2006.

[4] Garland G. Parker, 'A Summary of British Native Policy in Kenya and Uganda, 1885-1939' (1950) 19 The Journal of Negro Education 439, 440.

In consideration of the undoubted fact, that pre-colonial communities basically depended on the environment and natural resources as a basic source of livelihood, there are broadly two directions of argument that attempt to explain why human impact on the environment appeared to have been within containable limits. The fault line between these two arguments rests on whether the pre-colonial societies intentionally instituted effective resource management regimes. On one hand are the accounts that tend to focus on the theory of environmental carrying capacity, which presupposes that all natural habitats have a finite assimilative capability that once exceeded leads to environmental degradation.[5] It is, for instance, along such thinking that Hardin in his widely quoted work, 'The Tragedy of the Commons', warned that communal grazing systems were more prone to tragedies because individual herd managers lacked the incentive to conserve grazing resources, making demand for natural resources exceed the system's carrying capacity.[6]

It is believed that the containment of environmental degradation, among the pre-colonial communities, was not necessarily a result of organised natural resources management regimes, but rather because of the narrow base of resource use, which easily allowed the environmental resources to regenerate. This direction of argument is premised on the belief that as of then: population was low; environmental resources were basically utilised for domestic consumption; and the technologies in use were primitive and incapable of inflicting devastating effects on the environment. In other words, such localised utilisation of resources translated into the conservation of resources.[7] To affirm this preposition, Ghai argues that since many of

[5] See Garrett Hardin, 'Ethical Implications of Carrying Capacity' <http://dieoff.org/page96.htm> accessed 6th June 2005. It has nonetheless been argued that the carrying capacity of a place can be altered naturally or artificially through human interventions such as scientific and technological advancement. See, for example, the discussion in R. J. M. Crawford et al., 'An Altered Carrying Capacity of the Benguela Upwelling Ecosystem for African Penguins (*Spheniscus Demersus*)' (2007) 64 ICES Journal of Marine Science 570.

[6] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243. Also reproduced and available at < http://dieoff.org/page95.htm> accessed on the 6th June 2005.

[7] Dharam Ghai, 'Social Dynamics of Environmental Change in Africa: Essays in Memory of Philip Ndegwa' in D. Ghai (ed), *Renewing Social and Economic Progress in Africa* (Macmillan Press Basingstoke, London 2000) p.136-137 Dharam op. cit., at 136-137.

the traditional communities were organised in small low resource consumption groups, the impact of their activities on the environment was minimal and bearable, as it allowed for a matching pace of natural regeneration.[8] This argument could fit well for the case of Lake Victoria fisheries, where it is believed that the abundance of fish stock, prior to colonialism, was due to the rudimentary technologies that restricted fishing to areas close to the shoreline, river mouths and wetlands. [9] In fact, the desire for deep water fishing was deemed not so critical since shoreline fishing satisfied the demand.[10] Compounded by transportation hardships, and the fact that fish is highly perishable, such factors are believed to have constrained fish trade, which might otherwise have precipitated large scale fishing. In other words, the fishing effort on the Lake was also controlled by the low demand for fish.[11]

Aside from arguments inclined to the concept of environmental carrying capacity, there is a strong belief that, as environmental threats intensified, mainly as a result of increased human population and activity, many traditional communities devised and applied deliberate and sophisticated natural resources management systems.[12] Indeed, certain recent studies suggest that the African population in the late 19th century was always consolidated and relatively high in the agriculturally productive areas, such as the Lake Victoria region.[13] It is from that perspective that the second set of arguments dwells on various sociological theories and particularly that of collectivism.[14] It is argued that most pre-colonial societies had, prior to colonialism,

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[8] ibid.

[9] Fishing gears were essentially constituted of basket traps, papyrus beach seines and fishing spears. Meanwhile, rafts and later dug-in paddled canoes were the only means of transport for the fishermen.

[10] J. P. Owino, *Traditional and Central Management Systems of the Lake Victoria Fisheries in Kenya* (Socio-economics of Lake Victoria, Report No. 4., IUCN East African Programme 1999) p. 5.

[11] K. Geheb and T. Binns, ''Fishing Farmers' or 'Farming Fishermen'? The Quest for Household Income and Nutritional Security on the Kenyan Shores of Lake Victoria' (1997) 96 African Affairs 73.

[12] See, for example, the various works quoted under footnote n. 3.

[13] See D. Verschuren et al, 'History and Timing of Human Impact on Lake Victoria, East Africa' (2002) 269 Proceedings of the Royal Society B: Biological Sciences 289, particularly, figure 3 on the principal events in the recent environmental history of Lake Victoria, in relation to human-population growth and agricultural production in its drainage basin.

[14] Collectivism is any philosophic, political, economic or social outlook that emphasizes the interdependence of every human in some collective group and the priority of group goals over individual goals. See Moyra Grant, *Key Ideas in Politics* (Nelson Thomas 2003) p. 20. See also,

reached a certain level of organisation that naturally triggered the necessity and application of rules as a means of managing the relationships among themselves, and also with the environment and natural resources on which they depended for a living. It is believed that the communities, over time, accumulated knowledge about their relationships with the environmental resources, which eventually formed the basis for their development of sustainable resource management rules.[15] It is in this light that Ostrom argues that small-scale systems are not faced with the 'tragedy of commons', because users and resource appropriators, under such a system, devise dependable rights and rules for the exploitation of natural resources and the interaction among themselves as they use the resources.[16] That notwithstanding, however, the TNRM regimes were not necessarily purely conservationist as many of them were built on the fact that nature was not only a source of livelihood, but also suffering as it harboured dangerous and destructive animals, vectors and disease. It was, for example, common for the communities to burn extensive swatches of vegetation around their settlements in order to keep away wild animals. As such, the TNRM regimes embodied exploitation and destruction on the one hand, and preservation and conservation on the other.

Common Features in the Traditional Natural Resource Management Regimes

As this thesis is about multi-level government in natural resources management and most interested in the aspects concerning the institutional arrangement, the remainder of our discussion on the TNRM regimes is focused on the institutional issues. The purpose of this discussion is to show that natural resource management was a local affair that was interwoven within the local management structures and ways of life. It is against this fact that we later argue that, as the TNRM regimes are

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generally, Harry C. Triandis, 'Individualism-Collectivism and Personality' (2001) 69 Journal of Personality 909.

[15] See James C. Murombedzi, 'Pre-colonial and Colonial Conservation: Practices in Southern Africa and their Legacy Today' op. cit., n. 3.

[16] E. Ostrom et al (2000) (eds), quoted in Young Oran, 'Environmental Governance: The Role of Institutions in Causing and Confronting Environmental Problems' (2003) 3 International Environmental Agreements, Politics, Law and Economics 377.

not only non-existent but also difficult to reinstate, the current regimes should, at least, uphold the aspect of local participation and management, which was the core value in the TNRM regimes.

Among many African pre-colonial communities, the responsibility for the management of natural resources was often vested in the traditional leaders or institutions that essentially formed the core of the TNRM regimes. Nature was, among many African communities, treated with respect and reverence. While the development of resource management rules, and generally the regimes, thrived on the powerful attributes of traditional ecological knowledge or indigenous knowledge, it was also guided by spiritual rituals, religious practices, social taboos and sacred animals, plants or features.[17] Aside from the deliberate conservation measures, various cultural and religious beliefs, which were actually central in the lives of the traditional communities, were also a source of conservation practices. Resources such as forests and rivers were, for instance, considered by some communities to be sacred and were therefore preserved under strict set of rules and such practices translated into less or controlled stress on the environment.[18] Since such resource management rules formed part of their culture, traditions and taboos, the pre-colonial communities often developed mechanisms to severely punish those who violated the revered rules.[19] In the case of the Lake Victoria region, for example, Fuggle observes that traditional fishing was closely integrated into the culture and traditions of the fishing communities that lived along the Lake shores.[20]

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[17] See Jude Mathooko Mutuku, 'Application of Traditional Ecological Knowledge in the Management and Sustainability of Fisheries in East Africa: A Long-neglected Strategy?' (2005) 537 Hydrobiologia 1.

[18] Ghai (2001) op. cit., n. 7 at 136-137.

[19] See, for example, H.I. Majamba, *Regulating the Hunting Industry in Tanzania: Reflection on the Legislative, Institutional and Policy Making Frameworks* (LEAT Publication 2001) p. 3-4. See also, discussion in the section citing example of traditional management systems among the pre-colonial East African communities.

[20] R. F. Fuggle, 'Lake Victoria: A Case Study of Complex Interrelationships ' in UNEP (ed), *Africa Environment Outlook Case Studies* (UNEP, Nairobi 2002)

In exercise of their duty of ensuring that resources were conserved and equitably distributed, the traditional institutions enforced rules based on traditional norms and values.[21] In most cases the natural resources were communally utilised thus giving rise to the prevalence of management systems based on communal rights, where each community or section of the community had territories of rule and administration. Territorial user rights were commonly used to regulate resource use.[22] Although community membership was important in determining the enjoyment of these rights, some communities provided for the inclusion of 'outsiders'.[23] Actually, communal property rights and customary use rights proved to be incentives for good resource management.[24] That said, however, the development and effectiveness of TNRM regimes significantly depended on the level of organisation of the traditional institutions.

As was the case with most parts in Africa, pre-colonial East African people were organised in communities that varied in size, level of organisation and civilisation. Their level organisation ranged from culturally, administratively and militarily highly organised Kingdoms to communities loosely organised along narrower definitive social attributes such as family ties. Large institutions, such as the Kingdoms, were either constituted of smaller sub-autonomous units with own local rules or operated under fairly centralised systems that functioned under hierarchical structures that trickled down to local levels. While power and authority were highly centralised in some communities, the management and control of natural resources was usually vested in institutions presided over by individuals, such as chiefs, or groups such as councils of elders, whose authority was usually exercised at local level.[25] To their

[21] Ghai (2001) op. cit., n. 7
[22] Fuggle (2002) op. cit., n. 20, at p. 76.
[23] See, for example, discussion in the following section on the traditional fisheries management systems of the riparian Luos of Kenya.
[24] ibid.
[25] Richardson (1993) op. cit., n. 2, at p. 114; See also, Charles Odidi Okidi and Patricia Kameri-Mbote, *The Making of a Framework: Environmental Law in Kenya* (UNEP-ACTS Publication Series on Environmental Law and Policy in Africa: ACTS Press, Nairobi Kenya 2001) p. 25.

subjects, these institutions were powerful and highly regarded. Majamba, for instance, observes that:

> "The pre-colonial format of state and law of most communities that practised hunting was structured in a way that gave enormous powers to the enforcement machinery of the chief and local clan leaders."[26]

As can be seen, the TNRM regimes were integral components of the entire way of life of the traditional communities and this perhaps explains the strong relationship that these communities bore with their natural resources. We shall shortly see how this relationship was impacted by colonialism and the consequences that followed.

Examples of Traditional Management Systems among the East African Communities

The Luo as a Fishing Community

Although fishing among the traditional communities involved non-mass harvesting methods such as harpoons, baskets, spears and traps, the fish stocks then were easily maintained below the Maximum Sustainable Yield (MSY) because access to fishing was also restricted.[27] Among many traditional fishing communities, fishing areas were owned or controlled on the basis of inheritance.[28] As for the *Luo* communities living on the fringes of Lake Victoria in Kenya [29] they established strict fishing rules that vested the fishing management rights with clan institutions. These institutions enforced a system that observed no-fishing seasons, regulated access on the Lake and limited fishing gear.[30] They established *Puodhos* - fishing plots - which extended

[26] Majamba (2001) op. cit., n. 19, at p. 3-4.
[27] Mutuku (2005) op. cit. n. 17, at p. 2.
[28] ibid.
[29] While there are many tribes in Kenya's Lake Victoria Basin, which extends far in-land, the *Luo* ethnic group is the most dominant among those that live closest to the lake.
[30] K. Geheb, 'The Regulators and Regulated: Fisheries Management, Options and Dynamics in Kenya's Lake Victoria Fishery' (PhD Thesis, University of Sussex, UK 1997) pgs. 35-41.

inshore to as far as the maximum distance at which a *kira* line could be deployed. [31] The waters beyond the *puodhos* were open to access, but nonetheless to communities that had cordial relationships with owners of the surrounding *puodhos*.[32] The *puodhos* were managed by a set of rules. First, close seasons or restricted areas were often specified and honoured in order to allow the fish to breed. Secondly, only two fishermen were allowed ownership and operating rights per beach. Thirdly, in order to be granted fishing rights in the *puodhos*, 'outsiders' had to seek for permission and also agree to abide by the rules. Lastly, fishing rights were only open to those above 20 years and married, mainly because they were presumed to be responsible.[33] Such attributes of a traditional management system are a clear manifestation that the *Luo* had good knowledge about what they were doing and what ought to have happened, should they have ignored such regulatory measures.

The Gwassi Hill Communities on Forest Protection

The pre-colonial communities that were settled around the Gwassi hills,[34] in Kenya, established a system that imposed strict forest management rules. They demarcated forest boundaries and used taboos to control and protect them. Those who violated the traditional control measures were cursed by elders and, in some instances, punished through imposition of fines.[35] These systems were eventually overrun by highly centralised colonial forest management systems leading to severe deforestation in the Gwassi hills, which to-date stands out among the most degraded environments in East Africa.

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[31] In *luo*, a *puodho* is refers to owned land but the term is also used to refer to 'owned' water. While *Kira* or *lakira* refers to a stockade trap made from cane-like reeds. See Geheb (1997) op. cit., n. 30, at p. 39 and also the appendix.

[32] Geheb (1997) op. cit., n. 30, at p. 44.

[33] Fuggle (2000) op. cit., n. 20, at p.77.

[34] The Gwassi hills are part of the Lake Victoria Basin and found in the Southern part of Western Kenya. They are of great ecological importance to the Lake Victoria ecosystem that is already experiencing the impacts arising from severe deforestation of the hills.

[35] Ong'ang'a Obiero, *Lake Victoria and its Environs: Resources Opportunities and Challenges* (2nd edn, Osienala, Kendu Bay, Kenya 2005) p. 57.

The Fishing Communities among the Baganda

For long, the *Baganda* treated Lake Victoria as a haven of spirits and, therefore, revered it as sacred resource. In most parts of Buganda,[36] fish was initially considered to be a food supplement for the poor. Upon conquest of the Lake Victoria islands of Ssese, however, its inhabitants were assimilated into Buganda, bringing along with them the culture of eating fish as a delicacy.[37] On the inspiration of the islanders, Buganda's interest in fishing strengthened the management systems of the industry. As the fish business thrived, fishing and other Lake management measures were put in place, based on community rules. The *Ggabungas* who enjoyed territorial rights, administered a set of fishing rules, which were normally manifested in divine beliefs. Several other riparian communities are believed to have practised similar regulatory measures through community based controls.[38] Until the recent establishment of the Beach Management Units (BMUs), most fishing communities in Uganda were organised under the *Ggabunga* institution, which though informal was often instrumental in fisheries management.

Hunting among the Pre-colonial Communities in Tanzania

As was the case in most parts of Africa, hunting among the pre-colonial communities in Tanzania was a basic source of food and generally, livelihood. Owing to such importance, hunting was a social function that was not only culturally enshrined but also strongly regulated through a mixture of sacred believes and local community rules.[39] Hunting was among some communities regulated by the elders who allocated hunting quotas in accordance to species and the observance of hunting areas, seasons and methods. As such, the hunting regulatory regimes provided for both

[36] This is an area in central Uganda, which is predominantly inhabited by the Baganda or the Ganda Ethnic group.
[37] See Richard Reid, 'The Ganda On Lake Victoria: A Nineteenth Century East African Imperialism' (1998) 39 Journal Of African History 349. See also, J. Roscoe, *The Baganda; An account of Their Native Customs and Beliefs* (Frank Cass & Co., London 1965) p. 391.
[38] Fuggle (2000) op. cit., n. 20.
[39] See Majamba (2001) op. cit., n. 19.

community and conservation needs.[40] Success of these regulatory regimes is mainly attributed to the fact that, in most cases, the rules were known, fair and well enforced.[41]

While this thesis subscribes to the account that pre-colonial societies deliberately established their own resource management systems, it also concurs with the arguments surrounding the theory of environmental carrying capacity. It is, therefore, worth noting that other factors also contributed in controlling the level of environmental stress on the natural resources including: the low consumption levels; and the problems of technological difficulties; transport problems; and insufficient market demand. This is especially so in light of the fact that some pre-colonial communities totally lacked or had ineffective TNRM regimes. In the absence of reliable documentation, therefore, it remains difficult to make a qualified generalisation as to whether most pre-colonial societies had effective TNRM regimes. That notwithstanding, however, we draw on examples such as the ones illustrated to bring to light the fact that colonialism, at least in our area of interest of the Lake Victoria region, did not necessarily introduce the concept of natural resources management but rather, in most cases, replaced or modified it.

Colonialism and the Demise of the Traditional Natural Resource Management Systems

Despite their benefits, most TNRM regimes did not survive the sweeping changes and philosophy that came with colonialism. The incursion of colonialism saw many TNRM regimes subdued and others completely dismantled.[42] Armed with new scientific knowledge,[43] the colonial establishment persistently argued that traditional

[40] ibid.
[41] Agnes Kiss (ed) *Living with Wildlife: Wildlife Resource Management with Local Participation in Africa* (World Bank, Washington, D.C. 1990) p. 93.
[42] See Patricia A. Kameri-Mbote and Cullet Philppe, 'Law, Colonialism and Environmental Management in Africa' (1997) 6 Review of European Community & International Environmental Law 23; and Majamba (2001) op. cit., n. 19.
[43] Mutuku (2005) op. cit. n. 17, at p. 2.

management systems were ecologically wasteful and economically untenable in a competitive world. As such, the colonial natural resources management regimes were based on the alarmist premise that indigenous methods lacked tenure controls. They eventually replaced the TNRM regimes with highly centralised command-and-control systems.[44] In the case of Lake Victoria fisheries, for example, the traditional fisheries management systems were compromised by a change in the property rights' regimes that saw the Lake's fisheries being exposed to open fishery without putting in place effective control measures.[45]

There are two main points of departure between the traditional and colonial management systems. First, while TNRM concentrated power within the traditional local institutional setup, the colonialists on the other hand aimed at withdrawing such power and concentrating it under their central control. Secondly, unlike TNRM which thrived on communal ownership and management of the natural resources, the colonial policies promoted a mixture of private and state ownership of resources. Basically, the colonial natural resource management regimes delinked the local communities from their natural resources, as these communities no longer owned nor participated in the management of the resources. Worse still, their access to the resources was severely curtailed. These issues will shortly be discussed in detail as we explore the colonial institutional structures and natural resource management regimes in the sections that follow.

Notwithstanding the direct impact of colonialism, however, the constriction of certain TNRM practices can also be generally attributed to the fact that society is dynamic. For example, while TNRM attributes such as community property rights were directly eroded through policy and legislation, other practices such as shifting cultivation and bush furrowing, were naturally subdued by: the unrelenting

[44] Jeremy Lind and Jan Cappon, *Realities or Rhetoric? Revisiting the Decentralisation of Natural Resources Management in Uganda and Zambia* (ACTS Press, Nairobi 2001)
[45] Mutuku (2005) op. cit., n. 17, at p. 2.

demographic pressures; advancements in science and technology; commercialisation of agriculture; establishment of permanent settlements; and, generally, the changes in social relations. Nonetheless, it may be important to note that while such transformations could sooner or later have occurred, even without colonialism, they were set apace by the political and socio-economic developments introduced by colonialism. As we shall note in discussions to come, the colonial perception to TNRM appears to have sown a legacy that, to date, continues to influence the post-independence natural resource management regimes. Young, for instance, observes that traditional forms of governance at local levels continue to be broken down or subordinated by new political systems that render local users weak in protecting their interests, giving rise to the commodification of resources.[46]

Noting that the demise of the TNRM regimes was brought about by the incursion of colonialism, we shall be discussing the colonial ENRM regimes with a view to ascertaining whether they proved more successful than their predecessors. We shall first discuss colonialism and its impact on ENRM in the East African region. We shall then discuss the colonial philosophy and power structures and how these factors steadily influenced the colonial environmental policy, which thrived on state-centric and authoritarian approaches.

[46] Young Oran, 'Environmental Governance: The Role of Institutions in Causing and Confronting Environmental Problems' (2003) 3 International Environmental Agreements, Politics, Law and Economics 377.

Colonialism and Environmental and Natural Resource Management in East Africa

The trigger for the acceleration of environmental degradation in many developing countries has been closely associated with the colonial era. As indeed Kallonga *et al* argue, for a better understanding of the present day natural resource management regimes, one has to have a clear insight into the colonial context of resource appropriation.[47] Commenting on the impact of colonialism on the environment, Kameri-Mbote observes that Africa's natural resources continued to suffer excess stress because one of the motives of colonialism was to support industrial development in Europe, through the supply of cheap raw materials.[48] Africa's abundant and economically valuable natural resources generally presented two categories of natural resources – those, such as timber, which could be taken away and other static resources, such as the fertile soils, which could be utilised in the growing of valuable produce.

Colonialism set in a new political and socio-economic order, whose development processes and outputs had an impact on the environment. The colonial policies on land alienation and expropriation, state-centred control of natural resources and agricultural commercialisation influenced not only a rise in the exploitation of natural resources but also the manner in which the natives related to the natural resources.[49] Additionally, other socio-economic outcomes of colonialism such as urbanisation, industrialisation and the monetisation of the economies also contributed to the increased rate of environmental degradation. Although it is decades since colonialism ended in East Africa, several of its policies clearly survive to-date. It is commonly believed that colonial legacies are to blame as the major

[47]Emmanuel Kallonga et al, 'Reforming Environmental Government in Tanzania: Natural Resource Management and Rural Economy, 'Good Governance and the Rule of Law: Utopia or Reality?'' (The Inaugural Tanzanian Biennial Development Forum, Dar es Salaam Tanzania, 24th -25th April 2003) p. 4.

[48] Kameri-Mbote (1997) op. cit., n. 42, at p. 23.

[49] Ghai (2000) op. cit., n. 7, at pgs.139-142.

underlying factors for the failure of the post-independence environmental management regimes.[50] Sheehan actually states that:

> "…the colonial legacy of flawed property rights is nowhere more apparent than in East Africa where developing countries struggle to overcome this legacy ….[51]

In the light of such argument we shall discuss various issues concerning colonial legal and institutional arrangement in East Africa. A particular interest lies in ascertaining the extent to which this arrangement impacted on natural resource use and management. Special interest is paid to the issue of state-centrism in ENRM, which is a central issue in this thesis.

Colonisation of the East African States

The colonisation of the three East African countries of Uganda, Kenya and Tanzania was precipitated by a variety of imperatives including commercial motives, military strategy, humanitarianism, ecclesiastical missions and, generally, for the quest of national pride among the colonial masters.[52] The then European powers believed that having territories elsewhere was not only a show of military might and political glory, but also an economic strategy.[53] Aside from the productive land, vast forests, abundant water sources and the rich biodiversity in general, British interests in East Africa were particularly heightened by the spirit of imperialism, which was essentially catalysed by the German occupation of Tanganyika.[54]

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[50] See, for instance, Kallonga (2003) op. cit., n. 47, at p.4

[51] John Sheehan, 'Flawed Property Rights: The Aftermath of Colonialism' (12th Annual Pacific Rim Real Estate Society (PRRES) Conference, Hyatt Regency Hotel, Auckland 23 January 2006) p. 4.

[52] See, for instance, Kameri-Mbote (1997) op. cit., n. 42, at p. 23.

[53] William Beinart 'Introduction: The Politics of Colonial Conservation' (1989) 15 Journal of Southern African Studies 143.

[54] Garland G. Parker, 'A Summary of British Native Policy in Kenya and Uganda, 1885-1939' (1950) 19 The Journal of Negro Education 439.

While all the three East African states were, for the greatest part,[55] colonised by the same colonial master – Britain - they were individually administered as different territories. That notwithstanding, the manner in which they were managed had more similarities than differences. Aside from the usual administrative differences, colonial law and policy was often largely similar across the colonies. While commenting on soil erosion in East Africa, Stebbing, for instance, observed that:

> "It is only an accident that the individual Colonies happen to be, for governing purposes, independent units... It has been said that the subdivision of parts of British Africa into the several Protectorates or Colonies is a purely fortuitous one. Administratively, from the point of view of the welfare and prosperity of the people, erosion and desiccation is common to all, and is probably one of the most vital problems of the day." [56]

It is because of the high prevalence of similarities among the colonies that the following Chapters are largely discussed from a generalised perspective. That said, however, there were also differences, some of which are particularly important in our discussion. As the early colonial history was to later form the basis for the few but important differences, which existed in the natural resources management regimes, an attempt has been made to point out the areas of difference and where necessary discuss them in a comparative manner.

The colonisation of Uganda and Kenya was paved by missionary work and later the establishment of a trading company – the British East Africa Association/Company. It was largely through these two developments that the British Crown came to learn more about East Africa, and by the time of the 1885 Berlin Conference on the partitioning of Africa, Britain already had expressed keen interest in the East African

[55] Tanganyika was between the 1890s and 1919 colonised by German.
[56] E. P. Stebbing, 'Forests and Erosion' (1941) XL African Affairs 27, 47.

region.[57] As a result of the Conference, Kenya and Uganda were 'formally' recognised as British interests as Tanganyika went to the Germans. The British also extended their interest to Zanzibar and their rule over this East African Island had, by 1890, been recognised by the major colonial powers. Kenya was a British colony till 1963 and Uganda a British Protectorate till 1962, when the two attained their independence, respectively. Tanganyika, which was later ruled by the British, got her independence in 1961.

Uganda – The Uganda Protectorate

Although Uganda [58] is a land locked country, the colonialists took particular interest in the country's climate, fertile soils and other natural resources that presented a good base for the production of raw materials, which were a major interest to the colonial establishments. The colonisation of Uganda began with the establishment of a British protectorate over Buganda Kingdom in 1894. The Protectorate was gradually expanded and had by 1886, covered most of the area that was eventually named the British Protectorate of Uganda. It was, however, not until after 1900 that the colonialists established a detailed system of their administration. Unlike Kenya, which was a settlement colony and Tanzania, which was a Trust territory, the British Crown was initially reluctant to accept protectorate responsibility over Uganda. It was, therefore, decided for the British Administration in Uganda to expeditiously work towards establishing a self-financing colony that would be less dependent on the British Treasury. This distinctive conditionality implied that in order to achieve economic self-dependency, the Protectorate had to put emphasis on exploiting the income generating opportunities at its disposal, which were actually natural resources.

[57] The legal basis for British exercise of jurisdiction in Africa was entrenched by the Foreign Jurisdiction Act 1890 (as amended), whose provisions were later re-echoed in the African Order in Council of 1889.

[58] Uganda was under colonial rule (1894-1962) known as The Uganda Protectorate.

As a result, from the outset, colonial policy in Uganda emphasised mobilisation of the natives to labour on their own farms as a means of facilitating mass agricultural production.[59] Shortly afterward, however, the colonial establishment changed its policy over Uganda and it had, by the 1920s, started supporting development activities in the social services sector, which had been largely left to missionary societies. This shift in policy had been a result of the realisation that, for purposes of optimising its own interests, the colonial machinery had to champion the elevation of the socio-economic status of the natives. The purpose of which was to build a dependable human resource base to support production and generally, the native administration.

As the colonial administration took over the ownership and management of the natural resources, it was faced by the fact that many of these resources were being owned and managed under the auspices of traditional institutions, some of which were large, organised and influential among their subjects. To address this question, therefore, most colonial environmental laws and policies were deliberately segregationist and not uniformly applied. In the case of land, for instance, aside from most of it being decreed as Crown land, the rest was parcelled up and allocated to traditional institutions and some notable personalities, granting them the rights to manage all the resources that were found such as land.[60] This was specifically done to entice and enlist the loyalty of the traditional institutions and particularly their leadership.

Kenya – The British East Africa

The colonisation of Kenya began in 1895 with the formal declaration of a British Protectorate over a large part of the present day Kenya, which was named the

[59] Henry F. Morris, 'Annual Departmental Reports Relating to Uganda, 1903-1961' in Neville Rubin (ed), *Government Publications Relating to Africa in Microform* (African Studies Association of the United Kingdom 1978) p. 2.
[60] See, for instance, the Buganda Agreement 1900; Toro Agreement 1900; Ankole Agreement 1901; and Anglo-Maasai Agreement 1904.

Protectorate of British East Africa. In 1920, part of the Protectorate became the Colony of Kenya and its coastal part was renamed the Protectorate of Kenya. Nonetheless, the two continued to be managed as a single territory, up to 1963, when Kenya was declared an independent State.[61] Unlike in Uganda and Tanzania, Kenya was from the onset colonised with the intention of transforming it into a permanent European settlement, a position that was rigorously promoted and supported by the British Government. That policy direction involved the identification and allocation of the productive areas to the European settlers, and this entailed the displacement of many native communities. As a result, this soured the relationship between the settlers on the one hand and the natives on the other. As later discussed, the issue of ignoring native rights for the sake of European settlement remained instrumental in shaping the country's ENRM regime.

Tanganyika – German East Africa and later the Trust Territory of Tanganyika

Tanganyika, which in 1964 merged with the Republic of Zanzibar and Pemba to form the present day United Republic of Tanzania, was from 1885 to 1919 colonised by the Germans.[62] In anticipation of exploiting Tanganyika's vast natural resources, the German Administration attracted a sizeable population of German settlers, large scale farmers, trading companies and industrialists. The German Administration, via a process that largely was neither peaceful nor systematic, was entrenched through a mixture of treaty signing with local chiefs and land grabbing through barbaric raids.[63] Irrespectively, these two entry methods led to the destruction of the centrally organised native tribal structures, which formed the basis for the management of

[61] Henry F. Morris (ed) *Government Publications Relating to Kenya (Including the East African Commission and the East African Common Services Organisation) 1897 -1963* (Publication No R96995, Microform Academic Publishers 1976) p. 1.

[62] Tanganyika was, under German, rule called German East Africa, which in 1897 and 1903 expanded to cover the present day Rwanda and Burundi, respectively.

[63] See 'History of Tanzania' at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=pgu> accessed 23 December 2009.

local affairs.[64] In order to avoid stretching government resources, the Germans galvanised their colonisation process by placing government rights and obligations under the control of selected German trading companies.[65]

After the First World War (1914-1919), the Tanganyika colony was taken over by the British who managed it from 1920 to 1961.[66] In 1923, Tanganyika was enlisted under the League of Nations Mandates system of governance.[67] In 1946, its status was changed to a Trust Territory, but still remained under British administration. The Trusteeship Agreement was intended to ensure that the natives of Tanganyika were fairly treated. Article 8 of the Trust Agreement, for instance, clearly stated that:

> "In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population."[68]

Despite such Treaty provisions, however, the British administration in Tanganyika was not significantly different from that of Kenya and Uganda, which were 'ordinary' colonies. Clarifying on their administration in Tanganyika, the then British Secretary for State is said to have affirmed that there was nothing transient about Tanganyika, since they considered it to be as much a part of the British Empire as any other protectorate.[69] As we shall indeed be observing later, Tanzania's natural resources

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[64] Colin Leys, 'Recent Relations Between the States of East Africa' (1965) 20 International Journal 510, 511

[65] Loeb Isidore, *The German Colonial Fiscal System*, vol. 1 (Essays in Colonial Finance, 3rd Series, Publications of the American Economic Association 1900) pgs. 40-72.

[66] Initially British mandate in Tanganyika was under the British Foreign Jurisdictions Act of 1890, implemented by the Tanganyika Order in Council Ordinance of 1920, which was redefined by Government Notice No. 8 of 1923 [Tanganyika Gazette, Vol. IV, No. 2, 1923], following the listing of Tanganyika under the League of Nations' Territory of the Mandates system of governance.

[67] James S. Read, *Government Publications Relating to Tanganyika 1919-1961: Introduction to Microfilm Collection, 1919-1961* (Publication No. R96996, Microform Academic Publishers 1979) p. 3.

[68] Trusteeship Agreement for the Territory of Tanganyika, No.116 (UN), Art. 8.

[69] Read (1979) op. cit., n. 97, at p. 4.

management regime had little, if any, semblance to the rights bestowed unto the natives under the Trust Territories Mandate Agreement. However, because of the country's vastness and the lessons learnt from the native rebellions under German administration, the British administration in Tanganyika did not encourage the settlement of European farmers but instead preferred to promote cash crop growing by the natives. They nonetheless, maintained the German position which had placed the ownership and management of the key natural resources under the colonial administration.[70]

As we shall later argue, the centralist vis-à-vis segregationist colonial policy on the allocation of resource ownership and user rights was to set up a complex property rights regime that has, since colonial times, inevitably impacted on the proper functioning of the successive ENRM regimes. As our area of interest – multi-level government, which concerns the distribution of powers and functions, it is important to also examine the extent to which the colonial administrations attempted to disperse state powers and functions away from the central administrations.

The Colonial Institutional Structures and the Emergence of the Centralist Paradigm

The discussion on the colonial administrative, judicial, legislative and regional cooperation structures is central in assisting us to trace and understand the roots of state-centralism and its legacy on the current ENRM regimes. Given the importance of this to the thesis, certain structures and their functioning are discussed at length. The aim is to ascertain the extent to which the colonial institutions, and most particularly the central governments, embraced the involvement of other tiers of government in ENRM.

As seen earlier, irrespective of the variations in the mode of colonisation, the underlying philosophy, principles, impacts and institutional mechanisms of

[70] This issue is further discussed in the following section on Germany colonial rule in Tanganyika.

colonialism were largely similar throughout East Africa. Since all the three East African States were under British rule from 1920 until independence, most of the discussion is based on the British colonial institutions and is general in nature. We begin, however, with a brief discussion of the German administration in Tanganyika.

German Colonial rule in Tanganyika - German East Africa

Under the Germans, Tanganyika was administered through an excessively repressive system, headed by a Governor who wielded absolute powers. [71] In their pursuit of exploiting the natives and their natural resources, the Germans replaced the traditional institutional arrangements with new structures. The shortage of manpower, however, forced them to recruit locals into their ranks, and most particularly in the grass-root administration. The loyal Arabs and native Africans that were enlisted served their masters with diligence and they were in turn rewarded with power, respect and money.

Apart from the local chiefs - *Akida*s, the natives were subjected to incessant taxes and forced labour. The natives' social and economic livelihood patterns were extensively disrupted by an administration that had contempt for native ways of life.[72] Hunting of wild animals, which was a basic source of food, was greatly restricted by the Control of Hunting Regulations introduced in 1891 and subsequently widened through several amendments,[73] which incrementally created and gazetted more game reserves. Several forests were gazetted and access to them and their products by the natives was greatly restricted.[74] Additionally, land especially in the productive areas was alienated and given to German settlers and industrialists to

[71] See 'Information about Northern Tanzania: A Personal Scrapbook' available at <http://www.ntz.info/gen/n00006.html#id04022> accessed 23 December 2009.

[72] See Thaddeus Sunseri, 'Famine and Wild Pigs: Gender Struggles and the Outbreak of the Maji Maji War in Uzaramo (Tanzania)' (1997) 38 Journal of African History 235.

[73] Majamba (2001) op. cit., n. 19.

[74] By 1911, fifteen protected areas totalling to approximately 30,000km^2 or 5% of the territory had been officially declared as government reserves. See Rolf D. Baldus, 'Wildlife Conservation in Tanganyika under German Colonial Rule' available at <http://www.wildlife-programme.gtz.de/wildlife/download/colonial.pdf> accessed 25 May 2006.

open up large commercial farms. This arrangement, which presented a drastic change, triggered regular protests by the natives, the most prominent, being the famous *Maji-maji* rebellion, 1905-1907.[75] During the entire German rule, the conflicts between the colonialists and natives largely emanated from use and access rights over natural resources. This was compounded, however, by the policy of forced labour on German farms, which saw native land being forcefully alienated.[76] Moreover, forced labour was exercised under harsh conditions and, worst of all, supplied free of charge.

The aftermath of the *Maji-maji* war and other similar rebellions led to the rethinking of the German colonial policy. As a result, voluntary, household-based peasant production was preferred to forced labour in the production of cash crops. Also, a free labour market was promoted instead of the earlier policy that entailed the colonial administration supporting German industrialists.[77] Notwithstanding this, the colonial machinery maintained a stronghold over the ownership and control of the natural resources, especially the forests, wildlife and the alienated lands. Although natural resource based production remained a core interest for the German colonialists, their change in policy had been influenced by the rebellions. This illustrates two important points. First is that not all major colonial laws and policies were successful, irrespective of the use of force and the superior 'fire power' of the colonialists.[78] Secondly, the determination and concerted efforts of the natives, however minimal, also had an impact on colonial policy.

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[75] Thaddeus Sunseri, 'Famine and Wild Pigs: Gender Struggles and the Outbreak of the Maji Maji War in Uzaramo (Tanzania)' (1997) 38 Journal of African History 235.
[76] See Ole Ndaskoi Navaya, 'The Root Causes of Maasai Predicament,' (2006) 7 Fourth World Journal 28.
[77] Thaddeus Sunseri, 'The Baumwollfrage: Cotton Colonialism in German East Africa' (2001) 34 Central European History 31, 48.
[78] Similar circumstances surrounded the Bataka wars in Uganda and Mau Mau rebellion in Kenya.

The British Colonial Administration in East Africa

The British colonial administrations were each headed by a Commissioner, a title that later changed to Governor. While the Governors were responsible, through the Secretary of State, to the British monarch and Government in London,[79] they enjoyed reasonable discretion in exercise of their duties. Although the administrative structure was broken down into provinces,[80] each consisted of several districts, the power structure remained centralist as all the field stations were under the direct control of the central government.[81]

As practised elsewhere in the colonies, the British largely based their administration on the 'indirect rule' policy, which was often reinforced with the 'divide and rule' policy.[82] In spite of instances of resistance, these two policies were concertedly and successfully used in the colonisation of the East African countries.[83] After gaining reasonable control over the colonised territories, the colonial administrations often moved swiftly to legally entrench systems and structures that facilitated their administration and control over the colonies. They worked tirelessly and at times ruthlessly to ensure that such arrangements were in place, and in the process delineated the native communities from participating in governance matters.[84] As we shall see, British colonial administration in East Africa entailed the placing of excessive powers in the Executive, which virtually controlled the other arms of

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[79] G. W Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to the Present*, (Centenary Publishing House Ltd., Kampala, Uganda 2002) p. 10.

[80] Basically the provincial offices were responsible for monitoring and coordination, while actual field implementation of government policies was done by central government officers based in districts; Native Administrations; and later the Local Governments.

[81] The provincial and district administrations were both directly under the central government. Ordinarily the functions of government were executed through government departments run by a hierarchy of civil servants. For the case of Uganda see, for example, Morris (1978) op. cit., n. 59 at p. 1.

[82] Indirect rule was often exercised through local institutions or individual natives found to be loyal to the colonial administration. In comparison to expansionism, military adversaries and the assimilation policy, which were commonly applied by the French colonialists, indirect rule was considered to be cheap, sustainable and convenient.

[83] Notable examples of Chiefs that vehemently resisted colonialism includes: the Omukama Kabalega of Bunyoro in Uganda and Lenana of the Masaai, found in both Kenya and Tanzania.

[84] See David Killigray, 'The Maintenance of Law and Order in British Colonial Africa' (1986) 85 African Affairs 411.

government. We begin with a brief discussion of the policy of indirect rule on which the colonial structures were basically premised.

The Indirect Rule Policy

The British largely applied the indirect rule policy, which entailed the incorporation of the traditional local power structures, or at least part of them, into their colonial administrative structure. This policy was easily established in areas that had organised systems of governance. Generally, areas that lacked such systems or whose traditional institutions were not recognised by the colonial administrations were placed under direct control of the Governor, who appointed his own administrative chiefs, at times imported from other regions.[85] The same applied wherever the tribal institutions proved unpopular. For this reason, colonial administration was in some parts based on seamless structures that lacked the active involvement of local traditional institutions. This was especially the case in Kenya, where most of its tribal societies were hardly organised as large traditional administrative systems. In Tanzania, the native administrations were forged along tribal lines. This was a result of the British relying on the not very accurate account that Tanzania had well established tribal systems, which had been deliberately destroyed by the German administration.[86]

The Executives Councils

Initially, all the Executive powers of government were vested in the Governor. Introduction of the Executive Councils, in the 1920s, did not significantly alter this arrangement as most executive powers remained largely vested in the Governors. The Governors were in most cases not bound by advice of the Executive Council,

[85] Justin Willis, 'The Administration of Bonde, 1920-60: A Study of the Implementation of Indirect Rule in Tanganyika' (1993) 92 African Affairs 53.

[86] See Willis (1993) op. cit., n. 85; See also, Goldstein Gregg, 'Legal System and Wildlife Conservation: History and the Law's Effect on Indigenous People and Community Conservation in Tanzania' (2005) XVII Georgetown International Environmental Law Review 481.

which actually transacted business at their will.[87] In spite of the provisions empowering them to co-opt other members,[88] the Executive Councils were basically made up of government officials, who were part of the colonial machinery.[89] For this reason, representation of natives or their interests on the Councils remained abysmal for the greatest part of colonialism. As with other arms of Government, it was not until shortly before independence that membership on the Executive Councils was opened up to the natives. These changes were precipitated by the realisation that sooner or later, political independence of the territories was inevitable.

The Legislative Councils

Prior to the introduction of Legislative Councils (LEGCOs), in the 1920s, the legislative function in the colonies was basically played by the Commissioners/Governors.[90] The LEGCOs included official and non-official members, both of which memberships were exclusive to the Europeans. Primarily, the Legislative Councils were required to advise and give consent to the Governor in exercise of his legislative duties.[91] Largely, however, in addition to their role of assenting to legislation enacted by the LEGCOs,[92] the Governors remained the absolute legislative authorities in the colonies.[93] That notwithstanding, however, final assent to LEGCO bills was vested in the British Crown.[94] The manner in which the LEGCOs transacted their duties was in stark contrast, then, with the principles of separation of powers, which require the

[87] Although the requirement to submit Executive Council minutes to H. M the King was probably intended to ensure that the Councils conducted business, such measures were based on negative and political rather than positive and legal reasons. See Kanyeihamba (2002) op. cit. n. 79, at p. 10.
[88] See the Royal Instructions 1921 (Uganda).
[89] For composition of the Executive Council in Tanzania see, for example, Government Notice No. 100 of 1920 [Tanganyika Gazette Vol. 1 No. 39, 1920].
[90] In Tanganyika the Legislative Council was established in 1926 by an amendment of the 1920 Order in Council Ordinance; while in Uganda it was established by the 1920 Order in Council Ordinance; and in Kenya by East African Order in Council of 1906. Kenya's early establishment of a Legislative Council was largely a result of pressure from the Settlers' Colonists Association. See Morris (1976) op. cit., n. 61, at p. 1.
[91] For example see Tanganyika (Legislative Council) Order in Council 1926, Art. XIV.
[92] ibid., Art. XV.
[93] B. D. Bargar, 'Ostrich Breeding and the Kenyan Legislative Council, 1907-1915' (1970) 13 African Studies Review 401
[94] See, for example, Tanganyika (Legislative Council) Order in Council 1926, Arts. XVI and XVI,

legislature to be independent of the executive arm of government in the exercise of its duties.

Composition of the LEGCO gradually changed to include non-Europeans. In 1926, the Kenyan LEGCO reserved some of its non-official seats for the non-European nationals. All these seats were taken, however, by the Indians who, because of their economic status, often edged out the African natives.[95] Generally, the opening-up of LEGCO membership to non-Europeans was not based on a genuine commitment for racial equality but for purposes of political expediency.[96] The colonialists believed that a closer understanding between the European and the Indian, commercial, community was crucial in maintaining political stability.[97]

It was not until after the Second World War that representation on the LEGCO was opened-up to the native Africans. In 1945, the first Africans in the legislative Councils were appointed in Kenya[98] and Uganda.[99] Despite such developments, however, the LEGCOs continued to be influenced by the colonial office in London. In that sense, the ENRM regimes continued to be externally driven, fuelled by colonial economic motives. For example, acting on the influence of conservationists, the British Government blocked the 1950 decision by Tanzania's LEGCO to reallocate part of Serengeti Game Park to Masaai pastoralists who were in dire need of more land for pasture.[100] Generally, because of the power and structural imbalances, the

[95] Read (1979) op. cit., n. 97, at p. 5; See also Kanyeihamba (2002) op. cit. n. 79, at p. 16.
[96] See Kanyeihamb a (2002) op. cit. n. 79, at p. 16; and 'History of the Parliament of Uganda, available at <http://www.parliament.go.ug/index.php?option=com_content&task=view&id=17&Itemid=30> accessed 23 December 2008.
[97] Kanyeihamba (2002) op. cit. n. 79, at p. 16.
[98] In Kenya the New Order Ordinance reconstituted the Legislative Council in 1949, increasing the number fourteen officials (government) and that of unofficial members from seven to fifteen, constituted of seven Europeans, Four Africans and Four Indians.
[99] In Uganda all the three appointed legislators were high ranking Kingdom officials. That is the *Katikiros* (prime-ministers) of Bunyoro and Buganda Kingdoms and the Secretary General of Busoga Kingdom. See, Legislative Council, *Proceedings of the Legislative Council held on 25th December, 1945* (Uganda LEGCO 1945) p. 14.
[100] See Nelson H. Robert, 'Environmental Colonialism "Saving" Africa from Africans' (2003) VIII The Independent Review 65.

reconstitution of the LEGCOs did not translate into any significant change in the colonial philosophy towards ENRM. This was especially so in regard to the role and interests of the native communities.

Court Structure, Jurisdiction and Laws Applicable

Prior to the establishment of formal court structures, judicial services were administered in the early colonial days by Consular Courts. Developed in phases, the colonial judicial hierarchy consisted of the Court of Appeal for Eastern African, the Superior Court, which was either the High Court or Supreme Court, and the Subordinate Courts consisting of the Magistrate Courts and Native Courts.[101] In order to address outstanding peculiarities, other subordinate Courts included the Islamic Courts in Tanganyika, Kenya and the Buganda Court in Uganda.[102] From time to time, the territorial Courts were supported by Tribunals often appointed by the Governors. Although the High Courts had jurisdiction over all persons, most of the cases that related to Africans were disposed by native courts, which basically administered customary law and custom.[103] It is important to note, however, that notwithstanding the similarities in Court structure and applicable laws, jurisdiction and powers of same level Courts varied between the territories.[104]

Basically, with the exception of the 'reception date' for statutes of general application in England, the mainstream Courts in colonial East Africa functioned under a similar body of laws and rules.[105] Prior to the Ordinances that lay the

[101] High Courts and Magistrates Courts were directly established by Orders in Council, That is: Order in Council, 1920 (Uganda); Order in Council of 1902 (Kenya); and Order in Council 1920 (Tanganyika). The Native Courts were established and regulated by separate legislation, the Native Courts Ordinances and later the African or Local Courts Ordinance. That is: Native Courts Ordinance 1919 and African Courts Ordinance 1957 (Uganda); African Courts Ordinance 1951 and Local Courts Act 1958 (Kenya).
[102] See R. W. Cannon, 'Law, Bench and Bar in the Protectorate of Uganda' (1961) 10 International and Comparative Law Quarterly 877.
[103] ibid.
[104] J.H Jeahey, 'The Structure, Composition and Jurisdiction of Courts and Authorities Enforcing the Criminal Law in British African Territories' (1960) 9 The International and Comparative Law Quarterly 396.
[105] Jeahey (1960) op. cit., n. 104, at p. 899.

foundations for an expanded judicial framework, the laws applicable to both High and Magistrate Courts were primarily based on Indian law. The laws were exercised in conformity with common law, the doctrines of equity and statutes of general application in force in England at the date on which the Orders in Council entered force.[106] Other sources of law included: international agreements or treaties entered into, whether on their behalf or not, by their colonial masters;[107] by-laws and rules made by Native Councils, Local Governments and statutory bodies;[108] and also, to a limited extent, orders and pronouncements by chiefs[109] and other government officials.[110] As can be seen, the natives were suddenly introduced to a new legal order that was instrumental not only in the entrenchment of the colonial virtues but also in the suppression of native interests. Although the colonial governments had established their own structures, prudence made it practically difficult for the colonial institutional arrangement to completely ignore native law and institutions and thus the co-existence of the native judicial system.

[106] Thus: 22 July 1920 for Tanganyika, 12 August 1897 for Kenya and 1889 for Uganda.

[107] While the then international legal order did not recognise the East African colonies as countries or states, they were by proxy, signatories to the international agreements signed on their behalf by their colonial masters. Some of the agreements relating to the environment and natural resources included: the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa (1900 London Convention), which was superseded by 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State (1993 London Convention); the 1929 Nile Waters Agreement signed between Egypt and Great Britain; and 1959 Agreement for the Full Utilization of the Nile Waters (Nile Water Treaty), which were both signed between Sudan and Egypt.

[108] For instance the Agriculture Committees were empowered to make rules and orders and local authorities to enact by-laws that were applicable in their areas of jurisdiction. This was, however, to be done in consultation and with the approval of the minister responsible for local government and the central agricultural board. See Agriculture Act 1955 (Cap 318) (Kenya), s. 48 (2-3).

[109] According to s. 10 of the Chief's Authority Act (Cap. 128), a chief had the power, for the purposes prescribed in the Act, to issue orders to be obeyed by the persons residing or being within the local limits of their jurisdiction. These include prevention of water pollution and regulation of timber cutting. See also, L.N.362/1956, L.N.172/1960, L.N.461/1963, and L.N.101/1964.

[110] For instance laws such as the Mining Act of Uganda conferred wide jurisdiction on administrative officers to determine a range of disputes, especially those involving miners or prospectors. See Morris (1966) op. cit. n. 59, at p. 388.

The Native Judicial System

Certain pre-colonial East African communities had well-established judicial systems managed by customary laws.[111] In some areas, this arrangement served the basis for the establishment of the native judicial systems at whose core were the Native Courts. The Lower Native Courts, which handled the bulk of litigation in the territories,[112] were presided over by local chiefs who were also charged issuing orders that carried the force of law.[113] Native law was only applicable in cases where all parties involved were Africans. A major drawback for the Native Courts, which actually contributed to the constriction of their jurisdiction, was the issue of inconsistency in native judicial standards.[114] Cannon observes that:

> "There is considerable uncertainty as to what is 'customary law 'as it is a vague concept. It is recognised that customary law is not by nature immutable. Often, 'customary law,' as interpreted by the African courts, reflects the public opinion of the areas concerned. Sometimes it merely reflects the opinion of the more vocal and politically active section of the community. It poses very difficult problems of uniformity."[115]

Under the native judicial system, the issue of standards remained a problem especially across tribes and also in the distinction between customary law and the law of the land. Nonetheless, the Native Courts gradually regained greater jurisdiction in both criminal and civil matters as they embraced non-customary laws and procedures and also as a result of necessity due to the large volume of cases.[116] As most environmental laws were based on the 'prohibit/restrict and punish'

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[111] See Cannon (1961) op. cit., n. 102.
[112] ibid., at p. 5. For a detailed discussion on native administration in light of the justice system of the Native Courts in Uganda, see H. F. Morris 'Two Early Surveys of Native Courts in Uganda' (1967) 11 Journal of African Law 159
[113] See, generally, the Natives and Chief's Ordinances.
[114] See Cannon (1961) op. cit., n. 102.
[115] ibid., at p. 888.
[116] ibid., pgs. 877-891.

approach, however, both Native and Magisterial Courts were often used in its enforcement.[117]

As it was unfair and practically impossible to immediately subject native Africans to the full force of English law and judicial system, expediency demanded a tolerance of customary law, though within limits. Customary law was, for instance, inapplicable to non-Africans. It was also generally upheld in so far as it was not repugnant to 'justice and morality', as perceived from the colonial and English law point of view.[118] While such provisions were intended to preserve the 'good' attributes of native laws, in effect, they facilitated a far reaching entrenchment of exotic laws and cultures. This dichotomy partially sowed the seeds for the dualist legal system that reigned throughout East Africa during colonialism.[119] As a result of being extensively undermined by the colonialists, African customary law, which was subordinate to statute law, was gradually and in other cases drastically subdued by English law. Eventually, customary law became rarely applicable to the management of natural resources.[120]

In addition to native law, colonial legal tolerance also extended to religious laws, including Hindu and Islamic law, but their application was strictly limited to issues relating to family law, most particularly marriage, divorce and succession.[121]

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[117] Y. P. Ghai and 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* (Oxford University Press, Nairobi 1970) p. 112.
[118] See, for instance, Tanganyika Order in Council Ordinance 1920, Arts. 13 (4) and Art. 24 (a).
[119] Cannon (1961) op.cit., n. 102.
[120] Palamagamba John Kabudi, 'Challenges of Legislating for Water Utilisation in Rural Tanzania: Drafting New Laws' (International Workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, Johannesburg, South Africa, 26-28 January 2005).
[121] See, for example, The Marriage, Divorce and Succession (Non Christian Asiatics) Ordinance 1923 (Tanganyika).

The Integration of Administrative and Judicial Functions

As earlier indicated, the Governors played both administrative and judicial roles and such a stature was also extended to many other administrative officials.[122] Initially, the District Officers were responsible, in respect of their judicial services, to the High Court and not the Provincial Commissioners, who were ordinarily their immediate supervisors.[123] On the insistence of the proponents of administrative supremacy, however, the judicial departments lost their control over Native Courts to the Provincial Administration departments.[124] While supporting the merger between Native Courts and Administrations, one of the Governors, Sir Donald Cameron, confidentially wrote to the Secretary of State arguing that, one of the problems and consequences of the Native Courts Ordinance No. 6 of 1920 was that:

> "... Native courts are regarded as part of the judicial machinery of the Territory instead of as an integral part of the machinery of native administration."[125]

In that case, there was no clear distinction between those implementing and arbitrating the law. Although the district magisterial role was eventually taken over by professionally qualified full-time Magistrates appointed by the judicial department, District Officers retained the supervisory powers over Native Courts, which were almost entirely responsible to them.[126] Further changes included the exclusion of advocates from appearing before Native Courts and allocation of the appeals from Native Courts to the Governor. As observed by Ghai *et al,* despite their

[122] Until the 1950s, the District Commissioners were also the District Magistrates and District Officers were ex-official Magistrates in District Courts, which supervised and heard appeals from the Native Courts.
[123] Morris (1978) op. cit., n. 59, at p. 6.
[124] They argued that the capacity under which District Officers supervised Native Courts was more administrative than magisterial, implying that they ought to have been responsible to the Provincial Commissioners and not the High Court. See Morris (1978) op. cit., n. 59, at p. 5.
[125] Read (1979) op. cit., n. 67, at p. 6.
[126] Morris (1978) op. cit., n. 59, at pgs. 7 and 11.

clashes, the judiciary and administrative systems stood for the same master and, therefore, had to support one another whenever it was essential to so do.[127]

It was not until shortly before independence that the problem of judicial independence was given attention. Following the recommendations of the 1953 Judicial Adviser's Conference, each of the territories took steps towards the establishment of an independent and fully integrated judicial system. The reforms instituted included the replacement of district officers' and chiefs' judicial roles with full time, independent and specially trained persons. The reforms also aimed to close the gap between the High Court and African Native Courts. Largely, issues relating to natural resource management continued to be handled by the subordinate courts, especially the native courts. This position was most likely upheld because a great part of the natural resource management laws had continued to be enforced through by-laws and local resource specific rules. Because of the complexities of legal dualism and the fact that the integration process had to be handled gradually, it was not until the post independence period that reasonable integration of the judicial structures was achieved.[128]

The determination to muddle judicial, administrative and executive functions clearly shows how the colonial establishments stopped at nothing in entrenching their supremacy, underpinned by a centralist management approach. There is no doubt that the integration of the Native Courts within the Administrative ranks was calculated to serve colonial interests. First, the arrangement ensured that the colonial administration kept a firm grip on the entire judicial system. Secondly, by empowering Native Administrations as allies, the colonial administrations were undoubtedly targeting them to enlist their support and loyalty in pursuing the colonial agenda.

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[127] Ghai (1970) op. cit., n. 117, at p.172.

[128] In Uganda, for instance, full integration of judicial system was achieved in 1964, that is two years after attainment of her independence. See Morris (1978) op. cit., n. 59, at p.11.

As we have seen, colonisation in East Africa entailed the establishment of new government structures and systems that were not only centralist but also dominated and influenced by the colonial powers. Also, despite the existence of the other arms of government, power was particularly concentrated in the Executives presided over by the Crown. This arrangement was intended to elevate the colonial agenda and thus sideline the natives and their interests in the management of their affairs, which certainly included ENRM, itself a major motive for the colonisation of East Africa. Although there were institutional changes in the latter years of colonialism, these changes did little to mitigate the centralist and oppressive management approach, which, as is shown in Chapter Six, was a major drawback in the colonial ENRM regimes.

Having discussed the colonial central government structure in light of power distribution, it is appropriate to also explore the attempts made in the direction of dispersing state power and functions to other levels. In that regard our focus now shifts to how the concept of multi-level government was embraced by the colonial administration, most especially in ENRM. As the geographical scope of this study is trans-boundary – the Lake Victoria region - we shall focus on the attempts geared at both local and regional government.

Colonialism and the Concept of Multi-Level Government

As has been seen in the previous section, the colonial administrations in East Africa were characterised by highly centralised systems that undermined the principle of effective local participation and, in general, native representation. As situations changed, most particularly in the political and economic arena, the colonial structures and method of government incrementally underwent various significant changes. As will be discussed below, the Second World War period and the years shortly thereafter presented a landmark in the history of colonial policy reforms. We

now look at how the colonial administrations embodied the concepts of local government and regionalism in natural resource management.

Decentralisation and Native Governance

There are basically three forms through which the natives and their institutions were involved in the colonial administrations. First was the recognition of some Kingdoms that were incorporated into the administrative structures as sub-autonomous institutions.[129] Second were the Native Administrations that were either based on tribal institutions or conveniently created to cover a particular area or tribal grouping.[130] This was the most widespread arrangement. The third form, which emerged in the closing phase of colonialism, was the local government system that was established mostly as a replacement of the Native Administrations. While it is arguable that native administration, which was virtually a manifestation of the 'indirect rule' policy, was a form of decentralised governance, the major question remains as to whether these institutions stood for the interest of the local people. Reflecting on our discussion in Chapter One, it was seen that the basic principles of decentralisation include: democratic representation; local participation in decision making; and accountability of office bearers to the local population. In contrast, native administration entailed top-down decision models, centralised appointment of office bearers and centralised command structures based on upward accountability. In essence, therefore, the native administrations were not local governments but rather administrative units intended to serve the colonial machinery, which, as a matter of first priority, had the duty to uphold the interests of the colonial masters. We shall first discuss the native administrations and then the local government systems.

[129] This was, for example, the case with the Kingdom Buganda in Uganda. See the 1900 and 1955 Buganda Agreements.

[130] In Uganda several native administrative authorities were, for instance, created to cater for those tribal regions that did not have centralised traditional institutions. These included the Busoga, Teso, Acholi and Lango tribal regions.

The Native Administrations

Aside from the various interim provisions[131] and the agreements signed between the colonialists and traditional leaders, the Native Authority Ordinances that established the Native Councils,[132] were the first legal instruments to set out the involvement of natives in the colonial administration of East Africa. As was often the case with British colonial policy, East Africa's Native Administrations essentially operated as conduits in the enforcement of the 'indirect rule' policy. Because of the colonial dualist approach to government, however, the Local Native Councils in Kenya operated in parallel with the District Advisory Committees, which were their equivalent in the European settlements. Unlike the former, the latter had more powers and their relationship with the colonial administration was mostly based on a cooperative rather than a coercive framework.

The Native Administrations were intended to introduce systems aimed at saving central government from stretching its limited resources.[133] Also, the colonialists were well aware that implementation of their policies and laws was to be much easier if administered through native administrations. Sir Donald Cameron who was Tanganyika's Governor, between 1925 and 1931 observed that Native Administrations were introduced to:

> "...provide a form of local government, close to the people, which the people themselves understood, using traditional leaders of the people as administrators, and second, to initiate participation by the indigenous people

[131] These included: decrees and proclamations done by senior colonial administrators.
[132] In the case of Tanzania, see the 1921, 1923 and 1926 Native Authority Ordinances; As for Uganda, see the 1919 Native Authority Ordinance; and in the case of Kenya, see the 1912.
[133] See Peter A. Dewees, *Social and Economic Incentives for Smallholder Tree Growing: A Case Study from Murang'a District Kenya* (FAO Community Forestry Case Study Series, Rome, Italy 1995).

in the Government of the country, such as could be expanded with their increasing education and experience into full integration."[134]

In practice, however, the establishment and operation of the native authorities was far from this as the colonialists seem to have been aware of the threats to their interests if powerful native authorities were to be established. It was not until towards the end of colonialism that the Native Administration was transformed into local government system that was gradually democratised.[135]

Among the major functions of the native administrations were those of levying and collecting taxes; participating in public works; enforcing law and order; and making by-laws.[136] They nonetheless, remained subordinated to the central colonial administration. The District Commissioners were the chairmen and chief executives to the Native Councils, most of whose administrative and legislative decisions had to be vetoed by the Governor.[137] The Councils were used to accept and confirm decisions already finalised by the colonial administration, irrespective of whether they were popular. The colonial administrations also found it convenient to punish the natives through their own councils and this estranged the Councils from the people they 'represented'.[138] Actually, the native administrations were basically established for administrative convenience.

At the centre of the native administrations was a hierarchy of chiefs and agents usually appointed from among the natives, but remaining under direct control of the central government. In most cases, the native authorities were funded from the local

[134] Donald Cameron, 'Administration Memorandum No. 1, Principles of Native Administration and their Application', quoted in Reads (1979) op. cit., n. 67 at p. 6.
[135] See discussion on the local government in the following section.
[136] S.K Akivanga, W. Kulundu-Bitonye and M.M. Opi, *Local Authorities in Kenya* (Heinmann Educational Books, Nairobi 1985) p. 18.
[137] See the Native Authority Ordinances cited in footnote n. 132.
[138] Based on a paragraph in Oginga Odinga, 'Not Yet Uhuru', quoted in Akivanga (1985) op. cit., n. 136, at p. 19.

taxes that they collected.[139] This was intended to encourage the chiefs to collect more taxes and also to minimise stress on central government finances. In exercise of their duties, the Chiefs implemented orders and laws from 'above', something they did with the assistance of the local administration police and prisons, which were under their control.[140] The chiefs enjoyed the powers of issuing lawful orders to the Africans, in accordance to customary law, or as delegated by the colonial laws and policies.[141] It was, for instance, under their discretion to issue orders requiring able-bodied persons to engage in work or services which included those related to the conservation of natural resources.[142] As they were widely involved in agricultural campaigns, the chiefs also had the powers to regulate a wide range of issues relating to land management. Despite such powers, however, the operations of Native Councils were restricted to issues that were not in conflict with colonial interests. As was intended by its designers, the native administration structures greatly assisted in the establishment of a base through which colonial policies were locally enforced, irrespective of whether they were popular amongst the population.[143] On the other hand, however, it is worth recognising that the success of the native administration also greatly depended on local circumstances.[144]

Though the indirect system incorporated native administered institutions, it in effect negated the effective participation of local communities in decision making. Instead, it created a class structure that separated the local leaders from the communities that they led, especially in terms of accountability and interests.

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[139] In Tanzania, for instance, the Native Administration Memorandum No. 3, Native Treasuries introduced the practice of chiefs receiving salaries in lieu of customary tributes. See Reads (1979) op. cit., n. 67, at p. 6; See also, Justin Willis, 'The Administration of Bonde, 1920-60: A Study of the Implementation of Indirect Rule in Tanganyika' (1993) 92 African Affairs 53, p. 57.
[140] Morris (1978) op. cit., n. 59, at p. 6.
[141] See the Native Authority Ordinances cited in footnote n. 132.
[142] See, for example, Chief's Authority Act (Cap. 128) s.13.
[143] Nyangabyaki Bazaara, *Decentralisation, Politics and the Environment in Uganda* (Environmental Governance In Africa Working Paper No. 7, World Resources Institute, Washington, USA 2003) p. 4.
[144] Willis (1993) op. cit., n. 139 at p. 57.

The Local Government System

The move towards 'true' decentralised governments was effectively kick-started by the ushering in of the local government systems during the late 1940s and early 1950s.[145] For the first time, new Local Government laws attempted to spell out the extent and mode through which powers and functions were shared between central government and the local councils. Though in a toned down mode, the new arrangements upheld central government control over the Local Councils. Despite having legislative powers, for instance, District Council decisions could be vetoed by the central government, which also continued to appoint and preside over the District Commissioners (DCs), who were the chief executives of the Councils. Also, the DCs appointed all the other staff of the councils. Although the chiefs were being paid by the local governments, through the DCs, they remained answerable to the central government. In addition, the central government departments continued to post their own staff to local government. To maintain a close watch over the District Administrations, the Provincial Administrations were retained and integrated into the local government systems.[146] The exercise of the legislative and financial powers extended to local governments largely remained at the discretion of the central governments and this certainly impacted adversely on Local Government 'autonomy' in service delivery.

Basically, there were two methods through which powers and functions were devolved to the District Councils. First were the 'permanently' devolved powers and functions and second were those that were usually devolved on a case by case basis and therefore varied across the Councils. Whether 'permanently' or specially, the delegated natural resources management functions were often bloated with claw-back provisions. For example, while Uganda's Forest Act, 1947, provided for the involvement of local governments in the control and maintenance of local forest

[145] Local government was first introduced: in Uganda by the Local Government Ordinance 1949; in Kenya by the African District Local Councils Ordinance 1950; and in Tanganyika by the Local Governments Act 1953.

[146] Morris (1978) op. cit., n. 59, at p.5

reserves, it also required that such involvement had to be as specified by the minister responsible for forestry,[147] who also had the powers to withdraw it.[148] To affirm central government's continued interests in controlling the forestry resources, it was provided in the Forest Act 1947 that:

> "Nothing in this section shall be deemed to transfer to or vest in a local authority any privilege, right, title, interest or easement over any land declared to be a local forest reserve other than the privilege of maintenance and control."[149]

Aside from the major decisions, central control was also extended to the routine management of the local forests, which had to be undertaken under the direction of the central government's chief forest conservator.[150] While such checks may have been necessary for purposes of uniformity, standards and technical support, it was in some cases used to exert full central government control over the forestry resources. It is along those lines that Dewees observes that although native forest reserves in Kenya were technically under the control of Local Councils, they were in practice often managed by the Forest Department. [151]

Local Government from the 1950s to Independence

Particularly in the years immediately before independence, there were significant policy reforms that saw native interests being elevated in terms of rights and structures. This came as a result of concerted internal and external pressure to which the colonial establishment had no alternative but to yield, especially on realisation that independence was not only due but around the corner. Local government was among the sectors that benefited from the last minute reforms in colonial policy. In

[147] Forests Act 1947, Cap. 146 (Uganda), s. 4(1).
[148] ibid., .s. 6.
[149] ibid., s. 4 (2)
[150] ibid., s. 6.
[151] Dewees (1995) op. cit., n. 133.

Uganda, for instance, the 1955 District Administrations (District Councils) Ordinance strengthened the local government mandate in terms of functions and powers. While the provincial administrations and other decentralised central government agencies were retained, their roles were often confined to inspectorate and advisory services.[152]

As was the case in many other sectors, the late years of colonialism saw significant improvement in the involvement of local government in natural resource management. Uganda's Forest Ordinance 1947 was amended,[153] for example, to *inter alia* widen local government legislative powers over the forests under their control.[154] Webster *et al* observed that:

> "The amendments to the forest Ordinance brought about close protracted negotiations over the rule making powers of native authorities and make the way clear for them to make forests rules of substance and in a form acceptable to them."[155]

Although the local rules were subject to approval by the central government, the broadening of local government legislative powers was a milestone in local government participation in the management of local resources. This opportunity was swiftly utilised by several local authorities, which not only became involved in regulating forestry use, but also benefited from the accruing revenues.[156] To strengthen the local resource management regimes, the native courts, which formed part of native administrations, were also brought on board. In a more defined manner, several native courts were entrusted with the power to administer justice in

[152] Morris (1978) op. cit., n. 59, at p. 5.
[153] Forests (Amendment) Ordinance 1960 (Uganda).
[154] ibid.
[155] G. Webster and H. Osmaston, *A History of Uganda Forest Department* (Commonwealth Secretariat 2003) p. 12.
[156] For example, in the case of Uganda, see the Forests (Bunyoro Rules), L.N No. 14 of 1961 (Uganda); The Forests (Acholi Rules), L.N No. 46 of 1962 (Uganda); The Forests (Kigezi Rules), L.N No. 76 of 1962 (Uganda); and The Forests (West Nile Rules), L.N No.187 of 1962 (Uganda).

respect of certain parts of the Forests Ordinance 1947.[157] For purposes of expertise and expeditiousness, the judicial system incorporated several cadres of non-judicial public officers. This arrangement saw the local forestry officers being appointed as public prosecutors in forestry related cases.[158]

In Kenya, a scheme of transferring significant resource ownership and management rights was piloted in selected local councils in the 1960s. Ownership of the *Maasai Mara* and *Amboseli* Game Reserves were handed over to *Narok* African District Council and *Kajiando* County Council, respectively.[159] These Councils were given powers to: make the necessary by-laws; recruit own staff; collect and use accruing revenue to develop and maintain infrastructure in the reserves: and also provide capital development and social services to the community. The colonial administration was required, in principle, to retain peripheral roles such as advising on management and training of staff.[160] Though it provides evidence of the generosity of some of the last minute reforms, this rather isolated Kenyan case was a political settlement[161] and, as such, may not accurately reflect the extent of the reforms in the wildlife management sector, which largely remained centralised in all the countries.[162]

As can be seen, the structure of native self governance was modified to create a system with the semblance of a democratic institution. It was on the other hand, however, deliberately and variously frustrated to ensure continued central control of the colonial administration. The involvement of local government in ENRM was on

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[157] See Legal Notice No. 324 and Legal Notice 18 of 1961.
[158] For instance, G.N 672 of 1958 appointed the South Mengo District Forestry Officer as a public prosecutor. See Webster (2003) op. cit., n. 155.
[159] L. Talbot and P. Olindon, 'The Maasai Mara and Amboseli Reserves' in Agnes K (ed), *Living with Wildlife; Wildlife Resource Management with Local Participation in Africa* (African Technical Department Series: Technical Paper No. 130, World Bank, Washington DC 1990) p. 69-70.
[160] ibid.
[161] See discussion in sub-section on 'Decapitation of the Legitimacy of the Region and Local Government', in this Chapter.
[162] Part of *Amboseli* reserve was in 1974 eventually upgraded to a national park and subsequently taken over by the central government.

the periphery, especially in the earlier years of colonialism. Although different from sectors such as primary education, health services, public works, agriculture extension and water supply,[163] which enjoyed reasonable levels of devolution, the decentralisation of natural resources management had, by the time of independence, started to improve.

[163] See, for example, A. M. Sharp and N. M. Jetha, 'Central Government Grants to Local Authorities: A Case Study of Kenya' (1970) 13 African Studies Review 43.

Regional Cooperation under the Early Colonial Era

The three East African States of Uganda, Kenya and Tanzania have a relatively long history of regional cooperation, which dates back to the late 19th Century. Shortly after being colonised by the British, Kenya and Uganda explored the path for territorial cooperation on various issues.[164] This cooperation was joined by Tanganyika, [165] which had, after the First World War, been placed under British Administration. By 1920 all the three countries had started using a single currency and in 1940 the East African Income Tax Board and Joint Economic Council was established. On the political front, the East African Governor's Conference was established in 1926, as the first central coordination body for the cooperating colonies. This development marked a turning point for the broader forms of cooperation that later followed. The Conference, however, transacted all its business as a sole organ constituted of only the Governors of each colony. Since it lacked a legally recognised legislative character, Conference decisions that needed to be turned into law were privately discussed by the Governors, who would in turn present identical bills to their respective Legislative Councils.[166] Aside from these developments, there was nothing specifically achieved in terms of cooperation over ENRM issues. Instead, there was an effort to establish a political union for the three colonies and this might perhaps have provided an opportunity for a unified natural resource management regime.

The move Towards Regional Integration - The East African Political Union

Despite sharing the same colonial master, the East African colonies had continued to function independently of each other, save for the loose forms of cooperation. Mid-

[164] The cooperation between Uganda and Kenya started with the establishment of the East African Customs Collection Centre in 1897. This was followed by the establishment, in 1902, of the Court of Appeal for Eastern Africa, but which had a jurisdiction that extended beyond the two countries. A Currency Board and Postal Union were set up in 1905 and 1911, respectively. The collection centre was, in 1917, upgraded to a Customs Union, which Tanganyika joined in 1919.

[165] In 1964, Tanganyika united with Zanzibar to form the present day United Republic of Tanzania.

[166] D. Rothchild, 'Politics of Integration: The Second Attempt' (1968), quoted in Ochwada Hannington, 'Rethinking East African Integration: From Economic to Political and from State to Civil Society' (2004) XXIX Africa Development 53, 60.

way in the colonial era, however, the idea of establishing a political union of East Africa was envisioned by the British, including prominent citizens and parliamentarians.[167] The proponents believed that a political union would be a good foundation for economic integration. Lugard indeed observes that among the major reasons advanced by the colonial Commissioners for the establishment of a union were: to restore effective imperial control by establishing a central authority to control the common economic services among the three East African Colonies and also to consolidate the number of fragmented units through which the colonies were administered.[168] Lugard's observation highlights the fact that colonial interests were paramount in the bid to establish the Union.

Following the presentation of the second report on the closer union of East Africa, Sir Samuel Wilson, the then Permanent Under-Secretary of State for the Colonies, was tasked to ensure the workability and acceptability of the Union and not whether it was necessary.[169] Interestingly, though, the idea of forming a Union for the East African states was insufficiently popular even among the British colonial ranks. The majority of East Africa's European settlers were against the idea, save for the minority rich farmers who saw it as an opportunity for more farm labour. [170] Many of those against it argued that the East African Conference of Governors sufficed in coordinating the colonial economic interests.[171] As for the Africans, the Ormsby-Gores Commission Report showed that they were totally against the idea of a federation, as many of them were suspicious of the core intentions behind its establishment.[172] It may be worth noting that several of the native Africans

[167] Hannington Ochwada, 'Rethinking East African Integration: From Economic to Political and from State to Civil Society ' (2004) XXIX Africa Development 53, 58.
[168] Baron Lugard, 'Native Policy in East Africa' (1930) 9 Foreign Affairs 65, 77.
[169] ibid.; See also, Ochwada (2004) op. cit., n. 167, at p.58
[170] ibid.
[171] Lugard (1930) op. cit., n. 168, at p. 77.
[172] Ochwada (2004) op. cit., n. 167, at pgs. 58-59.

consulted by the Commission were the traditional leaders,[173] who were actually fearful that a larger political union was likely to undermine their authority.

The idea of a political union was on the other hand faced with a legal technicality over its inclusion of Tanganyika, which was a League of Nations' Trust Territory. Nonetheless, Lugard who was a member of the Permanent Mandate Commission (PMC) argued that the union would not be an infringement of the PMC principles, so long as Tanganyika had its own laws and budget as a separate entity.[174] That would have implied a weak union largely driven by national interests of the federating parties in their role as fully sovereign states. Eventually, neither did the idea of a federation materialise nor were the loose forms of cooperation strengthened. Basically, the cooperation among the colonies continued to centre on the fact that they shared the same colonial master. Significantly, for political and economic reasons, state centrism and individualism largely contributed to the failure of the push for a political union to materialise.

Regional Cooperation in the Later Years of Colonialism

In the mid-colonial period, aside from a few areas of cooperation, there was nothing tangible on the side of regional integration. The earlier areas of cooperation remained too fragmented in that no single sector of government, including that of natural resources, can be said to have reasonably benefited from the regional cooperation efforts. This section examines the extent to which the post Second World War policy shifts entailed the strengthening of regional cooperation, most especially in relation to its usefulness in environmental management.

Following a recommendation of the 1945 colonial white paper on inter-territorial organisation in East Africa, the East African High Commission (EAHC) was established

[173] See W. G. Ormsby-Gore, *Report of the East Africa Commission* (Cmnd 2387, His Majesty's Stationery Office, London, 1925) p. 7.
[174] Lugard (1930) op. cit., n. 168, at p. 77.

in 1947 and commenced operations in 1948. In addition to its basic function of setting out a centrally coordinated structure to administer common services,[175] the EAHC was also tasked with the responsibility of identifying more areas of cooperation. For the first time, an attempt was made, under the EAHC arrangement to detach the legislative function from the executive by establishing a separate body – the Central Legislative Assembly (CLA). Nonetheless, all powers of the Commission, which acted as a body corporate, virtually lay in the hands of the Governors of three territories and most particularly the Chairman who was the Governor of Kenya.[176] A secretariat was also established as the technical organ of the Commission and it was overseen by seven appointed Principle Executive Officers (PEOs), headed by the Administrator. While the CLA had an important role to play, its membership was not reflective of the principle of separation of powers. Out of the 34 members, only 9 were elected by the territorial legislatures and the remaining 25, including the Speaker and the PEOs (*ex-officials*), were either appointed or nominated by the Commission or the Governors, who were actually the same persons.[177] Although mandated to seek the advice and consent of the Assembly, the Commission wielded significant legislative powers over a wide range of issues, including the power to assent to the CLA Bills.[178]

In spite of such a structural arrangement, the EAHC wielded little powers over its parties. In that respect, the Raisman Commission Report of 1961 observed that the Commission was practically incapacitated by its limited functions because most of the powers remained with the individual territories.[179] Bills of the Assembly, for example, had to initially be sent to the territorial governments for thorough scrutiny

[175] The common services were essentially in the sectors of: Transport and Communication, Revenue Collection, Economics and Statistics, Research and General Administration.
[176] See E.N Gladden, 'The East African Common Services Organisation' (1963) XVI Parliamentary Affairs 428.
[177] Gladden (1963) op. cit., n. 176, at p. 429.
[178] See generally, the East Africa (High Commission) Orders in Council, ranging between 1947- 1961.
[179] Raisman Commission Report (cmnd 1279), as quoted in Gladden (1963) op. cit., n. 176, at p. 429.

before being submitted to the Commission. As Galdden observes, the territories scrutinised the Bills

> "…from the point of view of the interests of their particular Governments, and not from an East African point of view."[180]

Furthermore, the Commission's budgets and expenditures had to also be vetoed by the territorial legislatures.[181] Following the Raisman Report, the EAHC was in 1961 replaced by the East African Common Services Organization (EACSO),[182] which is discussed later.

Aside from being a centre through which national and regional policy matters could be discussed, the EAHC was not directly involved in environmental management. Though the regional cooperation agenda was then focused on economic and political issues, the fact that natural resources stood at the centre of those very issues did not initially attract significant policy reforms towards establishing a regional ENRM regime. In the field of ENRM, they instead chose to cooperate in areas considered to be less controversial, such as research. In 1947, for example, the Fisheries Service Institute was established and later renamed the East Africa Fisheries Organisation (EAFRO).[183] The East Africa Agriculture and Fisheries Research Council (EAAFRC), was also established in the same period. As a research organisation, EAFRO provided training and technical expertise to the fisheries industry whose management

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[180] Gladden (1963) op. cit., n. 176, at p. 430.

[181] Aside from such institutional deficiencies, another interesting finding by the Raisman Report was that the cooperating territories were economically unequal and were as such benefitting unequally from the common market. Kenya, which was by far the industrial hub of the region, enjoyed more economic benefits than the rest. For political prudence, therefore, a key recommendation in the Raisman report was on the need of establishing a cooperative framework capable of ensuring a fair distribution of benefits. See the summary of the Raisman Report 1960, in Gladden (1963) op. cit., n. 176, at p. 431.

[182] Additionally, as the countries prepared themselves for self-governance, it had become eminent for the EAHC to be replaced with an institution whose structures, functions and processes were to be reflective of the then envisaged political changes.

[183] While it was among the Community institutions that ceased with the collapse, in 1977, of the defunct EAC, EAFFRO can be said to have been the first formal cooperation whose core mandate concerned environmental management in the Lake Victoria region.

remained the responsibility of individual countries.[184] As such, EAFRO was ill placed to address the challenges that continued to be faced as a result of the disjointed and uncoordinated approach in the management of Lake Victoria as a shared resource. In an attempt to address the gap, the EAHC enacted the Lake Victoria Fisheries Act, 1950, which established the Lake Victoria Fisheries Board (LVFB) with the mandate to develop, control and regulate Lake Victoria fisheries.[185] To further operationalise it, the Act was, in 1953, amended[186] to provide for the introduction of a set of fishing regulations setting out the requirements and offences relating to registration of boats, licensing of fishermen and the use of nets.[187] Overseeing this was the Lake Victoria Fisheries Services (LVFS). Unfortunately, LVFS ceased to operate in 1960, and its functions were drawn-back to the respective fisheries department in each country and this gravely affected the platform for regional cooperation in the management and coordination of the Lake Victoria fishery.[188] EAFRO, which survived the politically ignited changes of the day, continued to strictly operate within its research mandate and as such, had no direct mandate in fisheries management.

[184] Even in the case of shared water bodies such as Lake Victoria, regional cooperation remained confined within EAFFRO's mandate.
[185] See Lake Victoria Fisheries Act 1950.
[186] Lake Victoria Fisheries (Amendments) Act 1953.
[187] See, F.L Orach-Meza, 'Existing Fishery Legislationa and Mechanisms for Surveillance and Control on Lake Victoria' (The National Seminar on the Management of the Fisheries of the Uganda Sector of Lake Victoria, Jinja, 6 - 8 August, 1991).
[188] See R. Ogutu-Ohwayo, 'The Fisheries of Lake Victoria Harvesting Biomass at the Expense of Biodiversity' at <http://www.unep.org/bpsp/Fisheries/Fisheries%20Case%20Study%20Summaries/Ogutu(Summary).pdf> accessed 30 January 2009.

Conclusion

The basis for the discussion in this Chapter draws on our core argument in Chapter Four that state-centrism, and the lack of an effective multi-level government arrangement has continued to impact on natural resources management in the Lake Victoria region. It is in that light that this Chapter has reviewed the historical roots of state centrism in natural resource management. It has been seen that though the low rate of environmental degradation, during the pre-colonial era, could have resulted from the low pressure on the resources, it has also been demonstrated that there were also well deliberately constructed natural resource management regimes among the pre-colonial communities. Under such regimes, ENRM was integral in the traditions, norms and values of the local communities. Therefore, although it was often vested in the local traditional institutions, ENRM was a duty of every member of the community and indeed, the resources were communally owned. The incursion of colonialism, however, saw these arrangements being replaced with highly centralised management regimes. In effect, the centralisation of ENRM estranged the local communities from benefiting and participating in the management of their resources. The colonial institutional arrangement was not only centralist but particularly concentrated in the Executive and the Crown, which remained at the centre of decision making in the colonies. Although the colonial establishments incorporated native administrations and judicial systems, this was mainly for administrative convenience and political expediency. As suggested above, the institutional reforms during the later years of colonialism did not achieve much in mitigating the centralist paradigm. Notwithstanding this, however, these reforms brought about changes, such as the democratisation of local government. Indeed, the run-up to independence saw local government gradually taking over some ENRM functions and powers.

From the regional perspective, it was seen that like the case with local government, the state did not disperse reasonable powers and functions to the regional level.

Regional cooperation was initially based on selected functional areas, particularly in the economic field. The effort to extend regional cooperation in ENRM, through the establishment of a Lake Victoria fisheries management body, was shortly frustrated. While an East African political union had been envisaged as a basis for deeper integration across sectors, the efforts towards its establishment were largely failed by state-centric tendencies.

Having discussed the institutional aspect of the colonial ENRM regimes, the next Chapter explores the environmental policies and laws, with the purpose of ascertaining whether their nature and enforcement was also influenced by the dominance of state-centric, colonialist structures.

CHAPTER SIX

The Colonial Environmental Law and Policies

The previous Chapter suggested that the colonial institutional arrangement was highly state-centric and also dominated by the colonial powers or rather their interests. Such an arrangement impacted on the Environment and Natural Resource Management (ENRM) regimes, as the much needed participation of the local communities in the management of their natural resources was displaced. We now turn our focus to discussing the colonial environmental laws and policies and ascertaining how their nature impacted on natural resources management. The nature of the colonial environmental policies and laws and their enforcement, owed much to the structural nature of colonial administrations and their methods of operation, both of which were state-centric. It is, for example, because of the high level of centralism, segregation and ruthlessness, that the colonial administrations were able, despite the intermittent native uprisings, to enforce coercive ENRM regimes. Prior to discussing the major characteristics of colonial environmental policy and laws, it may help to highlight the evolution and driving factors behind colonial environmental law. This will shed more light on the nature of the colonial ENRM regimes, over time.

Evolution and Driving Factors for Colonial Environmental Law

As in other branches of law, the development of the colonial environmental law in East Africa was influenced by both local and external factors. Due to the interest that the colonialists had in natural resources, several colonial laws were either focused on, or at least, had clauses concerning natural resources. The interests focused on the key questions of ownership, access and control rights. Notwithstanding the general interest in natural resources, however, the corpus of East Africa's colonial environmental law suggests that the colonial interests were initially on land, wildlife

and forests and later inland water and fisheries. The laws concerning these resources were comparatively more comprehensive, more regularly reviewed and more stringently enforced. Although the laws on the utilisation and management of these resources provided for both their conservation and exploitation, the latter was regulated in a biased manner. The permits and licensing schemes that were commonly used to regulate access to the resources were often unaffordable to the native population, leading to their virtual exclusion. This was most particularly common for the wildlife and forestry resources which were often managed as designated areas of exclusion. Such a stance undermined the fact that these resources formed part of the basic source of livelihood of most native communities. As we shall see, the 'legally' backed forceful practice of estranging the local communities from their resources was in many cases detrimental to the environmental well-being of the resources.

Evolution of colonial environmental law in East Africa can be traced to the late 19th century, as the early colonial trading companies and administrators started levying taxes on hunting and imposing export duty on game products.[1] Prior to the introduction of these measures, East Africa had been opened up to the international game trophy market, mostly by the Arab and Persian traders. Upon formal establishment of British colonial administration over parts of East Africa, in the late 19th century, more management measures were introduced to control the exploitation of wild game. These included the declaration of closed seasons, imposition of hunting limits and later the establishment of game sanctuaries. As for the forestry resources, restrictions were gradually imposed on activities in forests leading to the eventual establishment of forest reserves. While these measures were initially instituted by pronouncements and proclamations made by the colonial officials, they were gradually incorporated into 'formal' laws.

[1] This policy was initially introduced by the Imperial British East Africa Company, which had been sanctioned by the British Government to operate in East Africa, on its behalf.

By the 1900s, 'formal' systems of government had been established in most parts of the colonies. This was a turning point in the entrenchment of colonial environmental law whose framework was in some areas initiated by the signing of agreements between the colonialists and traditional leaders.[2] Because of the illiteracy and poor negotiating power on the part of the traditional leaders, however, the agreements basically presented the views and interests of the colonial powers.[3] Basically, the nature and development of colonial environmental law may be summarized in two words - exploitation and conservation. Whether for economic, scientific or recreational reasons, most colonial environmental laws had both elements of exploitation and conservation. The major issue, however, is the degree to which one of these elements was given prominence.

During the early and mid colonial eras, the concept of conservation was rarely perceived from the environment protection perspective. For instance, while reviewing the proceedings of one of the first colonial wildlife laws enacted by the Kenya LEGCO - the Ostrich Breeding Ordinance of 1907, Bargar remarks that:

> "I read with some surprise that one of the first bills proposed and eventually passed in the LEGCO was an ordinance to provide licensing for ostrich farmers. I was not prepared for anything so exotic as this... Conservation may not have been uppermost in the minds of the honorable members when this bill was introduced in August 1907. The provisions applied more to the farmers than to the birds."[4]

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[2] Other than the purpose of allegiance and general administration, the agreements signed between the traditional leaders and colonialists, were significantly concerned with the alienation of natural resources and thus the inclusion of several clauses on the ownership and management of those resources. See, for example, Buganda Agreement of 1900; the Ankole Agreement of 1901; Toro Agreement of 1900; the Bunyoro Agreements of 1933 and 1955; and the Maasai Agreements of 1904 and 1911.

[3] ibid.

[4] B. D. Bargar, 'Ostrich Breeding and the Kenyan Legislative Council, 1907-1915' (1970) 13 African Studies Review 401, 401.

As with other laws concerning natural resources passed at that time, the Ostrich Breeding Ordinance of 1907 was largely passed for economic than environmental reasons. With the basic aim of protecting licensed farmers, the colonial establishment envisaged good returns from trading in ostriches, their eggs and feathers, which were in high demand both on the international and local markets.[5] At that time, the international trophy market and trade in ivory and animal skins was booming, and Africa was seen as a potential source of steady supply. To optimise its benefits, therefore, the colonial establishment regulated or rather restricted access to wild game and their habitats.[6] Even on the international front, the 1933 London Convention also emphasised the protection of species of economic value to trophy hunters.[7] Indeed, Hermann von Wissmann, while a Governor of German East Africa, attempted to put forth the reasons for the conservationist approach in wildlife legislation. While issuing the first decree on Wildlife[8] he stated that:

> "I felt obliged to issue this Ordinance in order to conserve wildlife and to avoid that many species become extinct which can be expected for the not all that distant future, if the present conditions prevail [....] We are obliged to think also of future generations and we should secure them the chance to find leisure and recreation in African hunting in future times. I am also planning to create Hunting Reserves in game rich areas in order that wildlife can find there refuge and recovery. In such areas, hunting of game will be permitted only with the explicit prior permission of the Imperial Government.

[5] ibid., at p. 402.
[6] Simon Lyster, 'International Wildlife Law', quoted in Patricia Annie Kameri-Mbote and Philppe Cullet, 'Law, Colonialism and Environmnetal Management in Africa' (1997) 6 Review of European Community & International Environmental Law 23, 24.
[7] ibid.
[8] This was the Tanganyika Wildlife Ordinance 1896, which was implemented by various regulations issued in 1898, 1900, 1903, 1905, 1908 and 1911.

> Their establishment should also serve science, in order to conserve such game species which have already become rare in East Africa."[9]

While it is clear that some of the issues raised by the Governor, such as the concern for future generation, biodiversity preservation and scientific benefits, are consistent with the current environmental management principles, the problems that the colonialists encountered with the natives arose from the design of the laws and method of their enforcement. Whether intentionally or not, the Germans ought to have known and considered the fact that regulation of access to wildlife was an issue that was central in the livelihood of most native communities. For that reason, therefore, it was critical for wildlife regulatory regimes to be cognisant of native interests. As the above quotation indicates, however, such a vision was far from the minds of some colonialists.

While the colonial conservation regimes partly resulted from environmental concerns, they were also significantly influenced by economic factors. Afforestation and the regulation of forestry activities were introduced, for example, to facilitate a steady supply of timber for both the local and international markets. Hunting was also largely regulated to preserve wild game for the sake of sporting and tourism interests and to also provide precious animal products such as ivory.[10] It has been argued that the colonial administrations took particular interest in soil conservation measures due to fears that the collapse of agriculture would trigger rural-urban migration by the natives, and in the process constrain the agricultural sector, which was an area of core colonial interest. Though not as significant as the economic

[9] Quotation extracted from Rolf D. Baldus, 'Wildlife Conservation in Tanganyika under German Colonial Rule' available at <http://www.wildlife-programme.gtz.de/wildlife/download/colonial.pdf> accessed 25 May 2006.
[10] Beinart William, 'African History and Environmental History' (2000) 99 African Affairs 269.

motives, the drive for conservation especially in wildlife and forestry sector, was also influenced by aesthetic and scientific reasons.[11]

Environmental legislation in the colonies was also influenced by European conservationist organisations. The height of the imperialist spirit coincided with the emergence of conservationists and animal rights activists in Europe and America. The activism was pronounced in Britain, which was a major colonial power on the African continent. It is in fact believed that British colonial policy and law in her colonies was greatly influenced by the Society for the Preservation of the Wild Fauna of the Empire (SPWFE), which was also the model for the two London international agreements on the Conservation of Nature.[12] The idea of gazetting protected areas, such as parks and reserves for both fauna and flora, as promoted by the 1933 Convention, was extensively adopted in the colonial laws.[13] That notwithstanding, however, Kameri-Mbote observes that, because of conflicting interest, domestication of the London Conventions was slow and partial in the colonies.[14]

The Shift in Colonial Environmental Laws and Policies during the Later Years

Partly because of the Second World War and the associated economic and political issues at the time, the post WWII period was marked by several changes in the colonial administrations. Remarkable among them was the broadening of the participation of the natives and their institutions in various sectors of government. Prior to the War, however, the European economic depression of the 1930s had also

[11] A. D. Mackenzie, *Land, Ecology and Resistance in Kenya, 1880-1952* (1998) quoted in Beinart (2000) op. cit., n. 10.

[12] For a detailed account on the influence of the SPWFE, See David K. Prendergast and William M. Adams, 'Colonial Wildlife Conservation and the Origins of the Society for the Preservation of the Wild Fauna of the Empire (1903-1914)' (2003) 37 Oryx 351.

[13] To Kameri-Mbote the core motives behind the two London Conventions were, first, to preserve natural resources, which were known to be abundant in Africa; and secondly, to check on traditional African practices in the utilisation of the resources, many of which were believed to be unsustainable. See, Patricia Annie Kameri-Mbote and Philppe Cullet, 'Law, Colonialism and Environmental Management in Africa' (1997) 6 Review of European Community & International Environmental Law 23, 23-24.

[14] Kameri-Mbote op. cit., n. 13, at p. 23.

contributed to the re-thinking of colonial policy. In Kenya, for instance, the colonial government had to scale down its support to the European farmers, who likewise made cuts in their labour requirements. Though unintentionally, a surplus was realised and it was channelled as a 'carrot' to entice some African farmers and this led to the emergence of the first tranche of African commercial farms.[15]

Prior to the engagement of local government in ENRM, the change in environmental policy had been particularly influenced by the realisation that the colonies were not only prone to but had actually started experiencing catastrophes attributed to the then raging level of environmental degradation. While appreciating the urgent need for policy change, the colonial establishments remained tightly cognisant of their agenda and, as such, settled for reforms that favoured their economic interests.[16] The new conservation regime was, therefore, crafted in a manner that continued to support the wishes of the Crown, unabated. Morris observes that in Kenya:

> "One of the implied covenants of the agricultural leases for the lessee to improve and develop the resources of the land in a prudent and business-like manner..."[17]

In all the three countries, the period between 1940s and 50s, was vividly marked with several changes in the management of various natural resources. Being a key area of colonial interest, agriculture was among the sectors that experienced policy reforms. Along with other related laws, Kenya's principal laws on agriculture[18] were redrafted

[15] Barr Robin and Jacob McGrew, *Landscape-Level Tree Management in Meru Central District, Kenya* (Agroforestry in Landscape Mosaics Working Paper Series, World Agroforestry Centre, Tropical Resources Institute of Yale University, and The University of Georgia 2004) p. 5.
[16] For examples see, Henry F. Morris and James S. Read, *Uganda: The Development of its Laws and Constitution* (Stevens and Sons Limited, London 1966) pgs. 379 – 384.
[17] ibid., at p. 338.
[18] The main objectives of the Act were to stimulate agricultural production and to provide for the conservation of soil and its fertility in accordance with the accepted practices of good land management and good husbandry. See Part IV (s. 48 – 62) of the Act, which was particularly dedicated to the preservation of land and its fertility. Agriculture Act, 1955, Cap 318

to, *inter alia*, provide for land conservation measures, such as the protection of sloping land, water courses and soil from erosion.[19] To oversee its implementation, the Act established district and provincial committees and the Central Agricultural Board.[20] In Uganda, the 1945 Cattle Grazing Act was enacted to address the problem of over grazing and over stocking of animals.[21] Enforcement of this Act was basically handed to the District Commissioners and the veterinary officers, who were required to issue orders prescribing the maximum number of cattle to graze in a given area.[22] The Fish Act Cap. 228 was also enacted to regulate fishers, fishing vessels and also persons involved in fish processing and trade by a licensing regime. In addition to protection of particular fish species, fishing methods were also regulated.[23] The most conservationist in approach were laws relating to wild game, especially in gazetted areas, such as game reserves, parks and corridors.[24] Wildlife was basically preserved for economic and most particularly tourism interests.[25]

While such changes could have signified positive steps towards the improvement of the ENRM regime, the problem of centralism remained outstanding and thinly addressed. The colonial administrations remained at the centre of the management regimes more so, with ultimate powers. In Kenya, for example, the minister responsible for agriculture and the Director of Agriculture were handed wide ranging functions, including the power to issue land preservation orders, whose defiance was a punishable offence.[26] Though the issuance of land preservation orders ordinarily

[19] The Agriculture Act 1955 (Cap 318), required the institution of various measures intended to address natural resource management including the making of rules on: clearing of land; grazing of livestock; firing of bushes; protection of soil against erosion and other forms of degradation; maintenance of water; protection of state of land from engineering works; afforestation and re-forestation. See, for examples, the Agriculture (Land Preservation) Rules and L.N. 256/1963, L.N. 492/1956, L.N. 352/1963, L.N. 365/1964. See also, The Agriculture (Basic Land Usage) Rules.
[20] Agriculture Act 1955 (Cap. 318) (Kenya), Prt. III, ss. 22-39.
[21] Cattle Grazing Act, Cap 223 [Cap.22] (Uganda).
[22] ibid., s. 2.
[23] See Fish and Crocodiles Act, Cap 228 [Cap.197], ss. 5 and 7 (1); See also L.N. 58 of 1951 (Uganda)
[24] See, for example, The Game (Preservation and Control) Act, Cap. 226 (Uganda) and the National Parks Act, Cap. 227 (Uganda).
[25] Morris (1966) op. cit., n. 16, at p. 386.
[26] Agriculture Act 1955 (Cap. 318), ss. 50-51.

ought to have been a positive measure, to the natives, it was a tool of oppression since they were issued in a segregated manner, and without local consultations. The Minister was also required to make rules that controlled farmers in virtually all aspects, including the decisions on which crops to grow, when and in what quantities.[27] Generally, the Act ensured that the colonial government maintained firm control over the means and forms of agricultural production.

Although the issue of resource alienation had proved to be among the major problems of the early colonial era, various laws maintained the rule of entrusting the central government executives with the power to, without consultation; declare any area a government reserve. [28] Interestingly, such laws remained silent on whether the people affected were eligible for compensation. Tanzania's 1957 Forest Ordinance virtually handed the Mnister responsible for forests with the powers to re-write the law, by allowing him the discretion of exempting any person, class of persons, land or class of land from various provisions of the Ordinance.[29] The laws also provided for circumstances that allowed the executives the final word without any allowance for recourse to the law for the aggrieved. Kenya's Agriculture Act, for example, provided that:

> "No election, appointment or nomination of any person to anybody or authority established or constituted by or under this Act shall be questioned in any legal proceedings whatsoever."[30]

Certainly, such moves were made to ensure that, while the colonial governments wished and legislated for the natives to be held criminally liable for various 'environmental' offences, they, on the other hand, incapacitated the same legal

[27] Ibid., s. 184.
[28] See, for example, the Forests Act 1947 (Cap. 146) (Uganda), s. 3; Compensation is only mentioned in the case of revocation of a local forest reserve, but as stated in section 7, that also depended on the wish of the responsible minister.
[29] Forest Ordinance 1957 (Cap. 389) (Tanganyika), s. 31.
[30] Agriculture Act 1955 (Cap. 318), s. 214.

system from questioning their actions. By maintaining arrangements that were void of mechanisms intended to enforce equitable sharing of rights and duties across the interested parties, the colonial establishments remained at liberty to utilise and manage the natural resources at will. Such a colonial philosophy on the issues of state centralism and the oppression of native rights continued into the post WWII period, despite the various legal and institutional changes. Statute law maintained the prominence of the Crown in the control and ownership of the natural resources. Notwithstanding the limited devolution of powers and function, the discretionary powers of the Governors and their Executive Councils remained largely intact.

Key Issues in the Colonial Policy, Legal and Institutional Order and Their Impact on the State and Management of Natural Resources

As evidenced in the discussion in Chapter Five, colonialism presented a turning point for change in almost all aspects of life among the East African natives. It brought about significant changes in the ownership and management of the natural resources in the colonies. These changes were driven, shaped and maintained through new policy, legal and institutional arrangements, that were not only alien but also restrictive to the native populations. Subsequently, several centres of conflict of interest arose leading to various political, socio-economic and environmental impacts. While most changes were deliberately introduced, however, others emerged and evolved naturally in response to societal dynamism. This section discusses the major changes in environmental management, which were brought about by colonialism. Having considered the institutional aspects in Chapter Five, this section is focused on the issues of ownership, access and management rights in the colonial ENRM regimes.

Alienation of Natural Resources to the State

Of particular interest to the colonialists in East Africa was land, which was not only important for agricultural production but also the foundation of several other natural resources, such as wildlife and forests. Gradually, land ownership was largely alienated to the colonial establishments and its control highly centralised.[31] To legally backup their persuasive and forceful means of resource alienation, the colonialists were often swift in making laws and signing 'agreements'[32] that were duplicitous.[33]

[31] See, generally, as for the case of Kenya, Order in Council Ordinance 1901 [S.R.O. 661] and the 1902 and 1915 Crown Lands Ordinances. See also, the Native Lands Ordinance 1938; as for the case of Uganda see, the 1903 Crown Lands Ordinance 1903 and the Crown Lands Ordinance, Cap 117; and in the case of Tanzania see, the Crown Land Ordinance 1895and the Land Ordinance1923.

[32] Notable among such agreements were: Buganda Agreement of 1900; the Ankole Agreement of 1901; Toro Agreement of 1900; the Bunyoro Agreements of 1933 and 1955; and the Maasai Agreements of 1904 and 1911. Under the Buganda Agreement, for instance, 54% of Buganda's total of 19,600 sq. miles was placed under the Crown (H. M Government), as forest or waste land. The rest of the land was divided among Buganda officials, religious institutions and other notable persons. For more discussion

The agreements signed between colonial masters and the traditional rulers usually required that: 'Uncultivated or waste land' be designated as Crown land; the Crown be reserved the rights to natural resources of value such as forests and wild life; land and resources designated property under the Crown be managed through a licensing regime; and customary rights on 'Crown land' be upheld but regulated.[34] The traditional institutions were virtually left with no powers to control their natural resources as had hitherto been the case.[35]

For purposes of enlisting loyalty from the traditional leaders, however, the agreements often ensured that the chiefs and other notables were allocated, as a token of appreciation, parcels of land in their private capacities.[36] In the few cases where the traditional agreements were rejected or contested, efforts were made to ensure that access to justice was denied. In that regard, for instance, the case of *Ol Ole Njogo alias Murket Ole Nchoko and Others v. the Attorney General,*[37] filed by the

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on the issue of land alienation see generally, Bazaara Nyangabyaki, 'Agrarian Politics, Crisis and Reformism in Uganda, 1962- 1996' (PhD Thesis, Queen's University, Kingston, Canada 1997); See also, J.M. Lonsdale, 'The Politics of Conquest: The British in Western Kenya, 1894-1908' 20 The Historical Journal 841.

[33] The Anglo-Maasai Agreements of 1904 and 1911 present a good example where land was alienated purportedly through 'agreement'. Part of the 1904 Anglo-Masaai Agreement reads,

> "We, [Representatives of the Maasai]… of our own free will, decided that it is for our best interests to remove our people, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement… we recognize that the Government, in taking up this question, are taking into consideration our best interests."

See also, Joseph Ole Simel, 'The Anglo-Maasai-Agreements/Treaties: A case of Historical Injustice and the Dispossession of the Maasai Natural Resources (Land), and the Legal Perspectives ' (Expert Seminar on Treaties Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, Geneva, Switzerland, 15-17 December 2003) pgs. 2-6.

[34] Much of the land in Colonial East Africa taken up as Crown land, but there were a few exceptions through which customary land tenure was recognised. Such provisions could, however, not stop the Governor from selling or leasing any piece of land. See the Crown Land of 1895 (Tanganyika), of 1902 and 1915 (Kenya) and of 1903 and 1951 (Uganda).

[35] The Bunyoro Agreement1933, s. 30, for instance, states that:

> "In the event of any considerable mineral development taking place the Governor will consider what share, if any, of the royalties collected shall be paid to the Native Government."

[36] See Elliot D. Green, *Ethnicity and the Politics of Land Tenure Reform in Central Uganda* (Development Studies Institute Working Paper Series, No. 05-58, Development Studies Institute, London School of Economic and Political Science, London 2005).

[37] Civil Case No. 91 of 1912 (E.A.P. 1914), 5 E.A.L.R., 70.

Maasai elders was not only frustrated in the local court system but efforts were also made to block the elders from accessing justice elsewhere.[38]

The forests and wildlife resources were mainly alienated by designating particular areas as reserves, parks or controlled areas owned and controlled by the colonial administrations.[39] In Tanganyika, both the German and British colonial laws placed the ownership, control and management of the forest and wildlife resources under the colonial administrations.[40] In Kenya, there were two major alienation processes of communally owned forest to central government, one in 1908 and the other in 1932.[41] In Uganda, although most forests had earlier been alienated through land laws and agreements signed with traditional rulers, the formal gazetting of forests begun in 1932. [42] As for wildlife resources, the process of their alienation started with the introduction of hunting rules, which imposed hunting fees and other regulatory limits. With an initial focus on valuable game, such as elephants, the wildlife rules were gradually expanded leading to the eventual establishment of designated wildlife controlled areas.[43] The first laws on regulating hunting and wildlife were

[38] In this case the Maasai elders filed a suit challenging the British colonial administration's action of alienating part of their land and forcing them into unproductive and disease infected reserves. The elders argued that the move was illegal because the 1911 agreement enforcing such action had not been signed by Ole Maasai who had authority to speak for the whole tribe. It was further argued that the agreement was not in the interest of the Maasai people but rather for financial gain of the Colonial administration, which was ironically a trustee of the land as per a 1904 agreement. The British Crown, on the other hand, 'successfully' argued that municipal courts had no jurisdiction over such a case. Further efforts by the elders to access international justice were also frustrated by the Crown, which ensured that they failed to raise the required litigation costs.

[39] In the case of Tanganyika, for example, see the Wildlife Preservation Ordinance 1896; the Forest Ordinances of 1921, 1933 and 1957; and the Forest Rules of 1926 and 1930.

[40] Lovett (2003) 47 Journal of African Law 133; See also, Gregg Goldstein, 'Legal System and Wildlife Conservation: History and the Law's Effect on Indigenous People and Community Conservation in Tanzania' (2005) XVII Georgetown International Environmental Law Review 481.

[41] See Paul O. Ongugo and Jane Njuguna, 'The Effects of Decentralisation on Kenya's Forestry Sector: Cases from Forests Studied by the IFRI Collaborating Research Centre in Kenya' (Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, May-June, 2004).

[42] See Evelyn L. Namubiru, 'Coping with a Changing Forest Policy: Livelihoods in Mpigi District, Uganda' (International Association for the Study of Common Property Conference, Bali, Indonesia, June 19-23, 2006).

[43] See Goldstein (2005) op. cit., n. 40.

imposed from the mid 1890s[44] and were regularly reviewed until the mid 1930s, when the approach of establishing exclusive game parks was introduced largely as an outcome of the 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State.[45] The new game park laws were aimed at establishing state owned and managed wildlife areas[46] that were free from human interference.[47]

As for the water resources, the reverence of colonial powers in lacustrine and riverine regions was initially driven by geopolitical reason.[48] The nature and frequency in the enactment of colonial water laws tend to suggest that, unlike other natural resources, water and its resources were initially not prioritised as ecologically rich and fragile systems that required proper management and protection. Nonetheless the ownership and control of most water sources was vested in the colonial establishment. In Tanzania, for example, the 1923 Water Ordinance introduced registration as a regulatory control for vesting water rights and this was overseen by the state. In 1948, all major water sources were vested in trust of His Majesty the King of England, and aside from the alienation element, the colonial water laws were more concerned with water supply and utilisation of water resource management issues.[49] The fisheries resources, which were also vested in the Crown, were managed under separate legislation. Aside from a few rules and laws, however,

[44] These, in the case of Tanganyika included: the Wildlife Decree (Wildschutzverordnung) 1896 and the Hunting Ordinance 1898.

[45] See Edward Steinhart, 'National Parks and Anti-Poaching in Kenya - 1947-1957' (1994) 27 International Journal of African Historical Studies 59; See also, Wanitzek Ulrike and Sippel Harald, 'Land Rights in Conservation Areas in Tanzania' (1998) 46 GeoJournal 113, 116.

[46] The first game park in Tanzania – Serengeti, was established in 1941; while that of Kenya – Nairobi, was established in 1946; and that of Uganda – Murchison, was established in 1952.

[47] See, for example, Tanganyika's Game Ordinance 1940 (Cap. 159), the National Parks Ordinances of 1948 (Cap. 253) and 1959 (Cap. 412) and The Ngorongoro Conservation Area Ordinance 1959 (Cap. 413). For Uganda, see the National Parks Ordinance1952.

[48] See Jonathan Lautze, Mark Giordano and Maelis Borghese, 'Driving Forces Behind African Transboundary Water Law: External, and Implications' (International Workshop on 'African Water Laws: Plural Legislative Frameworks for Management in Africa', Johannesburg, South Africa, 26-28 January 2005).

[49] See, for example, the Water Ordinance 1948 (Cap 257) (Tanganyika); the Water Ordinance 1929 (Kenya); and the Water Works Ordinance 1929 (Uganda).

the fisheries sector was originally not given much attention as compared to the other resources.

The Shift from Communal to Individual Property Rights

Generally, it was not the issue of private rights that was alien to the pre-colonial societies, but rather the issue of individual rights and their formal recognition in a wider geographical and juridical setting. Indeed, Kameri-Mbote *et al* argue that, the colonial thinking that property rights were non-existent among traditional communal systems or open access regimes was a gross misconception, since, irrespective of the large numbers involved, communal ownership can as well be enforced in a private capacity.[50]

Following the alienation, the colonial administrations enforced a regime that drastically changed the native natural resources property rights and their management structures from a system that thrived on communal structures to a mixed one based on individual private property rights and public trusteeships. As noted earlier, many pre-colonial ENRM regimes largely thrived on communal ownership rights, which they revered as an appropriate approach to sustainability and social security, in general. On the other hand, the colonialists regarded communal ownership as a 'backward' property rights regime unsupportive of the natural resources based production economies that they sought to establish. The 1934 Annual Report of Kenya's Native Affairs Department, for example, states that:

> "A general tendency is recorded towards individual ownership of land; while no important change has taken place, improved methods of cultivation and

[50] Charles O. Okidi and Patricia A. Kameri-Mbote, *The Making of a Framework: Environmental Law in Kenya* (UNEP-ACTS Publication Series on Environmental Law and Policy in Africa: ACTS Press, Nairobi Kenya 2001) p. 25.

better housing create a desire for something more definite than the communal system of land holding."[51]

The colonialists generally contended that, in addition to being wasteful and conflict prone, the communal ownership and management of natural resources critically lacked centres of responsibility and a sense of duty of care, which are important attributes for a good natural resources management regime. As a result, in addition to state control, many colonial policies, agreements and laws promoted or provided for private property rights, especially over land. Having a contrary view from that of the colonialists, Owen observes that:

> "…a blunder could have been made as that which was perpetrated in the land settlement embodied in the treaty negotiated by the late Sir H. H. Johnston with the native kingdom of Buganda. The effect of this land settlement was to wipe out the age long rights of the clansmen (called the *Bataka*) in the clan lands, and to create a new land system, utterly alien to Africans, with many of the worst features of the private ownership of lands familiar in landlord systems the world over."[52]

The 'giving away' of land to African chiefs and notables can be said to have significantly contributed to the formal entrenchment of private property rights regimes over land in East Africa. Aside from such direct allocation, the early colonial agreements also provided for various tenure systems through which individual land ownership rights could be attained, though in a restrictive manner. [53]

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[51] Kenya Protectorate and Colony, 'Native Affairs Departmental Annual Report, 1935' (1936) XXXV African Affairs 440.
[52] W. E. Owen, 'Some Thoughts on Native Development in East Africa' (1931) XXX Journal of the African Society 225, 227 – 228.
[53] See Lands Ordinances cited in footnote n. 31.

In Kenya, promotion of land tenure policy based on private property rights was intensified from the 1930s.[54] In view of the recommendation of the Swynnerton Commission (1954), efforts were made to privatise land ownership by replacing the traditional tenure systems with English law based private property rights.[55] The Native Lands Registration Ordinance was passed in 1959 followed by the Native Land Tenure Rules and Land Adjudication Acts, to facilitate land titling. Similar efforts in Uganda met stiff resistance, especially from the affluent elites, who as landlords preferred customary tenure. The land occupancy system introduced in the 1920s was shortly abandoned and the individualisation of land ownership through registration, introduced in the 1950s, also failed to attract wide acceptance.[56] The proposal for native land settlement schemes in Uganda, where 18 per cent of the land was to be given away to African notables, was also abandoned.[57] Setting aside the land that had earlier been allocated to individuals under the colonial agreements, the big push for private land ownership rights in Uganda, generally, seem not to have succeeded to the expectation of its propagators.

The proponents of private property rights had argued that its legal imposition was intended to rationalise ownership and access rights over resources as well as act as an economic incentive for natural resource preservation.[58] Thus, land redistribution was partially intended to benefit the landless natives, who were expected to play a critical role in natural resource based production. Ironically, the introduction of private property rights aggravated the problem of landlessness among some

[54] Albert Mumma, 'Kenya's New Water Law: An Analysis of the Implications for the Rural Poor' (International Workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', Johannesburg, South Africa, 26-28 January 2005).
[55] Navaya ole Ndaskoi, 'The Root Causes of Maasai Predicament,' (2006) 7 Fourth World Journal 28.
[56] Although such land tenure policies had been piloted in some districts, they were hardly scaled up by the post independence government, which because of political expedience, had no interest in pursuing them further. See Morris F. Henry, 'Annual Departmental Reports Relating to Uganda, 1903-1961' in Neville Rubin (ed), *Government Publications Relating to Africa in Microform* (African Studies Association of the United Kingdom 1978) p. 17.
[57] ibid.
[58] Okidi (2001) op. cit., n. 50, at p. 25.

communities.[59] In Buganda, for instance, the private property regime had, despite several counter measures, created a rapacious clique of 'absentee' African landlords that controlled big chunks of lands.[60] As a result, such land remained unattended in terms of proper management since much of it was being utilised by squatters.

Generally, the colonialists disregarded native traditional property rights, because of their failure to appreciate them.[61] Native conceptions towards property management were changed and this resulted into the 'open-access mentality' over public resources. Subsequently, the indigenous property regimes, which had largely been the basis of managing common property resources, were replaced by a *de facto* open access system, under which both community and individual responsibility were farfetched. Mainly because of loss of personal attachment, such historically founded complexities have gravely impacted on the effectiveness of current environmental management regimes and to-date the issue of property rights remains complex and central in East Africa's ENRM regimes.

Political Patronage, Dualism and the Creation of Class Societies

While the discussion in this section is focused on land, the exercise of dualism and politics was cross-cutting. As for the water resources, for example, the registration to vest in water rights was, in Tanganyika, initially restricted only to the white settlers.[62] It was not until 1959, two years from independence, that registration option vested in water rights was extended to the native population.[63]

[59] Owen (1931) op. cit., n. 52, at p. 228.
[60] ibid.
[61] Patricia Kameri-Mbote, *Land Tenure, Land use and Sustainability in Kenya: Towards Innovative use of Property Rights in Wildlife Management* (IELRC Working Paper 2005-4, International Environmental Law Research Centre, Geneva, Switzerland 2005) p. 11.
[62] See the Water Ordinance 1923(Tanganyika).
[63] Barbara van Koppen, 'Dispossession at the interface of community based water law and permit systems' in Van Koppen Barbara and et al (eds), *Community-Based Water Law and Water Resource Management Reform in Developing Countries (Comprehensive Assessment of Water Management in Agriculture)* (International Water Management Institute, CABI Publishing 2008).

Much as the bottom line was that most natural resources were alienated, the approach, timing and motive of doing so varied across the colonies. Kenya and Tanganyika, especially while under the Germans, had European settler farmers whose interests inevitably influenced the land, agrarian and environmental laws in the respective colonies.[64] Ghai *et al,* for instance, note that:

> "... [In Kenya] there was a correlation between the form of the law, and method of its administration, ... the law and its administration had no inherent values, but derived both values and form from the predilections of the dominant political and economic groups in society."[65]

As such, the land policy and laws in Kenya and German Tanganyika were substantially based on land take-overs, redistribution and protection of European settler interests. On that note Ghai *et al* further observe that:

> "Where there were settlement interests, it was ensured that the white settlers were attracted and allocated the productive parts of the colonies.[66]

In German Tanganyika, the *German Land Kommission* (GLK) set forth a system that entailed the best land being removed from the natives and allotted to German settlers and companies.[67] There was a similar occurrence in Kenya, whose settler population at independence was estimated to be in the excess of 60,000 Europeans. A big chunk of the land, which was under the 1901 and 1904 Anglo-Maasai agreements, was taken away from the natives and was redistributed among

[64] See Y. P. Ghai and 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* (Oxford University Press, Nairobi 1970) pgs. 79-124.
[65] ibid., at p. 124.
[66] ibid., at pgs. 79-80.
[67] See ole Ndaskoi (2006) op. cit., n. 55, at pgs. 9-10.

European settlements, the Maasai chiefs, and the wildlife and native reserves.[68] While their authenticity continues to be challenged to-date,[69] the Anglo-Masaai agreements were instrumental in pushing the colonial agenda at the time. Whenever displaced, the natives were resettled against their will in congested native reserves, which were in turn intended to maintain a regular supply of labour on the European farms.[70] In Uganda's case, the situation was rather different to the extent that, although much of the land was alienated to the Crown, the natives continued under various tenure systems, to occupy and use most of the arable land.

Security of tenure for the European settlers in Kenya was sealed by the Crown Lands (Amendment) Ordinance 1938 and the Kenya (Highlands) Order in Council 1939, which aside from demarcating the settlers' highland boundaries also limited the rights of natives outside their reserves.[71] Such laws reflected political patronage and the prominence of dualism in the colonial political, legal and administrative order that reigned in Kenya, and was to also impact on its natural resources management efforts. It was, for instance, because of political patronage that the approach to combating soil erosion in European settlers was based on democratic co-operation, and thus in stark contrast with the administrative paternalist approach used in native reserves.[72] This Kenyan case suggests that the colonialists were cognisant of the benefits of democratic co-operation in natural resources management, but were for some reason hesitant to use such approaches among the natives.[73]

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[68] Other than the Masaai, the other tribes affected by land alienation in Kenya included: the Nandi, Kikuyu, Embu, Meru, and Kamba. See, ole Ndaskoi (2006) op. cit., n. 55, at p. 8.
[69] See, MAA Speaking Communities in Kenya, 'A Memorandum on the Anglo-Maasai Agreements: A case of Historical and Contemporary Injustices and Dispossessions of the Maasailand', petition presented to the Government of the Republic of Kenya, 13 August 2004.
[70] See Laurence Juma, 'Environmental Protection in Kenya: Will the Environmental Management and Coordination Act (1999) Make a Difference?' (2002) 9 South Carolina Environmental Law Journal 181, 185.
[71] These positions were enforced by the Highlands Board, established under the Kenya (Highlands) Order in Council 1939 and the Non-statutory Land Advisory Board, established in 1928.
[72] Ghai (1970) op. cit., n. 64, at p. 112.
[73] See, for instance, Frank Stockdale, *Report on Visit by Sir Stockdale Frank to East Africa* (Record No CO 822/77/11, Colonial Office, London, 1937).

Aside from breeding poor relations, the patronist land policies had major implications on the environmental state of the land and other natural resources.[74] The reforms triggered the deterioration of land quality, mainly as a result of soil erosion and overstocking of animals.[75] By the 1940s parts of Kenya and Tanzania, especially in the congested native reserves, had been extensively eroded to the extent of being barely supportive of agricultural activities.[76] Forests within or near the reserves were also severely destroyed as the surging populations sought for basic livelihoods.[77] In the European settlements, land was extensively opened up for mass agricultural production without due regard to environmental concerns.[78] On the other hand, the native 'squatters' felt neither obliged to follow nor did they have the means of practising land management measures. The dualist tenure system and other legal limitations coupled with financial reasons incapacitated the native African from effectively participating in resource management measures.[79]

Although the negative socio-economic and environmental impacts of congested native reserves had been realised, the fact that the 'un-grabbed' native land remained tied to tribes, complicated further resettlement, which had been thought of as a remedy. Land fragmentation and decreased furrow periods further exacerbated the environmental problems.[80] The attempts to address the problem of land degradation, were later over-shadowed by the World War II and the post war

[74] The strenuous relations between the settlers and natives also contributed to the acute labour shortages on white farms, therefore defeating the purpose for which they had opted to settle in foreign land. As a partial remedy, taxes were introduced to induce Africans to work on the settler's farms. Also, in 1906, the draconian Master and Servant Ordinance (No. 8 of 1906) was enacted. See, David M. Anderson, 'Master and Servant in Colonial Kenya, 1895-193' (2000) 41 Journal of African History 459.
[75] Okoth-Ogendo (1989), 'Customary law in the Kenyan Legal System: An old debate reviewed', quoted in Juma (2002) op. cit., n. 70, at p. 186.
[76] Stockdale (1937) op. cit., n. 73; See also, E. H. Ward, 'Kenya's Greatest Problem' (1939) XXXVIII African Affairs 370.
[77] E. H. Ward, 'Kenya's Greatest Problem' (1939) XXXVIII African Affairs 370.
[78] ibid., at p. 370.
[79] Juma (2002) op. cit., n. 70, at p. 187.
[80] Ghai (1970) op. cit., n. 64, at p. 116.

strategy of producing "…as much food as possible, irrespective of the long-term consequences."[81]

Restriction and Insensitivity of the Management Regimes to Native Interests

Largely, colonial environmental laws restricted use and access rights to natural resources, especially in the parks, reserves and other areas designated as controlled. Consequently, many of the traditional practices that supported native livelihoods were criminalised as hunting became poaching, firewood collection from forests was regarded as theft and grazing of animals in controlled areas was tantamount to trespass.[82] In German Tanganyika, for example, the conservation regulations proscribed collective hunting, peasant access to forests, and the burning of the bush to open up new fields.[83] The falling of Tanganyika to the British did not change much as similar restrictions were maintained.[84] The restrictive nature of the policies disregarded the fact that native communities had for long depended on environmental resources for a livelihood. As a result, the policies severely encumbered rural food production and inhibited the social controls that the natives had been using to protect the land and stem agricultural deterioration.[85]

Despite the pressure mounted to loosen the restrictive noose of the conservation laws, especially during the late colonial years, changes remained insignificant. Instead, other laws were further tightened. For example, unlike the predecessor law,

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[81] ibid., at p. 110.

[82] See Gregg Goldstein, 'Legal System and Wildlife Conservation: History and the Law's Effect on Indigenous People and Community Conservation in Tanzania' (2005) XVII Georgetown International Environmental Law Review 481.

[83] Thaddeus Sunseri, 'The Baumwollfrage: Cotton Colonialism in German East Africa' (2001) 34 Central European History 31, 33. See also, Thaddeus Sunseri, 'Famine and Wild Pigs: Gender Struggles and the Outbreak of the Maji Maji War in Uzaramo (Tanzania)' (1997) 38 Journal of African History 235, 259.

[84] For example, in disregard of the preamble to the Forests Ordinance 1921, which recognised native customary rights over land and natural fruits, the British reinstated forests reserves and went ahead to place restrictions on access and use of forest products. The restrictions enforced by the Ordinance were reinforced by the Forest Rules of 1933. While the restrictions were, in 1926 and 1930, relaxed to allow access to natural fruits, they were again tightened by the Forest Ordinance 1933 and also retained by the Forest Ordinance1957.

[85] Sunseri (2001) op. cit., n. 83, at p. 33; See also, Sunseri (1997) op. cit., n. 83, at p. 259.

Tanzania's 1957 Forest Ordinance placed the burden of proof on the accused. It thus stated that:

> "Any person within or in the vicinity of a Forest reserve in possession of any implement for cutting, taking, working or rendering any forest produce shall be guilty of an offence against the ordinance. The burden of proof shall be on him to prove that he had lawful excuse."[86]

And also that:

> "Any livestock found in the reserve shall be presumed to have been grazed or depastured on the owner's or herdsman's authority unless he can prove to the contrary."[87]

Although not much different, this law was more stringent than its predecessor which, at least, provided that one had to be in possession of forest produce in order to be guilty of an offence.[88]

On the other hand, the restrictions ignored the fact that the natural resources were, to the natives, not only a source of livelihood but also danger and harm. Such a dichotomy is well captured by Morris, who observes that:

> "To the African cultivator, however, many of these animals were a source of danger both to his person and his crops, and many of them, such as the buffalo and the antelope, were an important source of food."[89]

[86] Forest Ordinance 1957 (Cap 389) (Tanganyika), s. 15 (2).
[87] ibid., s. 15 (4).
[88] Forest Ordinance 1921 (Tanganyika), s. 13.
[89] Morris (1978) op. cit., n. 56, at p. 15.

Irrespective of such circumstances, the wildlife laws largely ignored native interests. Although they were later changed to provide for instances where animals could be killed in self defence or to safeguard property, the basic principle of 'keeping away' the natives from the animals and their reserves remained. It was not until the very last years prior to independence that such hardliner tendencies were relaxed. For example, in 1959, with only two years to independence, the colonial government in Tanganyika seemed poised to take the crucial step of allowing local people to share their land with wild animals in and around certain protected areas.[90]

The Coercive Aspect in Driving the Conservation Agenda

The establishment of flora and fauna controlled areas, reserves and parks entailed the relocation of communities whose socio-economic attributes were extensively distorted if not destroyed in the process. The natives were required to instantaneously change their ways of life as the resources, that they erstwhile freely enjoyed, no longer belonged to them. To effect such daring operations, coercion was a major, if not dependable, tool for the colonialist in driving their alienation agenda. It was observed in the Kenya Agricultural Department's Annual Report of 1954 that:

> "…Administrative officials themselves saw coercion as a superficially easy and justifiable method of 'getting the people to do what we know is good for them and the land'."[91]

Frequently, the establishment of reserves and parks was met with resistance from the affected communities, but that could not stop the unyielding perpetrators. As Nelson illustrates, the extent of force used in some cases was unimaginable.[92] The

[90] Adams (1996), 'The Myth of Wild Africa: Conservation Without Illusion.' p. 53, quoted in Robert H. Nelson, 'Environmental Colonialism "Saving" Africa from Africans' (2003) VIII The Independent Review 65, 78.
[91] See 'Kenya Agricultural Department Annual Report 1954', p. 2, quoted in Ghai (1970) op. cit., n. 64, at p.111.
[92] See generally, Robert H. Nelson, 'Environmental Colonialism "Saving" Africa from Africans' (2003) VIII The Independent Review 65.

Germans, for example, applied the scorched earth policy, where they deliberately starved people and razed their homes in order to establish a reserve over an area that now form part of the famous Selous Game Reserve in Tanzania.[93] A British official who was charged with similar operations is quoted to have written that:

> "I went all out to achieve what I had conceived in 1931 to be the betterment of Liwale District [South Eastern Tanzania] and its people, namely its elimination."[94]

Whenever awareness campaigns and other 'soft' approaches were used in the implementation of natural resources management measures, coercion and intimidation remained to complement such efforts. Going by the old adage that you can lead a horse to the river but cannot force it to drink, several conservation measures were not sustainable, as they were often neglected or abandoned shortly after being implemented. A government report, for instance, observed that trees that had been planted in the reserves had been uprooted later on the ground that they were foreign.[95]

Coercion was not only used in the establishment of regulated areas, but also in the general enforcement of environmental laws. Land preservation rules were, for example, enforced through highly coercive community service rules, which not only sought to punish the non-compliant natives but also the chiefs whose areas of jurisdiction failed to strictly adhere to the rules. In Kenya, the Compulsory Labour (Regulation) Ordinance 1932 was used on a number of occasions in the enforcement of land preservation.[96]

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[93] ibid., at p. 71.
[94] Helge Kjekshus, 'Ecology Control and Economic Development in East African History', quoted in Nelson (2003) op. cit., n. 92, at p. 71.
[95] Kenya Protectorate and Colony, 'Native Affairs Departmental Annual Report, 1935' (1936) XXXV African Affairs 440, 441.
[96] See, for instance, Government Notice (Order applying to Embu) 259/1950 and the Compulsory Labour (Embu) Regulations, G. N 358/1950.

As noted by Okidi et al, forced labour was standard in the enforcement of community conservation measures.[97] In relation to the power entrusted to law enforcement officers and the fear that they unleashed on the population, Okidi *et al* narrates;

> "The stories of *Bwana Ondhoro*, the enigmatic and harsh fisheries officer from Kisumu, haunted fishermen around Nyanza Gulf [Part of Lake Victoria]. Local Communities composed songs in his name, saying that whenever he approached in the silence of the night, the fishermen would flee leaving behind their gears, the same way hunters flee when a lion approaches."[98]

This narration clearly reveals situations where, while law enforcement thrived on fear, people continued to 'break' the law whenever the source of fear was out of sight. In such situations, lines were clearly drawn between the natives – the restricted potential resource users, and the colonial enforcement machinery, where each perceived the other as the enemy.

Conclusion

While the colonial environmental policies and laws were on the one side exploitative and restrictive on the other, most of the restrictions were interestingly directed at the native communities. This was done either through direct prohibition or indirectly, through the imposition of processes or fees that disfavoured the natives. Notwithstanding the restrictive nature of the conservation regime in its entirety, three underlying factors explain the continued degradation of natural resources during the colonial era. First and most obvious was the direct and excessive exploitation of the resources, on the one hand, by the colonialists as they sought raw materials and business opportunities and, on the other, by the native communities as they scampered for the scarce resources allowed to them. Secondly, because they

[97] Okidi (2001) op. cit., n. 50, at p. 17.
[98] ibid.

had been detached and restricted not only from the management but also utilisation of their resources, the natives naturally felt no obligation of caring for these resources. They instead used them unreservedly whenever they had the opportunity to do so. In response, the colonial establishments often applied coercion, which though proved successful in some instances, was on the other hand an instigator for environmental degradation.

Lastly, and of much interest to this thesis, is the dismantling of the traditional institutional frameworks for natural resource management and replacing them with inappropriate systems that aside from being coercive, were lopsided, in favour of the colonial agenda. Aside from paving the channels through which the colonial powers excessively exploited the resources, these systems neither had sufficient manpower nor the collective interest of the natives to partake in the protection of the resources.

Generally, this Chapter has served the purpose of bringing forth two issues that are of paramount interest in our call for the strengthening of multi-level government in ENRM. On the one hand, from a historical point of view, it demonstrated that the success of ENRM regimes can be critically dependent on how the resource management regimes define the manner and level of participation of the locals in the management of their resources. On the other hand, it showed how the concept of local participation in ENRM was downplayed by the colonial state-centric regimes that significantly thrived on the oppression of the natives.

CHAPTER SEVEN

Local Government, Regional Cooperation and Natural Resource Management in the Post Independence Era

We saw, in the previous two Chapters, that the colonial Environment and Natural Resource Management (ENRM) regimes were largely state-centric. The concepts of local government and regional cooperation, which are our central focus of study, were not significantly embraced by the colonial ENRM regimes. Although there were various policy shifts, especially towards the end of colonial era, the centralist paradigm in ENRM remained crucial to the colonial agenda. That notwithstanding, however, several of the last minute policy shifts presented the post-independence governments with opportunities that could have been capitalized on to advance the concept of multi-level government. It is against this background that this Chapter discusses the post independence era - 1960s to the 1980s, with a view to ascertaining the extent to which the concept of multi-level government was embraced by the post-independence governments. We focus on the concepts of local government and regional cooperation, which will first be explored from a general perspective and then specifically in relation to ENRM. We will review the extent to which the embracing of these two concepts mitigated the paradigm of state-centrism in ENRM. Prior to that discussion, however, there is an overview of multi-level government in the post-colonial era which explores some of the major challenges that faced the newly independent states and considers how these challenges impacted on the ENRM regimes.

Embracing the Concept of Multi-level Government in the Post-independence Era

As was seen in Chapters Five and Six, among the major problems that contributed to natural resource degradation in the Lake region during the colonial era were the issues of: first, disengaging the participation in the management of their resources

and secondly, the lack of a regional ENRM framework. The colonial powers solely and centrally owned and controlled most of the natural resources in the colonies. The native authorities that were meant to champion native interests were more less instruments of administrative convenience for the colonial establishments. On the other hand, the Lake Victoria region, despite being a shared resource, was not concertedly managed by the lacustrine countries. Any effort made towards end of the colonial era to change this was short lived. The post-colonial governments did not make any significant stride towards embracing the concept of multi-level government in ENRM. While there was renewed enthusiasm in regionalism, local government was extensively eroded. Even the spirit for regionalism was short lived, and it was barely extended to ENRM. We shall examine first the extent to which the post independence governments perceived and incorporated the concept of local participation in the management of public local affairs. Secondly, we shall explore how the concept of regionalism was embraced and applied in natural resource management. As was the case under colonialism, there was no such thing as a defined ENRM regime for the Lake Victoria regime during the post-independence era. As such, the discussion that follows is based on the broad concept of the local government in each of the three countries.

An Overview of Some Key Issues at Independence

Since colonialism had been associated with a myriad of injustices towards the native communities, political independence was anticipated to be a panacea in addressing such injustices. Sooner rather than later, however, it was clear that the newly independent states were faced with several challenges, most of which had been brought about by the transition from colonialism. To compound the internal problems, the international political and economic order was characterised by unfair terms of trade, protectionist markets and the ideological divide between the Capitalists and Marxists. As natural resources stood at the centre of the national economies, such challenges were certainly relevant to ENRM.

As in direct relation to ENRM, the post independence governments were faced with the challenge of reviewing the colonial environmental laws and the institutional framework, especially in regard to the necessity of addressing the sensitive issues of property rights and reconsidering the question of local participation. The need for institutional reform also arose from the inherited centralised structure which was ill suited to the size and location of the resources. That aside, there was a high political demand for local government across the region. Law and policy reforms were, therefore, crucially important for driving forward change. As the new political order was expected to usher in a pro-native regime, for example, the attainment of independence was expected to render several colonial laws and their enforcement mechanisms untenable. The new independent states were also faced with the inherited problem of legal dualism.[1] For example, certain laws in Kenya still favoured the white settler communities, while some laws in Uganda had virtually created a 'state' within the State, where the Buganda Kingdom enjoyed certain rights unavailable to the rest of the country.[2]

The post-independence governments had other pressing issues, which were to later impact on the general management of the natural resources. First, they were faced with the problem of internal power struggles, which they urgently needed to neutralise. Secondly, socio-economic development had to be high on their agenda if they were to prove their worth and stay in power. Thirdly, they believed that cultivation of good international relations, with various international parties, would be instrumental in assisting them to address their domestic concerns of political stability and socio-economic prosperity. These political and socio-economic issues are further discussed in the following sections.

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[1] F. Henry Morris and James S. Read, *Uganda: The Development of its Laws and Constitution* (Stevens and Sons Limited, London 1966) p. 411.

[2] It was, for instance, stated in the Buganda Agreement 1900 that minerals found within land under the *mailoland* tenure system, which is found only in Buganda, is a property of the land owner.

Post Independence Politics and the Entrenchment of State Centralism

Uganda got her independence on October 9, 1962 and initially operated under a federal constitution that had been promulgated in April of the same year and slightly amended in 1963. Under the federal arrangement various functions were devolved to local governments and certain traditional institutions. However, as a result of a power struggle that largely emanated from discomfort of the federal arrangement, dissensions persistently ensued between the federalist and republican camps, leading to the eventual abolition of the traditional institutions in 1967. After abrogation of the 1962 Independence Constitution by the Uganda People's Congress (UPC) government, Uganda was declared a republic under the hastily promulgated 1966 Constitution, which was later amended and passed as the 1967 Constitution.

Kenya got her independence on December 12, 1963 with the Kenya African National Union (KANU) party taking over as first post-independence government. Notwithstanding the powers entrusted to central government, the Independence Constitution provided for the establishment of powerful regional governments at a time when Kenya was faced with sentiments of full regional autonomy and secession threats,[3] and thus the setting-in of a power struggle between the republicans and federalists.[4] This 'regionalism vs. centralism' debate, which had flowed from the nationalist to the post independence period, was mostly embedded in the relative uncertainty over power issues and personal interests, than ideological, social and economic issues.[5] From the onset, the post independence government perceived devolution and particularly regionalism (*Majimboism*), as a divide and rule ploy planted by the former colonial master - Britain. Unsurprisingly, therefore, KANU

[3] See H.W.O Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) 71 African Affairs 9.

[4] While KANU agitated for a centralised system of Government, KADU preferred a strong federalist system based on regional administration. Power struggles between KANU and KADU were, nonetheless, short lived, as the later was voluntarily liquidated in 1964 and many of its members joined the former. See, Roger Southall and Godfrey Wood, 'Local Governments and the Return to Multi-Partyism in Kenya' (1996) 95 African Affairs 501, 505.

[5] See, Du Bois Institute, 'The Changing Face of Kenya Politics' (1966) 25 Transition 44, available at <http://www.jstor.org/stable/2934286> Accessed 09 July 2008.

abrogated the Independence Constitution within two years of ascending to power. It adopted a Republican Constitution that saw the sub-national regional structure of government abolished and replaced with a centralised arrangement based on administrative deconcetration.[6]

Tanganyika also replaced its 1961 Independence Constitution with the 1962 Republican Constitution. In 1964, it united with the island of Zanzibar, which had become independent in December 1963, to form the United Republic of Tanzania. Tanzania's agitation for centralism was, ironically, embedded within a State strategy, the socialist *Ujamaa* system, which was intended to politically and socio-economically empower local communities in the management of their affairs, most particularly in regard to development. The *Ujaama* administrative arrangement was closely fused within the ranks of the socialist ruling party, Tanzania African National Union (TANU), which thrived on a highly centralised structure.

While a centralist system of government was arguably critically important in forging national unity, it also turned out to be a spring board for the suppression of the local government systems. Centralism had been perceived as a stand-alone and not a complementary government approach. The centralist mentality was largely a result of Intra-state power struggles for political supremacy, and this indeed sowed the seeds for the 'false starts' that were to later haunt the management of the newly independent States. As it will be seen, the centralist mentality led to the decapitation and abolition of local governments throughout East Africa.

[6] See Constitution of the Republic of Kenya 1963.

The Quest for Socio-Economic Development

In pursuit of nation-building, most post colonial states invested heavily in national economic development programmes.[7] Undoubtedly, they placed socio-economic development above environmental interests,[8] as they were more pre-occupied with agricultural production and industrial investment as the frontline national development strategies. These strategies were basically focused on mass production of cash crops and Import Substitution Industrialisation (ISI) as a means of providing for domestic consumption and foreign exchange earnings through export of the surplus produce and products. Not only did the central governments control the means of production, but they also became actively involved in agricultural production and the manufacturing industry. In many cases as a monopoly, they owned and operated natural resources based businesses including sawmills, trophy processing and marketing, fishing vessels and food processing plants.

In the mid 1960s, all the three countries conceptualised the adoption of African socialism as being a major precipitator for the enhancement of their national socio-economic development strategies.[9] The move towards African socialism was premised on the belief that the Africans should themselves be at the centre of their socio-economic prosperity. The approach to African socialism, however, varied across the countries, both in definition and interpretation. It was indeed such distinctiveness that was to later see each of the three countries take a different direction in political ideology and socio-economic development. While emphasizing the 'Africanisation' of the economy, Kenya put more emphasis on rapid economic

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[7] D. Rondinelli, J. Nellis and S. Cheema, *Decentralisation in Developing Countries: A Review of Recent Experience* (Management and Development Series No. 8 - Staff Working Papers No. 581, World Bank 1983) p. 7.

[8] Laurence Juma, 'Environmental Protection in Kenya: Will the Environmental Management and Coordination Act (1999) Make a Difference?' (2002) 9 South Carolina Environmental Law Journal 181, 190.

[9] African Socialism is basically centred on the belief that Africa's development should be modelled along traditional African principles, while stressing the issue of oneness. Many African politicians of the 1950s and 1960s professed their support for African socialism, but the definition and interpretation of this term varied considerably. For more information on African Socialism, see generally, the works of its key proponents that include: Julius Nyerere and Kwame Nkuruma.

growth than human social development with the belief that success of the former was a solution to the latter.[10] In that regard, access to social services, distribution of property rights, equality and political participation were mostly perceived from the economic perspective. The converse was true for Tanzania which put more emphasis on the building of social structures, where the issue of equality was considered to be paramount.[11] Tanzania believed that the major means of production and exchange should be controlled and owned by the peasants working through their own co-operatives but under the guidance of the government.[12] Uganda also believed that the means of production should be in the hands of the citizens, and thus perceived the nationalisation of means of production as a major potential drive for socio-economic prosperity.[13] Aside from Tanzania, however, these ideological perceptions were hardly implemented.

Uganda and Tanzania experienced economic difficulties that peaked during the 1970s. Uganda, which was since 1971 under military rule, saw its economy deteriorating by the day and completely run down by the end of the decade. A run down economy compounded by a break down in government services and the rule of law left the natural resource base extensively degraded. These factors, which were exacerbated by multiple economic disequilibria and a high population growth rate led to the escalation of poaching and the encroachment and destruction of various natural resources. [14] In Tanzania the ramifications of its socialist policies were vividly evident on the country's economy. Tourism, which had been among its major sources of income could no longer break even.[15] Poverty and government's inability to

[10] See Government of Kenya, *Sessional Paper Number 10* (Government Printers, Nairobi 1965).
[11] See Julius Nyerere, *The Arusha Declaration: TANU's Policy on Socialism and Self-Reliance* (Government Printer, Dar-es-Salaam 1967).
[12] Nyerere (1967), 'The Arusha Declaration', part II.
[13] Obote A. Milton, *Common Man's Charter: 'Move to the Left'* (Government Printers, Entebbe 1969).
[14] See W. Kisamba-Mugerwa, 'Private and Communal Property Rights in Rangeland and Forests in Uganda' in P. Groppo (ed), *Land Reform: Land Tenure Policies, Land Access and Markets*, vol 1/1998 (FAO, Geneva 1998).
[15] See H.I. Majamba, *Regulating the Hunting Industry in Tanzania: Reflection on the Legislative, Institutional and Policy Making Frameworks* (LEAT Publication 2001).

adequately provide for service delivery greatly contributed to the indiscriminate exploitation of natural resources, where the wildlife sector was the most affected. The imposition of a hunting ban between 1973 and 1978 did not deter poaching and illicit trade in wild animals and their products.[16] Natural resource degradation was, however, not peculiar to economic decline. Kenya whose economy was booming at the time also experienced various forms of resource degradation, including: a steep decline in wildlife populations; decrease in vegetation cover; and escalation of soil erosion in some areas. No wonder, Kenya was among the first African countries to establish an environmental management body – the National Environment Secretariat (NES), which was established in 1971.

The Property Rights' Question

The property rights' question was among the prominent political issues fronted by the independence movements as they agitated for self governance. As we saw in Chapters Five and Six, the colonial administrations severally altered the traditional property rights regimes. This included: the alienation and vesting of most natural resources in the British Crown; allocation of the productive land to the white settlers; and the expropriation of large swathes of land as conservation areas. In addition, colonial policy orchestrated, and in certain cases, supported inter and intra-tribal conflicts, some of which redefined property rights over natural resources.[17] By the time of independence, there was much anticipation and hope in political circles that self-governance would offer solutions to most of the property rights' issues of the time. On the other hand, there were also fears, especially among 'outsiders', that nothing was likely to stop the post-independence governments from embracing extensive land reform programmes aimed at returning the alienated land to the

[16] ibid.

[17] An example, is the conflict between the Kingdoms of Bunyoro and Buganda, in Uganda, arising from the claim over the 'the lost' counties of Bugaya and Bugangazi. For a detailed account on this issue, see Hjalmar Rune Espeland, 'The "Lost Counties": Politics of Land Rights and Belonging in Uganda' (Colloque international 'Les Frontières de la Question Foncière – At the Frontier of Land Issues', Montpellier, 17 -19 May 2006); Also Doyle Shane, 'From Kitara to the Lost Counties: Genealogy, Land and Legitimacy in the Kingdom of Bunyoro, Western Uganda' (2006) 12 Social Identities 457.

natives. This fear was premised on the belief that the post-independence governments ultimately stood for citizenry concerns and rights. On the contrary, however, the post-independence governments did not significantly alter the property rights structures of land ownership and management.[18] The forestry, water and fisheries resources also remained under the ownership and management of central government.[19]

Land that had been vested in the Crown automatically reverted to the central governments, which in some cases expanded its reach. In Tanzania for example, a law was in 1963 enacted to convert freehold lands into government leases,[20] and customary tenure was expropriated during the villagisation programme.[21] Parts of the village lands were redistributed to big national parastatals and other government departments and agencies without local consent.[22] The alienated land in Kenya remained in the hands of the government and the native lands which became trust lands were placed under the management of statutory trustees, the County Councils.[23] In Uganda, the Land Reform Decree 1975 declared all land to be public land. As for the land alienated to settlers in Kenya, the protracted pre-independence negotiations led to the inclusion of the "willing-seller willing-buyer" clause in the 1960 Constitution. This legal entrenchment was aimed at re-Africanisation of the Kenyan highlands.[24] While over one million acres had been purchased and redistributed by 1971, the process was marred by nepotism and cost problems, leaving the squatter and congestion problems partially unsolved.[25] The act of placing

[18] See Michael Ochieng Odhiambo, *Improving Tenure security for the Rural Poor: Kenya, Tanzania and Uganda - Case Study, Legal Empowerment of the Poor* (Working Paper No. 3, FAO 2006).
[19] See Bahiigwa Godfrey and et al, 'Fiscal Reforms in Fisheries in Uganda' (Workshop on Fiscal Reforms in Fisheries, Rome, 13-15 October 2003).
[20] Freehold Titles (Conversion) and Government Leases Act 1963, Cap 523.
[21] See Odhiambo (2006), op. cit., n. 18.
[22] Ole Ndaskoi Navaya, 'The Root Causes of Maasai Predicament,' (2006) 7 Fourth World Journal 28, 11.
[23] Constitution of the Republic of Kenya 1963, Art. 115 (1).
[24] Paul Maurice Syagga, 'Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective' in Ogechi Elizaphan (ed), *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (Regal Press Kenya Ltd, Kenya 2006).
[25] ibid.

land under the state was partially driven by the quest for political leverage to enable the state to easily expropriate private land in public interest.[26]

The other major outstanding property rights' issue concerned the land and other natural resources gazetted as reserves. The conservationists thought that, as land disputes between humans were more complex, the governments would find it easier to de-gazette and reallocate the game and forest reserve lands. They, therefore, made spirited efforts to convince both serving and presumptive post-independence African leaders. In 1961 these leaders, in a conference sponsored by the IUCN, made a re-assurance that they were committed to maintaining the conservation measures in place.[27] This position was indeed honoured in East Africa, as more conservation areas were declared and the laws protecting them strengthened.[28]

Although the creation of conservation areas was intended to protect various natural resources, the manner in which it was done was reminiscent of the colonial oppressive regimes. Although the local communities were allowed in certain cases to utilise some resources strictly for domestic purposes,[29] access to the natural resources generally remained regulated through licences and permits.[30] As the locals felt estranged from such natural resources, they basically often responded in two ways. First, they felt no obligation to assist in enforcing the conservation of the resources. Secondly, they unsustainably exploited the resources whenever they had the opportunity to access them.

[26] See Odhiambo (2006), op. cit., n. 18.
[27] See CCTA and IUCN, *Symposium Report: Conservation of Nature and Natural Resources in Modern African States* (IUCN New Series No. 1, Morges, Switzerland 1963).
[28] For example, in the case of Tanzania's expansion of its wild life conservation areas see Ole Ndaskoi (2006) op. cit., n. 22, at p. 11.
[29] Forests Act 1947, Cap. 146 (Uganda), s.14; and Forest Ordinance 1957 (Cap. 389) (Tanganyika), s. 15.
[30] See, generally, the laws of the time that concerned wildlife, forestry, water and fisheries management.

Environmental Law in the Post Independence Era

Save for the modifications expressly indicated in the respective Independence Acts,[31] the post-independence governments largely maintained the laws inherited from the colonial administrations. This position was also legally entrenched by the independence Constitutions. Among the slight changes made in environmental laws was the substitution of words such as 'Crown' with 'Government' and 'Governor' with 'President'. Because of such minor changes it has been said that independence signified a change of 'guards' and not 'habits'. Inheritance of the colonial laws meant that the post-independence governments maintained an environmental law regime that was: State-centric and thus with no regard to the effective participation of other tiers of government; based on the command and control enforcement approaches; incomprehensive in content to cater for the changing situations; fragmented and uncoordinated among sectors; and focused on the coercive 'gazette and protect' approach to conservation.[32] In addition to maintaining the decision-making process as a central government monopoly, the post-independence laws upheld law enforcement as a central government duty often done through specially designated authorised officers.[33]

As the case was with many other laws, the few amendments of the environmental laws were made for the basic purpose of re-customising them to match the post-independence structures of government.[34] A few laws were significantly reviewed. In contrast with its predecessor law, for instance, Uganda's Land Reform Decree 1975,

[31] These are: The Independence Act 1961 (Tanganyika); The Independence Act 1962 (Uganda); and The Independence Act 1963 (Kenya).

[32] John Ntambirweki, 'Environmental Law as a Tool for Sustainable Development ' in Robert A. Wabunoha (ed), *Handbook on Environmental Law in Uganda*, Vol. 2 (Second edn, Greenwatch (U) 2005) Ch. Nine, p. 83; See also, Government of Uganda, *State of the Environment Report 1996* (National Environment Management Authority 1996).

[33] It may be noted that there were, however, a few variations in the powers entrusted with the 'authorised officers', across the laws. See, for example, Fisheries Act 1970, s. 9 (Tanzania); Fish Act (Cap. 197) ss. 24 – 26 and 30 (Uganda); Fish Industry Act 1968, s. 12 (Kenya); Forests Act (Cap. 385) s. 11(Kenya); Wildlife (Conservation and Management) Act 1976, s. 49 (Kenya); and Wildlife Conservation Act 1974, s. 81(Tanzania).

[34] Ntambirweki (2005) op. cit., n. 32, at p. 80.

declared all land in Uganda to be public land and abolished all land tenures greater than leasehold. This Decree was, however, hardly implemented to allow the reforms it introduced.[35] Other examples include Kenya and Tanzania's wildlife Acts, which were significantly reviewed on the basis of the 'gazette and protect' approach, to provide for new management structures and enforcement methods.[36] Notwithstanding the fact that the post independence government largely upheld the colonial laws, they were reluctant to uphold the colonial approach to law enforcement.[37] As a result, several laws became redundant, especially in regard to the provisions that were considered to be draconian, such as those that restricted access to the natural resources. While some provisions of the inherited laws stood for the good of the environment, for reasons of political expediency they remained largely ignored.

Although the attainment of independence signified the end of colonialism, this did not deter the continuation of western influence on environmental policy in Africa, and this was partially delivered through international laws. While commenting on environmental policy in post colonial Africa, Nelson observes that;

> "African nations and governments survived in a condition of great dependence on outside donor agencies. …Continuation of the flow of money depended in significant part on a deep respect for the wishes of Europeans

[35] John Mugambwa, 'A Comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea' (2007) 11 Journal of South Pacific Law 39; See also, Richardson J. Benjamin, 'Environmental Management in Uganda: The Importance of Property Law and Local Government in Wetlands Conservation' (1993) 37 Journal of African Law 109, 109.

[36] See Wildlife (Conservation and Management) Act 1976, ss. 15, 19 and 38 (Kenya); Wildlife Conservation Act 1974, s. 5 (Tanzania); Ngorongoro Conservation Area Authority, 1959 (Cap. 413), s. 9(Tanzania).

[37] See Charles Odidi Okidi and Patricia Kameri-Mbote, *The Making of a Framework: Environmental Law in Kenya* (UNEP-ACTS Publication Series on Environmental Law and Policy in Africa: ACTS Press, Nairobi Kenya 2001).

and Americans, including prominently international environmental organizations and their constituencies."[38]

As mentioned earlier, the post-independence African governments, under auspices of the IUCN, were convinced to uphold a forceful declaration of conservation areas, which was widely unpopular among the locals. The cordial relationship between the African governments and their western contemporaries, in the 1960s, culminated into the signing of the African Convention on the Conservation of Nature and Natural Resources 1968. In 1975, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was entered into by several states to regulate the international wildlife trade. To a reasonable extent, these two instruments influenced environmental policy and law in post-independence Africa. For example, notwithstanding their delay in ratifying CITES,[39] Kenya and Tanzania included many of the Convention's principles and requirements in their post-independence wildlife laws[40] and the subsequent regulations on hunting and capture of animals. Due to the challenges pointed out earlier, however, many provisions of these international instruments remained poorly implemented.

The emphasis placed in the conservation of wildlife and to some extent the forestry resources was not necessarily due to environmental concerns. While these resources were conserved for purposes of boosting the national economic base, this purpose promoted the unsustainable exploitation of resources in other sectors. The fisheries and water laws, for instance, were more inclined towards utilisation than protection or conservation.[41] For example, the protection and conservation of fish was not directly provided for in the Fisheries Acts but listed among the issues on which

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[38] Robert H. Nelson, 'Environmental Colonialism "Saving" Africa from Africans' (2003) VIII The Independent Review 65, 77.
[39] CITES was adopted in 1973 and ratified by Kenya and Tanzania in 1978 and 1979, respectively.
[40] These are: The Wildlife Conservation Act 1974(Tanzania) and Wildlife (Conservation and Management) Act 1976 (Kenya).
[41] See, generally, Fish Industry Act 1968 (Kenya); Fisheries Act 1970 (Tanzania); and Fish and Crocodiles Act, (Cap 228) (Uganda).

regulations could be made.[42] It was, however, long after these Acts entered in force that such regulations were made.[43] Because of the problem of acute water stress, however, as a matter of exception, Kenya reviewed its water law to provide for: control of access, abstraction and flow of water in swamps; water bodies to become protected areas; and the making of by-laws by local governments in respect to controlling the use and preservation of water and pollution control.[44]

The Institutional Structure for Natural Resource Management

As was largely the case under colonialism, natural resources management in the post-colonial era remained a function of the mainstream government ministries and departments,[45] which were run by public officers hired and fired 'at the pleasure of the Executive.'[46] As others were dissolved,[47] the remaining few resource management bodies outside the mainstream government structure were made directly answerable to the central government, which appointed them; decided their remuneration and operational funds; directed the course of their business; and also set the rules under which they operated.[48] The first resource management institutions to enjoy administrative, financial and staffing autonomy were established in the 1970s and this was particularly in the field of wildlife management. The Wildlife Conservation and Management Service (WCMS)[49] and Ngorongoro

[42]. See, for example, Fisheries Act 1970, s. 7 (Tanzania); and Fish industry Act 1968, s. 7 (Kenya).
[43] In the case of Tanzania, for instance, most regulations were made after 1980. They include: the Fisheries (Explosives Poisons and Water Pollution) Regulations (G.N. No. 109 of 1982); Fisheries (Inland Waters) Regulations (G.N No. 3 of 1982); and the Fisheries Principal Regulations (G.N No. 317 of 1989).
[44] See Water Act (Cap. 372), ss. 13, 14, 145 and 149.
[45] See, for example, Fisheries Act 1970, s. 3 (1) (Tanzania); Forests Act (Cap. 385), s. 7 (2) (Kenya); Kenya Wildlife (Conservation and Management), s.3 (Kenya); and Wildlife Act 1974, s. 3 (Tanzania).
[46] See, for example, Constitution of the Republic of the Kenya 1963, Art. 25 (1); Constitution of the United Republic of Tanzania 1977, Arts. 34 (4), 35 (1) and 36 (1).
[47] Tanzania's Fisheries Act 1970 (s. 17), for example, dissolved the Fisheries Boards that had been established under its predecessor law, the Fisheries Ordinance (Cap.295).
[48] Such institutions and organs included: Kenya's Fisheries Advisory Councils established by, the Fish Industry Act 1968, s. 4; Kenya's Wildlife Conservation and Management Service established by the Wildlife (Conservation and Management) Act 1976, s. 3; and Kenya's Water Resources Authority established under the Water Act 1952 (Cap 372) s. 19, by L.N 741/1963.
[49] Kenya Wildlife (Conservation and Management) Act 1976, s.3.

Conservation Area Authority (NCAA)[50] were established in Kenya and Tanzania in 1976 and 1975, respectively.

The post colonial environmental laws maintained the concentration of powers in the central government Executive. Such powers were mainly exercised by ministers and to some extent the President, especially in the case of Tanzania. The appointment of top personnel and resource management organs, whether at the central or local level, continued to be at the discretion of the Executive.[51] As for the committees, boards and other decision making organs,[52] the majority, if not all members were appointed by the Executive. Interestingly, the authority of the Executive was in some cases exercised even in the appointment of judicial bodies[53] and local institutions.[54] While most laws required the natural resources to be managed through a hierarchy of relevant professionals, who were at times assisted by specialist organs or institutions, the phrase that:

> "...the minister may from time to time give general or specific direction to..."[55]

was often entrenched in the same laws to provide for the presence of the Executive in the day-to-day management of the resources. In addition, the Executives enjoyed the powers to: waive parts of the law and in some cases the mandate to suspend provisions of an entire Act; [56] make subsidiary legislation with direct effect; [57] and,

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[50] Ngorongoro Conservation Area Act 1959, s. 4 (As amended by the Game Parks Laws (Miscellaneous Amendments) 1975).
[51] See, for example, Tanzania's Fisheries Act 1970, s.1; Kenya Fish Industry Act 1968, s. 4; and Tanzania's, Wildlife Act 1974, s.3 and 4.
[52] These included: The Wildlife Fund Trustees (Kenya); Fisheries Advisory Council (Kenya); Ngorongoro Conservation Area Authority (Tanzania); and the Water Resources Authority (Kenya).
[53] See, for instance, provisions on the appointment of Kenya's Wildlife Conservation and Management Service Appeal Tribunal, as provided for by the Wildlife (Conservation and Management) Act 1976, s. 65.
[54] See, for instance, the provision on the appointment of Kenya's District Wildlife Committees, as provided for by the Wildlife (Conservation and Management) Act 1976, s. 62 (2).
[55] See, for example, Kenya Wildlife (Conservation and Management) Act 1976, s. 3 (5).
[56] See, Uganda's Fish Act (Cap. 197) s. 1 (3); Tanzania's Fisheries Act 1970 s. 14; Kenya's Wildlife (Conservation and Management) Act 1976, s.46; and Tanzania's, Wildlife Act, 1974, s. 19 and s. 84.

without consultation, declare protected areas or resources.[58] As can be seen, similar to the case under colonialism, the central government and most particularly the Executive controlled or stood at the centre of the institutional structure for natural resource management.

Decapitation of the Legitimacy of the Region and Local Government

As was seen in Chapter Five, the system of local government had in each of the three countries been significantly reformed prior to the end of the colonial era. As discussed at the beginning of this Chapter, local governments were at independence inherited as the basis decentralised governance, in all the three countries. On the assumption that colonialism was a stumbling block for the active involvement of local institutions in government, it might be assumed that the solution to such problems lay in self governance. As such, the post-independence governments were expected to willingly and swiftly strengthen their local government systems. To the newly independent governments, however, the system of local government was a threat to their political ambitions and an inhibitor to socio-economic development and national unity. As a result, local government powers and functions were gradually curtailed, leading to the eventual collapse of local government in the three countries.

As mentioned earlier, top on the agenda of the post-colonial governments were the issues of rapid economic growth and capture of political power. On the economic front, the governments subscribed to central planning that was later denoted by socialist ideologies. As for political power, they moved towards the entrenchment of one-party systems aimed at locking out political opposition. As Olowu observes, with such ambitions, democratic local governments were seen as irritants, if not obstacles

[57] For example see Tanzania's Fisheries Act, 1970, s. 1; Kenya's Wildlife (Conservation and Management) Act 1976, s.16 and 67; Kenya's Water Act 1952 (Cap. 372), s.182; Uganda's Fish Act (Cap. 197) s. 35; and Kenya's Forests Act (Cap. 385), s.15; and the Ngorongoro Conservation Area Act 1959 (Cap 413).

[58] See, for example, Kenya's Forest Act (Cap. 385), s. 4; Kenya's Wildlife (Conservation and Management) Act 1976, ss. 6-8; and Tanzania's Wildlife Act 1974, ss. 5, 6 and 15.

to economic transformation and political supremacy.[59] It was not long, therefore, before the legitimacy of local institutions was eroded and centralist government was systematically restored in all the three countries. In the words of Ghai *et al*: 'colonial administration was in practice Africanised and not democratised.'[60] They observe that "Kenya's post independence government exercised greater executive power control and authoritarianism, which was coupled with deliberate neglect of the law, to prevent the acquisition of power by, or the development of the powerless."[61] Certainly, such tendencies, which were not rare among the post independence governments, present a clear manifestation of the roots of the colonial legacies in government. The following section takes us through individual country experiences with local government between the 1960s and 1970s.

Kenya: From the Road towards Devolution Back to Centrally Commanded Administration

Shortly before her independence, Kenya replaced its dual local government system with a three tiered unified structure.[62] Upholding the unified system, the Independence Constitution established Regional Governments (RG's) with Assemblies that enjoyed the discretion of deciding the powers and responsibilities of the local councils under their jurisdiction.[63] The RG arrangement was, however, shortly abandoned through constitutional change and replaced with a unitary system that placed the local governments under the direct control of the central government. Although not initially provided for under the Republican Constitution,

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[59] Dele Olowu, *Decentralization Policies and Practices under Structural Adjustment and Democratization in Africa* (Democracy, Governance and Human Rights Programme Paper Number 4, United Nations Research Institute for Social Development 2001) pgs. 5-6.

[60] See Robert Martin, 'Review of Y. P Ghai and J. P McAuslan, 'Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present' ' (1971) 9 Journal of Modern African Studies 324, 325.

[61] Y. P. Ghai and 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* (Oxford University Press, Nairobi 1970) p. 509.

[62] The new system was comprised of Municipal/County Councils, Urban/Area Councils and Local Councils, in that hierarchical order. This system was, at independence, inherited along with the 1963 Local Government Regulations that, among others, upheld the principle of democratic representation.

[63] Roger Southall and Godfrey Wood, 'Local Governments and the Return to Multi-Partyism in Kenya' (1996) 95 Affrican Affairs 501, 504.

Provincial Administration was re-introduced and placed under the presidency, to complement and oversee the local government.[64] As the unitary system took root, local government experienced several setbacks. The county councils that had been established by the colonial administration in 1952 were relieved of their responsibility of assessing graduated personal tax and that function was taken over by the central government.[65]

Eventually, the finances of the county councils were, from 1968, indirectly but firmly controlled by the District Commissioners, who were part of central government.[66] Provincial Administration remained part of the Presidency, while the Councils fell under the Ministry of Local Government, and thus creating two parallel command structures for local administration.[67] This administrative arrangement greatly eroded the local government functioning capacity and at the same time paved way for the entrenchment of administrative decentralisation. As the Provincial and District Administrations[68] became well facilitated centres of ultimate authority,[69] the local councils were, as in accordance to their responsibilities, incommensurately funded.[70] In the mean time, the government made several attempts to graft its deconcentrated model of decentralisation with financial decentralisation.[71] The Provincial and District Development Advisory Committees (P/DDAC), which were established at about the

[64] Patricia Stamp, 'Local Government in Kenya: Ideology and Political Practice, 1895-1974' (1986) 39 African Studies Review 17, 25.
[65] J. Barkan and M. Chege, 'Decentralising the State: District Focus and the Politics of Re-Allocation in Kenya' (1989) 27 Journal of Modern African Studies 432, 440.
[66] Bazaara Nyangabyaki, *Legal and Policy Framework for Citizen Participation in East Africa: A Comparative Analysis* (East African Regional Report, LogoLink, 2002).
[67] Stamp (1986) op. cit., n. 64, at p.28
[68] The Provincial and District Commissioners, who headed the Provincial and District Administrations, respectively, were directly appointed by the president and not the Public Service Commission as was the case with other civil servants.
[69] Barkan (1989) op. cit., n. 65, at p. 438.
[70] See, generally, A. M. Sharp and N. M. Jetha, 'Central Government Grants to Local Authorities: A Case Study of Kenya' (1970) 13 African Studies Review 43.
[71] The major financing arrangements included: The District Development Grant (DDG), which was attempted in 1966; and the Special Rural Development Programme (SRDP), which was piloted in six districts between 1967 and 1974. See Barkan (1989) op. cit., n. 65, at p.441.

same time, often had their functions high-jacked by the politicians.[72] This, coupled with the fact that the two committees operated under an ad hoc arrangement that lacked consistency in command and relationship with other local institutions, led to their eventual collapse.[73]

The replacement of local government authority with such ad hoc interventions did little to salvage the local councils, which were already faced with myriad service delivery challenges. Notwithstanding its share of the blame, the central government went ahead to enact the Transfer of Functions Act, 1970, that further eroded the responsibilities of the Local Councils.[74] In 1974 the Graduated Personal Tax, which was the main source of revenue for the local councils was abolished and the Local Authority Service Charge that had been introduced as a compensatory measure was also abolished in 1978.[75] In 1984, local government power to recruit own staff was curtailed by the Local Government Amendment Act, which abolished the Local Government Staff Commission.

Tanzania: The Shift from Traditional Local Government to the Socialist Ujamaa System

At her independence, in 1961, Tanganyika inherited the local government system established by the colonialists and most of the laws under which it operated were maintained.[76] The sections establishing native authorities were repealed, however, in the 1962 local government review. The African Chiefs Ordinance 1953, which introduced elected chiefs, was also repealed under the same review. The 1962 Constitution that replaced the 1961 Independence Constitution established District, Municipal and Urban Councils as the core institutions of the country's local government system. These local authorities were supervised by the central

[72] Stamp (1986) op. cit. n. 64, at p. 30.
[73] ibid.
[74] Southall (1996) op. cit., vol. 63, at p. 506.
[75] Henry F. Morris, 'Annual Departmental Reports Relating to Uganda, 1903-1961' in Neville Rubin (ed), *Government Publications Relating to Africa in Microform* (African Studies Association of the United Kingdom 1978) p. 56.
[76] The principal law for local government was, the Local Government Ordinance 1953 (Cap 333).

government, through the regional and area commissioners, who were politically appointed.[77] The legitimacy of the local government system was significantly eroded by the 1965 Local Government Election Act[78] which, although re-introduced the concept of local elections, also provided that all elected councillors had to be members of the ruling party, the Tanzania National Union (TANU).[79] This Act followed the constitutional amendment of 1965, which had in effect declared Tanzania a one-party state. Owing to political interference and dwindling resources, the local authorities hardly coped with their mandatory functions, leading to a drastic decline in the quality of services they provided.[80]

In 1967, Tanzania adopted the Arusha Declaration that introduced the *Ujamaa* policy as the framework for national socio-economic development.[81] The policy was aimed at empowering local committees to actively participate in their local development strategies and policies. The 1969 structural reforms that were intended to implement the socialist policy further fused the local government system with the ruling party, which reigned on a highly centralist command structure.[82] While the elected local authorities remained, a parallel system of regional, district and village development committees was established to oversee economic development programmes within their jurisdictions. The local rates and produce cess, which were a major local government source of revenue, were abolished in 1969 and 1970, respectively. This

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[77] N.D. Mutizwa-Mangiza, 'Lessons from Tanzania's Experience of Rural Local Government Reform' (1990) 3 International Journal of Public Sector Management 23, 23; Nyangabyaki Bazaara, *Legal and Policy Framework for Citizen Participation in East Africa: A Comparative Analysis* (East African Regional Report, LogoLink, 2002) p. 9.

[78] The Local Government Election Act 1965 (Tanzania).

[79] Eugene Mniwasa and Vincent Shauri, *Review of the Decentralisation Process and its Impact on Environment and Natural Resources Management in Tanzania* (LEAT 2001) p. 7.

[80] Philip Mawhood (1993), 'The Search for Participation in Tanzania', in Philip Mawhood (ed), *Local Government in the Third World*, quoted in Mutizwa-Mangiza (1990) op. cit., n. 77 at pgs. 23-25.

[81] Proclaimed by the then President of Tanzanian, Mwalimu Julius Kambarege Nyerere on 5 February 1967, the Arusha Declaration outlines the principles of Ujamaa (African Socialism) as seen by Nyerere and his compatriots in remoulding the ideological concept of socialism, as in accordance to the African situations. The declaration was followed by a villagisation programme that sought to transform the pattern of rural settlement by congregating the rural population in nucleated villages intended to benefit from economies of scale. See Julius Nyerere, *The Arusha Declaration: TANU's Policy on Socialism and Self-Reliance* (Government Printer, Dar-es-Salaam 1967) (originally published in Swahili).

[82] See Mutizwa-Mangiza (1990) op. cit., n. 77.

further affected local government performance as central government was unable to compensate for the abolished local taxes. Especially after 1966, more local government functions and powers were successively recentralised.[83]

The District Authorities were eventually abolished in 1972 and the Urban Authorities faced a similar fate a year later. A new arrangement was established under the Decentralisation of Government Administration (Interim Provisions) Act, 1972, which despite its title was ironically a variant of centralism.[84] The Act was aimed at harmonising the government administrative system with party socialist policy.[85] The socialist *Ujamaa* policy was further strengthened by the enactment of the Villages and *Ujamaa* Villages Act, which focused on the *Ujamaa* villages as the core planning unit. District and regional development committees were also established as facilitative, advisory, oversight and coordinating centres for the *Ujaama* villages.[86] The power and proper functioning of the village units was substantially curtailed, however, by the centrally appointed district and regional bureaucracies, which wielded the financial and administrative powers. Although the *Ujamaa* system was supposedly founded on the principle of local participation, its fusion of the ruling party and administrative structures ignored the decentralisation attribute of having a hierarchy of elective offices that are downwardly accountable to the people. Major decision making powers were retained within the party system or central government. While the *Ujamaa* policy was packaged and marketed as a devolution programme, in practice it exhibited more characteristics of administrative

[83] Mawhood (1993) op. cit., n. 80, at pgs. 23-25.

[84] The Act, for instance, required the local officers to be absorbed into the national civil service structure, and thus entrenchment of administrative decentralisation.

[85] See s. 7 (2) (b) of the Act and summary of the Decentralisation of Government Administration (Interim Provisions) Act 1972, thus:

> "An Act to confer upon the Prime Minister power to make provisions for the Decentralisation of the Administration of Government by Dissolution of Local Authorities and Establishment of District Development Councils, to provide for the functions of District Development Councils and for matters incidental, thereto or connected therewith."

[86] Decentralisation of Government Administration (Interim Provisions) Act 1972, s. 6 (1), 7 (1), 10 and 11.

deconcentration.[87] In effect, the policy failed to overcome the limitations of centralised administration,[88] and the centrally commanded deconcentration arrangement, under auspices of the *Madaraka Mikoam*i, (Powers of the Regions) reigned till 1982.

Uganda: The Abolition of the Local Government System

At independence, Uganda also inherited the local government system established by the colonialists together with the Local Government Ordinance 1949, under which it operated. Although local government councils continued to be constituted through elections, the ruling party manipulated the elections to ensure that only its members were 'elected'.[89] Since local government initially remained with various functions that entailed significant expenditure,[90] they were allowed to collect revenue from various sources, though the expenditure had to be approved by the central government, which also approved the locally appointed civil servants. By 1965, it was clear that Uganda was also treading the same path of entrenching a *de facto* one party state. Among other developments intended to demean the powers of local government, the central government began to virtually appoint the local councillors.[91] the Constitution was, in 1966, abrogated and as was the case with other constitutional institutions, local government status remained unclear as it continued to exist in oblivion. The final blow was clearly contained in the 1967 Constitution that abolished the traditional institutions, which were the basis for local government in many parts of the country. Local government was downgraded and placed under direct control of the central government, signalling the return to

[87] See Denis Rondinelli, 'Government Decentralisation in Comparative Perspective: Theory and Practice in Developing Countries' (1980) 47 International Review of Administrative Science 133; Mutizwa-Mangiza (1990) op. cit., n. 77, at p. 25.
[88] Barkan (1989) op. cit., n. 65, at p. 433.
[89] Bazaara Nyangabyaki, *Decentralisation, Politics and the Environment in Uganda* (Environmental Governance In Africa Working Paper No. 7, World Resources Institute, Washington, USA 2003) p. 5.
[90] Ahmad Ehtisham, Giorgio Brosio and Gonzalez Maria, *Uganda: Managing More Effective Decentralization* (IMF Working Paper No. 06/279 2006) p. 6.
[91] Nyangabyaki (2002) op. cit., n. 77, at p. 11.

administrative deconcentration.[92] Complemented by central government departmental field staff, the districts were headed by central government administrators, most of whom were politically appointed. The same system continued under the military junta, 1971-1979, and a number of administrative positions were taken over by the military. During this period, government services and the rule of law drastically deteriorated, leading to complete ceasing of some public service sectors.

Inevitably, the collapse of local government took its own toll on the rate of environmental degradation, which is believed to have increased in all the three countries during the post-independence era. As local governments were abolished or their powers severely reduced, the devolved natural resource management functions were once again re-centralised.[93] In Tanzania, for example, the forests that had been placed under the management of district authorities, in 1969, were recentralised in 1976 on the argument that districts were unsustainably utilising forest products to raise revenue. [94] The recentralisation took the problem to another level, as the forests became more susceptible to extensive mechanised logging, which was funded by foreign governments.[95] In Kenya, the factors that led to the mismanagement and eventual recentralisation of part of the Amboseli Game Reserve also emanated from several failures on the part of the central government.[96] It failed, as required, to offer the guidance to and training of the local council staff in wildlife management.[97] This failure had led to a rundown of the reserve, in the process exacerbating conflicts between the local warring political factions, and giving the central government an excuse of recentralising part of the reserve.[98] Although poor local government

[92] See the Local Administration Act 1967 (Uganda); and the Urban Authorities Act 1964 (Uganda)
[93] Nyangabyaki (2003) op. cit., n. 89, at p. 15.
[94] Jon C. Lovett, 'Statute Note: Tanzania Forest Act, 2002' (2003) 47 Journal of African Law 133, 134.
[95] ibid.
[96] L. Talbot and P. Olindon, 'The Maasai Mara and Amboseli Reserves' in Agnes K (ed), *Living with Wildlife; Wildlife Resource Management with Local Participation in Africa* (African Technical Department Series: Technical Paper No. 130, World Bank, Washington DC 1990) pgs. 69-71.
[97] ibid.
[98] ibid.

performance was often given as the justification for the recentralisation of various local government powers and functions, it ought to be borne in mind that such poor performance often arose from central governments' own failures to support local government.

The non-involvement of local government in natural resources management continued to impact on the state of the resources, as the local councils no longer felt obliged to participate in enforcing the required laws. In Uganda, for instance, a system was put in place, during the 1960s, to allocate part of the revenue realised from national parks to the surrounding local governments that were equally required to pass it over to the communities. This money was meagre, however, in addition to its release being intermittent. Having no stake in the park, the communities resorted to poaching whenever they had the opportunity.[99] The attempts made to share revenue accruing between the central and local governments were in most cases *ad hoc* and unreliable in their disbursement. In some cases, such funds were never released or simply never reached the communities.[100] In addition to the issue of the unfair sharing of benefits, the fact that local government powers had been subdued exacerbated the problem of law enforcement, and this certainly impacted on the conservation of natural resources.[101]

The Renewal of Interest in Local Government since the 1980s

We have seen that despite inheriting fairly structured local government systems, the post independence governments opted to downgrade rather than strengthen them, and that this contributed to natural resources degradation. This section introduces yet another important phase in local-central relations in the management of local affairs.

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[99] Kamugasha Nganwa, 'Queen Elizabeth Park' in Kiss Agnes (ed), *Living with Wildlife: Wildlife Resource Management with Local Participation in Africa* (World bank Technical Paper No. 130, African Technical Department Series, the World Bank, Washington DC, 1990) p. 62.
[100] ibid.
[101] ibid., at p. 61.

Throughout Africa, the renewed interest for decentralisation during the 1980s was generally influenced by embracing of the national development models that entailed the restructuring of the state-centred approaches to the delivery of public services and governance in general. After experiencing a series of economic crises that peaked during 1970's, all the East African countries, in the 1980s, embraced the IMF/World Bank's Structural Adjustment Programmes (SAPs) as the backbone for national development strategies. The IMF/World Bank and its policies have since been a major influence in the political and socio-economic affairs of the region. While introducing the SAPs, which were in fact a precondition for accessing most loans and grants, IMF/World Bank's major objectives included democratisation of public governance and the cutting back of government expenditure. Decentralisation and privatisation were among the strategies considered in divesting government services. Most of the subsequent decentralisation programmes were more inclined, however, to deconcentration than complete devolution of the local service delivery systems.[102] Many of them established institutions that: did not have sufficient legal mandate; lacked financial resources; and were significantly dependent on central government appointed officials. Generally, the political will to transfer reasonable authority and functions from the centre to democratic local institutions remained lacking.[103] By the 1990s it was clear that the reforms had failed to address centralised public sector management and the associated fiscal, economic and political crises that daunted most developing countries.[104] This prompted the external donors, funding development expenditure in these developed countries, to promote and support decentralisation programmes that embody democratisation and poverty reduction strategies.[105] This effort has since been matched by non-state domestic organisations. While the recent wave of decentralisation in Africa has generally been

[102] Olowu (2001) op. cit., n. 59, at pgs. 6-9.
[103] ibid.
[104] Wunsch and Olowu (1995), 'The Failure of the Centralised State', quoted in Olowu (2001) op. cit., n. 59, at p. 10.
[105] Olowu (2001) op. cit., n. 59, at pgs. 10-11.

inspired by development models, the return to democratic decentralisation has also been seen and used as a political tool for containing regional and local elites and associated political issues.[106] In that respect, we recognise that the element of national politics remains alive and at times influential in local government. The following section examines the revival of local government and the extent to which its functions and powers were structured as to be able to support in the management of local natural resources.

Tanzania: Rethinking the Socialist Ideology and Approach to Rural Development

By the late 1970s it was clear both within and outside government that the decentralisation reforms based on the socialist strategy had absurdly failed to meet their intended goal. As earlier mentioned, Tanzania's *Ujamaa* policy stood for the worthy cause of decentralisation but the policy was not well translated in practice into the transfer of sufficient powers, functions and resources to the decentralised units. In fact, the local government system, expunged by the *Ujaama* approach, had several attributes of a good decentralisation programme. Mwalimu Julius Nyerere who, as President, had spearheaded the *Ujamaa* reforms was to later state that:

> "There are certain things I would not do if I were to start again. One of them is the abolition of local governments... and the other was the disbanding of cooperatives. We were impatient and ignorant... We had these two useful instruments of participation and we got rid of them. It is true that local

[106] See C. Boone, 'State Building in the African Countryside: Structure and Politics at the Grassroots' (1998) 34 Journal of Development Studies 1; Robin Mitchinson, 'Devolution in Uganda: An Experiment in Local Service Delivery' (2003) 23 Public Administration and Development 241, 247; Jeffrey Krutz, 'Decentralisation as Patronage? Local Government and Regime Support in Uganda' (Midwest Political Science Association National Conference, Chicago, Illinois, 20 April 2006); Tim Kelsall, 'Governance, Local Politics and 'Districtization' Tanzania: the 1998 Arumeru Tax Revolt' (2000) 99 African Affairs 533; Elliot Green, *District Creation and Decentralisation in Uganda* (Crisis States Working Papers Series No.2/24, Destin Development Studies Institute, London School of Economics 2008).

governments were afraid of taking decisions but instead of helping them we abolished them. Those were two major mistakes ..."[107]

The renewed interest in local government was initially marked by the reintroduction of urban local authorities in 1978. This was followed, in 1982, by the simultaneous enactment of five principal Acts on local government.[108] In addition to re-introducing elected district councils that were functionally similar to those abolished, the new local government laws disbanded the higher local institutions established after 1972, save for the Regional Development Committees, which were retained as coordination and consultative institutions. The structures below district level remained virtually intact. The re-introduced local government system did not, however, effectively commence until it was constitutionally entrenched by Act No.15 of 1984.[109]

The re-introduced local government framework was faced, nonetheless, with legal and structural limitations that were compounded by limited operational resources. The laws fell short of establishing a clear distribution of authority and functions among the centre, regions and districts.[110] Due to insufficient local revenue and human resource, local government remained strongly dependent on the central government, which was unfortunately also faced with severe macro-economic problems that were particularly exacerbated by a high ratio of external debt servicing.[111] Such dependence was inevitable, as the centre retained substantial powers necessary for local government operation. Throughout the 1980s, a significant part of local government revenue went towards servicing recurrent expenditure and most particularly staff salaries. Central government ministries

[107] Julius Nyerere (1984), 'Interview', quoted in Olowu (2001) op. cit. n. 59, at p. 6.
[108] The Acts are: Local Government (District Authorities) Act 1982; Local Government (Urban Authorities) Act 1982; Local Government Finances, Act 1982; Local Government Services, Act 1982; Local Government Negotiating Machinery Act 1982.
[109] Constitution of the United Republic of Tanzania 1977, Arts. 145-146.
[110] Mutizwa-Mangiza (1990) op. cit., n. 77 at p. 27.
[111] ibid., at p. 26.

continued through their regional offices, to control and direct the local government, as the local governments had stringent limitations on recruiting own staff. That notwithstanding, the Local Government Service Commission, which recruited local government staff was also under strong control of the centre and most particularly the Presidency and the Minister responsible for local governments.[112] Although the reintroduction of elected councils depicted the political or rather the democratic dimension of decentralisation, the absence of sufficient administrative and fiscal authority at local government level, undermined the decentralised efforts.

After embracing IMF/World Bank Structural Adjustment Programme in 1986, Tanzania continued to restructure government institutions and systems, including local government. The local government reform process was significantly re-energised in 1996, leading to the enactment of the Regional Administration Act 1997, which repealed the Decentralisation of Government Administration (Interim Provisions) Act that had greatly curtailed local government powers and functions.[113] The Regional Administration Act transferred more powers to the districts councils by creating smaller regional secretariats as a replacement to the Regional Directorates that often duplicated or usurped the local government functions and responsibilities.[114] It also created a direct link between the centre and district and urban authorities.[115] The adoption of the policy paper on Local Government Reform in 1998, further redefined the local government framework with the intention of shifting away from the deconcentration to the devolution model of decentralisation.[116] As decentralisation reforms continue to-date, the on-going Local Government Reform Programme (LGRP) is intended to effect further, more significant changes in the country's local government system.

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[112] See, for example, The Local Government Service Act 1982, s. 6.
[113] Decentralisation of Government Administration (Interim Provisions) Act 1972 was repealed by the Regional Administration Act 1997, s. 22 (1).
[114] Regional Administration Act, 1997, s. 10.
[115] Mniwasa (2001) op. cit., n. 79, at p. 9.
[116] See the Local Government Laws (Miscellaneous Amendments) Act 1999 and the Local Government Laws (Miscellaneous Amendments) Act 2006.

Kenya: Decentralisation and the Politics of Sharing the National Cake

Local government in post-independent Kenya, since the replacement of the Independence Constitution, has not been a mainstream channel for local service delivery especially in the rural areas. Unlike the other countries, Kenya's earlier endorsement of the revival of decentralisation did not entail significant legal and institutional changes. As elaborated earlier, the central government's administrative hierarchy has always been the lead player in local service delivery and the attempts to strengthen local government have mostly been focussed on fiscal decentralisation.

The 1983 decentralisation reforms based on the policy of the District Focus for Rural Development (DFRD)[117] entrenched the administrative deconcentration model of decentralisation.[118] The DFRD policy was in effect, more of a political gimmick driven by the desire to modify, if not dismantle, the ethno-regional arrangement that, since independence, had greatly influenced the sharing of political power and resources through a clientelist system.[119] The DFRD was principally inspired by the *Fata Nyayo* (follow in the footsteps) philosophy, which sought to promote equitable distribution of resources and opportunities across Kenya's regions.[120] Notwithstanding DFRD's various contributions in enhancing local government, it failed to address certain pertinent gaps, such as the issue of coordination among the different levels of government.[121] It also fell short of establishing a locally accountable personnel system.[122] Additionally, the District Executive Committee, which was central in

[117] See, generally, Barkan (1989) op. cit., n. 65.
[118] Paul O. Ongugo and Jane Njuguna, 'The Effects of Decentralisation on Kenya's Forestry Sector: Cases from Forests Studied by the IFRI Collaborating Research Centre in Kenya' (Workshop in Political Theroy and Policy Analysis, Indiana University, Bloomington, May-June, 2004) p. 4.
[119] Barkan (1989) op. cit., n. 65, at p. 434
[120] ibid.
[121] While the DFRD strengthened district level budgeting and planning, the coordination platform that it founded is narrow in scope let alone the problem that it is an administrative arrangement that may not be easily acceptable across the service delivery systems, which may not necessarily have similar goals.
[122] For example, in addition to central government staff posted to the districts, the function of recruiting senior local government staff was in 1984 transferred to the centre. See Southall (1996, op. cit., n. 63, at p. 508

decision making, comprised of departmental staff posted from ministries and chaired by the District Commissioner, who was also a central government employee. While reviewing the DFRD Barkan *et al* observe that;

> "Put succinctly, decentralisation to the district level and the empowerment of the rural population are not the same, not least because the former has resulted more in deconcentration than in devolution."[123]

There was also inadequate political commitment on the part of Central Government. For instance, the Rural Development Fund (RDF), which was the funding mechanism under DFRD, hardly reached 0.5 per cent of Kenya's development budget.[124] The argument that such a meagre transfer of funds arose mainly from the low absorption capacity of the districts undermines important issues. Local capacity building is a central tenet in decentralisation processes and it should ordinarily be spearheaded by central government. Also, since districts were virtually run by central government staff, it is interesting that the same staff cadre had the capacity to locally execute central government programmes, but not those implemented through the local government system. The political overtones of the DFRD, by far, outpaced other expected outcomes of the policy. As a result, inequitable distribution of resources was legitimised on pretext of subjecting service delivery to the criterion of absorption capacity and the demand driven approach. Contrary to its policy objective of regional equity, DFRD's release of funds and implementation of programmes was skewed towards political interests.[125] The Local Authority Transfer Fund (LATF), which was introduced in 1998, and runs to-date, is also a fiscal measure that until recently

[123] Barkan (1989) op. cit., n. 65, at p. 446.
[124] ibid., at p. 448.
[125] bid., at pgs. 446-452.

operated without any major legal and institutional changes in the local government system.[126]

Following a change in government, Parliament passed yet another fiscal decentralisation arrangement, the Constituency Development Fund (CDF).[127] The CDF is directly disbursed from the Finance Ministry to the recipient communities. Service delivery under this system is the responsibility of the Community Development Committees usually chaired by the area Member of Parliament. The CDF, which is basically operated through political structures, is required to be 2.5 per cent of the ordinary national annual revenue.[128] The birth of the CDF structure, which is a variant of administrative decentralisation, is a clear manifestation of the lack of confidence in the local government system by the central government. The technical people who oversee activities under the CDF are mostly central government delegated personnel. The community and local political structures are used as frontline and not complementary institutions in service delivery. While such an arrangement has its own merits, it also presents a series of problems. Being largely a political programme, enforcement of the rules that manage it may prove to be difficult as political ambitions and patronage take centre stage in the planning, implementation and disciplinary processes.[129] The same reasoning makes its continued existence highly uncertain.

Aside from a few exceptions such as the Local Authority Transfer Fund (LATF), which links directly to the local authorities, fiscal decentralisation has been often operated either with limited collaboration or in parallel with other forms of decentralisation including provisional administration, local government and the sector-based

[126] The Local Authority Transfer Fund (LATF), which was established by the Local Authority Transfer Fund (LATF) Act 1998, is intended to supplement the locally generated revenue of the local authorities by supporting both recurrent and capital development expenditure.
[127] The fund is established by the Constituency Development Fund Act 2003.
[128] Constituency Development Fund Act 2003, s. 4 (2) (a).
[129] See, generally, Mwangi S. Kimenyi, *Efficiency and Efficacy of Kenya's Constituency Development Fund: Theory and Evidence* (W/P No. 2005-42, Department of Economics Working Paper Series, University of Connecticut, USA 2005).

approaches to decentralisation. Such scenarios have always resulted because new measures are often introduced without any major legal and institutional changes in the entire local service delivery system. Notwithstanding the proposed reforms,[130] Kenya's approach to decentralised service-delivery remains highly disjointed with hardly any effective coordination centres. As a form of decentralisation, local government particularly remains at the periphery, especially in the non-urban areas, where local councils are more of trustees than useful platforms in the management of local affairs.[131] There appears to be no administrative or legal instrument that clearly draws a line distinguishing the roles of administrative units and local councils. Such a shortfall often leads not only to duplication of services but also to conflicts among the service provision systems, thus impacting on their effectiveness and efficiency.

Uganda: Placing Local Government at the Centre of the Local Service Delivery System

Among the three countries, Uganda has embraced a more comprehensive decentralisation programme that has involved several legal and institutional changes, especially since the early 1990s. After the return to civilian rule, local government councils were in 1981 revived but operated under the old laws, which, among other things, required councillors to be nominated by the central government, which also had the powers to appoint the chiefs and other local officials. Following another change in government in 1986, a new decentralisation policy was unveiled and it has since evolved through a series of significant legal and institutional changes. These

[130] Apparently Kenya's local government system is still undergoing a reform through the Kenya Local Government Review Programme (LGRP). That aside, the draft of a new Constitution provides for the strengthening of local government. It is worthwhile to note, however, that the aspect of strengthening local government was among the controversial issues that led to the major disagreements and consequential abandonment, in 2004, of the constitutional review process.

[131] Under the CDF, for instance, other than facilitating the release of funds, the district administrative, finance and planning offices, which are required to be central in local service delivery, are hardly entrusted with any other function.

changes have led to the strengthening of local government administrative, political, and legislative powers, and to an extent, quasi judicial functions.[132]

After more than a decade of political instability that heavily impacted on the state of the environment and natural resources,[133] democratic decentralised governance was reintroduced, through radical reforms, by the Resistance Councils Statute 1987. The emphasis was initially on political decentralisation, where a five tier local government system was established with the basic intention of strengthening local democracy through local participation in decision making. Owing to its popularity and success, the resistance councils system was transformed into a local government system that was formalised by the Local Governments (Resistance Councils) Statute, 1993.[134] The Statute devolved and distributed varying degrees of administrative, political and fiscal authority among the established local governments and administrative units.[135] The significant developments of the early 1990s included the integration of most locally based central government personnel into local government, which was allowed to collect its own revenue in addition to the mandatory central government transfers. In 1995 the local government system was elaborately enshrined in the country's new Constitution.[136] This development, in concert with other demands, necessitated a review of the local government system, and a new law, the Local Governments Act 1997 was subsequently enacted leading to a further broadening of local government powers and responsibilities. The powers and responsibilities have not been instantaneously implemented as several devolved functions including certain aspects of natural resources management still remain with the central government. Despite such strides, however, the recent moves and aspirations to

[132] See, generally, The Local Governments Act 1997 (As amended).
[133] See, for instance, Richardson J. Benjamin, 'Environmental Management in Uganda: The Importance of Property Law and Local Government in Wetlands Conservation' (1993) 37 Journal of African Law 109.
[134] Meanwhile, the process of establishing a robust local government system had, in 1992, been administratively launched in 13 pilot districts and the entire country was eventually covered in three successive years.
[135] See Local Governments (Resistance Councils) Statute 1993.
[136] The Constitution of the Republic of Uganda 1995, Ch. XI, Arts. 170-207.

recentralise certain staff, functions and responsibilities[137] has prompted fears that the centre is rethinking its decentralisation policy and may, in the process, dismantle the underlying principles on which it was founded. That notwithstanding, however, Uganda's decentralisation programme, in many aspects, ranks high among similar efforts within East Africa.[138]

[137] The Constitution (Amendment) Act 2005, Art. 36 amended Art. 188 of the 1995 Constitution in order to recentralise the management of the capital city and it its divisions; Also, the Constitution (Amendment) (No.2) Act 2005 (Uganda) amended the Constitution to recentralise the appointment of the City, Municipal, and District Chief Executives and the deputies of the later.

[138] See Stephen N. Ndegwa, *Decentralization in Africa: A Stocktaking Survey* (Africa Region Working Paper Series No. 40 2002).

Regional Cooperation during the Post independence Era

While regional cooperation is undoubtedly of great importance across sectors in the public management domain, it is crucially important for sectors such as that of environmental management, which deals with issues that naturally cut across political national borders. Regionalism often arises from the realisation that cooperation remains paramount in optimising the intended benefits of the cooperating states. As shown from previous discussion, however, regional cooperation among the three East African countries was weak and very limited in scope. Aside from the issue of political expediency and the joint management of selected common services and research activities, nothing much materialised in the direction of natural resources management. The Lake Victoria Fisheries Service, which signified a major development towards the joint management of Lake Victoria Fisheries, was disbanded after a few years in service. Particularly for ENRM, all powers remained firmly ensconced in the territorial governments, which, because of the weak regional institutional arrangement, had no other check on them aside from the colonial powers in London. In the following section, we discuss the trends in regional cooperation between the 1960s and 1980s. This discussion is intended to ascertain the extent to the then forms of regional cooperation provided an enabling framework for a coordinated or joint ENRM regime in East Africa and Lake Victoria region in particular.

The East African Common Services Organisation (EACSO)

The achievement of political independence of the East African States, between 1961 and 1963, did not deter their spirit for regional cooperation. Changes in the political order, however, necessitated several institutional reforms. As a result, the EAHC was, in 1961, replaced with the East African Common Services Organization (EACSO). Under it were established the East African Common Services Authority (EACSA) and the Central Legislative Assembly (CLA) as the governing and policy organ and the

legislative arm, respectively.[139] EACSA was constituted by the Principle Minister from each country and its mandate was largely confined to matters that related to the services offered by the Organisation.[140] The CLA was constituted of twelve ministerial committee members and nine members from each country elected by the national legislatures.[141] On a rather interesting note, the EACSA appointed the Speaker of the Assembly. Ordinarily, EASCO transacted its business through the four Ministerial committees on Communications, Finance, Commercial and Industrial Coordination and the Social and Research Committees. Notwithstanding the First Schedule which listed the services that were to be administered by the Organisation, EACSO's Constitution provided flexibility through which more services could be added.

Although there was excitement and hope among sections of the public,[142] fears for EACSO's continued existence were expressed from its infancy. EACSO's major weaknesses lay in the fact that it failed to embrace any substantial institutional re-organisation, despite the Raisman Report's recommendations and perhaps the lessons learnt from EAHC's failures. Its structure maintained the intertwining of the executive, legislative and administrative functions juxtaposed by partner-state dominance. EACSO's policy organ and legislature were more less extensions of their national counterparts in that the Organisation's structures and processes greatly relied on national political inputs and will.[143] Also, while EACSO maintained an emphasis on the economic objectives of the cooperation, it also failed to put in place an acceptable mechanism for the redistribution of likely benefits. This failure was to later be advantageous to the anti-federalism activists, whose nationalist ideology

[139] E. N. Gladden, 'The East African Common Services Organisation' (1963) XVI Parliamentary Affairs 428.
[140] For the services which were mandated to EACSO, see Second Schedule of the EACSO Agreement 1961.
[141] See EACSO Agreement 1961.
[142] See Nyanzi Semei, 'A Review of the East African Common Market' (1962) 6/7 Transition 13, 13-14.
[143] See Gladden (1963) op. cit., n. 139.

was, at the time, aggressively sweeping across the region.[144] The sceptics believed that the Organisation could hardly withstand both the internal weakness and external forces that threatened its existence. Its operations were significantly affected, in 1963, by the termination of assistance from the colonial development and welfare fund.[145] Despite such setbacks, however, EACSO limped on until 1967 when it was replaced by the East African Cooperation (EAC), which was intended to be stronger in terms of areas of power and scope.

The Renewed Interest for a Political Federation

The fact that the idea to create a federation had totally failed under the colonial administration did not deter the post-independence governments from pursuing similar aspirations. They actually believed that, given their shared history, it was likely to be much easier and beneficial to have a federation than loose form cooperation. Tanzania had actually offered to delay its independence by another year on condition that the British government agrees to pave the way for an East African federation by, among other measures, declaring the independence of the three East African countries on the same day. This did not materialise as Kenya and Uganda appear not to have embraced the idea with the same level of enthusiasm. Nonetheless, renewed interest surfaced as the drums for Pan-Africanism sounded into the late 1960s. Despite several formal and informal meetings, the issue of a federation remained on the table. Aside from the concern of in-commensurate benefits among the federating states, there were also intra-national disagreements. In Uganda, for example, the then influential Kingdom of Buganda felt that its sub-autonomous status would be significantly undermined or even revoked under a federal arrangement.[146] While in Kenya, amidst their divergent views on the sub-autonomy of the country's regions, the two major post-independence parties were in total disagreement on how the proposed federal government was to relate politically

[144] Hannington Ochwada, 'Rethinking East African Integration: From Economic to Political and from State to Civil Society' (2004) XXIX Africa Development 53, 63.
[145] See Kenya's Independence Act 1963(Cap. 54), s. 5.
[146] Ochwada (2004) op. cit., n. 144, at p. 65.

with their sub-national regions.[147] The attempt by Tanzania and Kenya to form a federation exclusive of Uganda was thwarted over disagreements on the benchmarks that were to underpin their federation.[148] Mid-way in the confusion on whether to federate or not, Tanzania pulled out from the common currency marking the end of an arrangement which had been in operation since the 1920s. Despite such set-backs, the cooperation efforts continued though underpinned with suspicion. For the anti-federalists, the establishment of the 1967 EAC was a victory and for the federalists it was deemed to be a good beginning for a higher goal. Its establishment thus represented a compromise position.

The 1967 East African Treaty

Following the shelving of the federalist drive, the East African Cooperation Treaty was signed in 1967 and came into force in the same year. Although it was mainly premised on economic objectives,[149] the EAC was also a vehicle for social development, as some of the institutions and the common services under it were of social benefit to the region. Among the Community's core targets was the need to narrow the economic gap that existed among the Partner States.[150] The EAC Treaty established several organs including: the East African Authority (EAA); the East African Legislative Assembly (EALA); and Court of Appeal for East Africa (CAEA).[151]

Constituted by the Heads of State of the Partner States, the EAA was the supreme organ of the Community. It was advised by the Committee of East African Ministers,

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[147] K.G. Adar and M. Ngunyi, 'The Politics of Integration in East Africa Since Independence' in W.O. Oyugi (ed), *Politics and Administration in East Africa* (East African Educational Publishers, Nairobi 1994) pgs. 399 - 400.

[148] Ochwada (2004) op. cit., n. 144, at p. 65.

[149] Article 2 of the Treaty states that:

> "It shall be the aim of the community to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities and benefits whereof shall be equitably shared."

[150] For a detailed account on the Community and the economic disparity and gains among the Partner States, see Robert L. Birmingham, 'Economic Integration in East Africa: Distribution of Gains' (1968/69) 9 Virginia Journal of International Law 408.

[151] Treaty for East African Cooperation 1967, Art. 3 [Revised Edition 1970]

which was concerned with day to day decision making.[152] These Ministers were designated as Community officials detached from the national Executives, but having cabinet status in their home governments. As was the case with the earlier forms of cooperation, this arrangement stood at the centre of the Community-State power contradiction and, therefore, signified the onset of the failure of the Community to position itself as a supra-national regional institution capable of checking on national influence and excesses in matters of regional interest.

As for the EALA, the majority of its members were appointed by the Partner states.[153] While the Assembly enjoyed legislative powers, its autonomy in law making was subject to partner-state veto as its Bills were not only to be approved by the Council of Ministers but also subject to the assent of each Head of State of the Partner States.[154] Additionally, the Assembly did not have powers to initiate motions that were likely to have financial implications.[155] Basically, the matters on which Acts of the Community could be enacted were focused on the pre-determined areas of cooperation, which essentially concerned the common market and its tax regimes, research, community staff affairs and the established common services.[156] The Assembly also had the powers to legislate on matters concerning the Court of Appeal for East Africa but not its jurisdiction. Generally, apart from pesticide control, the Assembly had no direct legislative mandate over matters that concerned natural resource management and the environment in general.[157] Other than some areas of research,[158] ENRM remained a direct responsibility of the Partner States, irrespective

[152] ibid., Arts. 47-51.
[153] The Assembly was constituted of the East African Ministers and their deputies; nine appointed members from each of the three Partners states; the Chairman of the Assembly; the Secretary General; and the Counsel to the Community. See Article 56 (2), The Treaty for East African Co-operation 1967 [Revised Edition 1970].
[154] Treaty for East African Co-operation 1967, Arts. 59 -60.
[155] Paulo Sebalu, 'The East African Community' (1972) 16 Journal of African Law 345, 349. (This Author was then the Counsel to the EAC).
[156] See Treaty for East African Co-operation 1967, Annex IX, which lists the services to be administered by the Community or by the Corporation.
[157] See Treaty for East African Co-operation 1967, Annex X, which lists the matters with respect to which Acts of the Community may be enacted.
[158] For example, in the sectors of fisheries, agriculture, forestry and animal husbandry.

of the fact that regional economic development, which was a core objective of the Community, had a direct link to the exploitation and management of natural resources.

On the part of the regional judicial system, the 1967 Treaty did not create a regional court of first instance. Instead it reconstituted the Court of Appeal for East Africa (CAEA),[159] which had been established and operated under the 1961-1966 EACSO agreements, to hear and determine appeals from Partner State courts.[160] In the absence of an East African court of first instance, all matters not related to the common market went to Partner State Courts. In respect of the provision that required jurisdiction of the CAEA had to be subject to the law in force in each Partner State, however, jurisdiction of the Court was eventually curtailed so as not to handle constitutional matters in Uganda and those that concerning treason in Tanzania.[161] Interestingly, the East African Authority, which was by no means a judicial body, had the final authority on interpretation of the Treaty.[162]

The Collapse of the 1967 EAC

The success of regional inter-governmental cooperation does not only rely on strong regional institutions and mechanisms of operations, but also on the confidence and trust with which the cooperating states have amongst themselves and in the regional institution as a whole. At least on paper, the EAC attempted to address the problem of inequitable sharing of benefits, which was actually the melting-pot for dissidence and suspicion among the partner states.[163] Notwithstanding such a development, in

[159] Other judicial bodies of the Community included the Common Market Tribunal and the East African Industrial Court, which administered no separate law, since they were required to follow the applicable laws of the Partner State.
[160] The Treaty for East African Co-operation 1967, Arts. 80-81.
[161] Sebalu (1972) op. cit., n. 155, at p. 352.
[162] See, generally, The Treaty for East African Co-operation 1967.
[163] Among the measures under taken to build inter-state confidence the 1967 Treaty, for the first time, relocated the Community headquarters from Kenya to Tanzania and also redistributed head offices of the common services among the Partner States. It also attempted to establish a common market built on the principle of equity and equality. It, for example, put in place measures such as fiscal incentives, transfer taxes and the establishment of the East African Development Bank, all intended to promote

practice, the issue of state-centrism remained pronounced. For example, the 1964 Kampala Agreement, which sought to introduce the Community's direct control over inter-territorial trade and the location of regional industries, could not be implemented due to national interests.[164] Hardly a year into the agreement, Tanzania unilaterally decided to pull out of a common currency and also imposed quotas on its inter territorial trade, which actions threw the cooperation efforts into further disarray.[165] By the early 1970s, a period marked by undulating signs of an imminent collapse of the Community, the agreed fiscal measures had not been tried and tax transfers had proved to be unsuccessful.[166]

Eventually, the EAC did not live long enough to actualise its intended ultimate goal of deeper regional integration. After a dramatic decade of undulating events, the Community finally collapsed, in 1977, amidst counter accusations among the Partner states. As an institution that was founded on economic objectives, EAC's weaknesses became more exposed as the countries took different development strategies. Deeply embedded in these development strategies were the issues of nationalism and state sovereignty. In terms of authority and actual decision making powers the community's institutional structures hardly functioned, as most issues were being directly handled by the heads of state of the Partner States, thus usurping the powers of the East African Ministers. While most of the accounts of its collapse tend to focus on inter-state relations and differences,[167] EAC's weakness and eventual collapse rested on the fact that it's constitutive Treaty failed to mould strong

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balanced industrial development. See the Treaty for East African Co-operation 1967, Arts. 19-20 and 86-87.

[164] Birmingham (1968/1969) op. cit., n. 150 at p. 442.

[165] Ibid., op. cit., n. 150.

[166] Sebalu (1972) op. cit., n. 155, at p. 360.

[167] These include: ideological drift; nationalism and radicalism; state centralism without regard to civil society participation; systematic external penetration and proliferation; mutual mistrust; and economic imbalance and benefits. See, generally, Agrippah Mugomba, 'Regional Organisations and African Underdevelopment: The Collapse of the East African Community' (1978) 16 Journal of Modern African Studies 261; Nasali Maria, 'The East Africa Community and the Struggle for Constitutionalism: Challenges and Prospects' Kituo cha Katiba Resource Centre, Makerere University, Kampala available at <http://www.kituochakatiba.co.ug/EAC2000.htm> accessed 6th January 2007; and Ochwada (2004) op. cit., n. 144, at p. 58.

autonomous institutions to withstand potential threats. Although portrayed using different theories, the issue of institutional failure remains prominent in all accounts on the collapse of the EAC. In other words, many of the immediate causes for the collapse arose because the Community failed to function as a supra-national institution able to make decisions based on regional and not national interests. Kamanga, for instance, observes that despite their intended central role in Community affairs, the ministerial committee and councils took long to meet, often leaving decisions in abeyance, and eventually leading to the direct intervention of individual partner states in the day to day operations of the EAC, which was ironically designed to be autonomous and of distinct legal personality.[168] What he does not point out, though, is that such conduct by the ministerial committee and councils was a likely result of the manner in which the Treaty distributed power among the Community organs, a circumstance that was exacerbated by ill political will and the ever deteriorating relations among the cooperating states. The 1967 Treaty clearly vested most powers in the Authority at whose direction the ministerial committees and councils were expected to function. For example, Article 51 (1) of the Treaty clearly states that;

> It shall be the responsibility of the East African Ministers to assist the Authority in exercise of executive functions to the extent required by and subject to the direction of the Authority, and to advice the Authority generally in respect of the affairs of the Community.[169] (*Emphasis added*)

To put it more succinctly, the Ministers were ambassadors of their national Executives, and as such had limited decision-making powers.[170] The distinction

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[168] Khoti Kamanga *Some Constitutional Dimensions of East African Cooperation* (State of Constitutional Development in East Africa Project, Kituo Cha Katiba, Undated) p. 11.
[169] The East African Cooperation Treaty 1967, Art. 51 (1).
[170] Article 51 of the Treaty, which spells out the functions of the East African Ministers clearly attaches their functions to the direction of the Authority. In fact this Article and also Article 52, which concerns the Deputy East African Ministers, do not clearly define the functions of these Ministers. It appears much is left to Article 51 (3), which provides that the Authority may allocate particular responsibilities

between Community's key decision-making organs and those of the Partner States remained blurred, a situation that gravely affected the former's stature as an autonomous institution intended to serve the common good of it parties. More so, most of the executive powers, that ought to have been exercised by the Secretary-General, as the principal executive of the Common Services Organisation, were redistributed among the East African Ministers.[171]

On the other hand, the effective functioning of the Community suffered major setbacks from the dualist nature of the Partner States legal systems.[172] This meant that national law prevailed over EAC law, which therefore had to be incorporated into domestic law in order to take effect in the Partner States. To illustrate this point, Kamanga cites the Kenyan cases of *R. v. Okunda Mushiyi* and R. v. *Meshack Ombisi* and the Court of Appeal case of *East African Community v. The Republic of Kenya*,[173] where it was held that in the circumstances of the case, the Kenyan Constitution prevailed over Community law. [174] Simply put, these judgments were premised on the constitutional provisions that enshrine national constitutional supremacy over other laws.[175] However, while the issue of constitutional supremacy remains embedded in the Constitutions of the EAC Partner States, the principles of the Vienna Convention on the Law of Treaties 1969,[176] its case law and the works of several

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to each Minister. This provision was initially fulfilled by the EAC General Notice 1 of 1967, which empowered the ministers with day to day oversight powers. Also, as seen in Article 55, aside from the Common Market Council (See also, Article 30) the responsibilities of other Ministerial Councils are not clearly spelt out, most especially as in regard to their powers.

[171] Sebalu (1972) op. cit., n. 155, at p. 352.

[172] Kamanga (undated) op. cit., n. 168, at p. 12.

[173] These cases are reproduced in Vol. IX No.3 ILM (1970) 556.

[174] The case concerned the breach of Kenya's Official Secrets Act, Cap. 187

[175] Article 3 of Kenya's Constitution states that;

> "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if <u>any other law</u> is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void"(Emphasis added)

And as such, Community law is in this case regarded as being 'any other law'.

[176] For instance, Article 27 of the Vienna Convention on the Law of Treaties sets out a general principle of International Law that, a State may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation or responsibility. The three Partner States are parties to this Treaty.

scholars,[177] suggest that, once international agreements are voluntarily entered into, provisions on constitutional supremacy should not be invoked to undermine the objectives of the international agreements.[178] The essence of community law is gravely affected without such assurance. Through the 1967 EAC Treaty established a level of regional integration that was unique at the time,[179] the intensity of integration failed to build its regional jurisprudence. As observed by Kiplagat, the above case clearly illustrates that the integration "did not filter into the operation of national Courts".[180]

Regional Cooperation in ENRM

Although regional cooperation in East Africa began in the early 20th century, it was not until the middle of that century that cooperation in the management of shared natural resources came about. The scope of cooperation in natural resources management was generally narrow and particularly focused at research activities.[181] Many achievements in the drive for regional cooperation in ENRM were overtaken by the new post-independence political and legal order. Unfortunately, the post-independence ENRM regime failed to capture the aspects of regional cooperation. The defunct EAC (1967-1977) scaled back and confined the scope of cooperation in natural resource management to research related activities. In addition to upholding EFFRO, it established the East African Natural Resources Research Council, whose basic function was to research and advise the Partner States.

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[177] R. H. Lauwaars, 'Lawfulness and Legal Force of Community Decisions', quoted in Kamanga (undated) op. cit., n. 168, at p. 13.

[178] Kamanga (undated) op. cit., n. 168, at p. 13.

[179] See Kenneth P. Kiplagat, 'Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA process' (1995) 23 Denver Journal of International Law and Policy 259.

[180] See Kiplagat's comparison of the various regional integrations in Kiplagat (1994/1995) op. cit., n. 179, at p. 227.

[181] The research councils that concerned the environment and natural resource sector included: the Marine Fisheries Research Organisation; Agriculture and Forestry Research Organisation; Fresh Fisheries Research Organisation; Tropical Pesticides Research Institute; and the Veterinary Research Organisation.

For the Lake Victoria region, where there had hitherto been the achievement of establishing the short lived LVFS, no other major attempt was made in terms of regional-wide management efforts. After the collapse of the EAC, each country established its own national fisheries research body. For political reasons, mainly arising from the events that led to the Community's collapse, these bodies could not freely work closely and unlike EAFFRO, their jurisdiction was strictly confined to their national boundaries. This meant a lack of inter-state coordination or sharing of information and data, both of which are essential in the management of the Lake resources. From December 1980, the roles of coordinating research and development were handed to an external body, the Committee for Inland Fisheries of Africa (CIFA),[182] which by virtue of its status had no mandate over national sovereign interests. CIFA's direct mandate over the Lake ended when it successfully initiated and coordinated a process that led to the signing of a Convention in 1994, which established the Lake Victoria Fisheries Organisation (LVFO).

The preceding discussion suggests that the post independence governments did not embrace the concept of multi-level government, not only in ENRM but in their general management of public affairs. Instead of strengthening the framework for multi-level government inherited at independence, from the colonial administrations, they deliberately frustrated local and regional government mechanisms, for political and economic reasons. This meant that, at the local level, the populations remained detached from the decision-making processes on matters pertinent to local interest of which the utilisation and management of natural resources and the sharing of the accruing benefits rank highly. As such, the local people took no interest in protecting the resources, which they considered to be public (read 'open-access') property. On the regional cooperation front, despite the expression of interest, aside from the provision of common services and research, the cooperation framework failed to effectively spread into areas pertinent to the enforcement of a coordinated or joint

[182] CIFA is a sub-committee of the United Nations Food and Agriculture Organisation's Committee on Fisheries (COFI).

ENRM. Institutions such as the regional policy organ, Legislative Assembly and Court, were not only incapacitated but also not well defined and entrenched. On the other hand, the post independence governments did not pay attention to reviewing the colonial environmental laws, forgetting, or rather ignoring the fact, that success of those laws was underpinned by coercive enforcement means. For socio-political reasons, however, it is unimaginable that the post independence governments were ready to embark on similar levels coercion.

This Chapter has been particularly important in understanding issues relating to colonial legacies in the post independence ENRM regime, the most prominent of which is the centralist paradigm. It has also served the purpose of enlightening us as to some of the challenges in the adoption of multi-level government.

Conclusion

Not only did the post independence governments inherit, from the colonialists, a state-centralist government approach but they went further to subdue the functional existence of other tiers of government. As such, the concept of multi-level government was absent in ENRM. The decapitation of the legitimacy of local government scaled back the few achievements that had been gained on the part of involving local institutions in ENRM. Instead, ENRM was placed under the firm control of the central governments, which virtually owned the natural resources. This move certainly continued to impact on the effectiveness of the ENRM regimes, as the central governments lacked the capacity and, in some cases, the will to sustainably manage the resources. We saw that aside from the problem of power struggles, the post independence governments were more focused on national economic development, which they believed could best be addressed through centralised planning models. Since their economies were predominantly based on natural resources, the national development plans were focused on economic issues with no regard to the environmental interests. The push for economic development,

however, led to mixed perceptions in the management and exploitation of the natural resources. For instance, while forests were extensively cut to provide timber and more farm land, an effort was made to conserve wild game for tourism purposes. It was for such reasons that contrary to widespread expectation, the post independence governments were reluctant to undo the property rights regimes that had been instituted by the colonial administrations. As a result, the locals felt no duty of care for the natural resources as they remained estranged from participating in their management. To compound the problem, political expediency demanded relaxation of the enforcement of the conservation measures, many of which were believed to have been devised by the colonial administrations to oppress the natives.

While the spirit of regional cooperation was upheld and indeed strengthened in the post-colonial era, this effort was minimally extended in relation to ENRM. Notwithstanding this, the state has remained, in all post-independence regional cooperation frameworks, the determinant player in the regional political arena. This not only led to the failure of attempts to establish a federal political union, but also contributed to the eventual collapse of regional cooperation. Considering that the Lake Victoria region is a shared resource, the general failure in regional cooperation inevitably impacted on the proper management of its natural resource, as each of the countries remained focused on its own national interests.

In sum, we see that, as was the case under colonialism, the post-independence era lacked the requisite synergy of multi-level government in ENRM. The next two Parts of the thesis examine the extent to which the current ENRM regimes have embraced the concept of multi-level government and how this has, or is likely to, impact on environmental degradation in the shared Lake Victoria region. The current national and regional ENRM regimes are discussed with an interest in examining the extent to which the natural resource management powers and functions have been rationalized among the local, national and regional tiers of government.

PART IV

This thesis concerns the strengthening multi-level government as a way of mitigating the historical challenge of state-centralism in natural resources management. Our focal area of interest is the Lake Victoria region, which is shared among the three East African countries of Uganda, Kenya and Tanzania. It reviews the scope for a multi-level arrangement that meaningfully incorporates local and regional government in the management of the Lake region's environment and natural resources. The argument for such an arrangement stems from the fact that the Lake region is shared across local and national governments and from the inevitable need for coordination and cooperation among them. Also, of late, there have been various changes in both local and regional government, which developments present an enormous opportunity for an improvement in the management of the Lake region's resources, through multi-level government. This Part – Chapters Eight and Nine - focuses on the incorporation of the concept of local government in ENRM. Questions of regionalism shall be explored in the Part V.

Following the discussion in Chapter Seven, Chapter Eight suggests that despite its low level of development in Kenya, the concept of local government is generally applied as a major medium for local service delivery in East Africa. However, while the scope of this thesis is Lake Victoria region, for each country the concept of local government is considered from a general perspective as none of them has a specific institutional arrangement for the Lake region. Also, none of the countries has specific policy or legislation on decentralised environmental management of the Lake region.[183]

[183] Although there is, in Kenya, the Lake Basin Development Authority, the objects of this institution are more focussed to the promotion and coordination of development activities in the region. Besides, the Authority is under control of the central government. See, Lake Basin Development Authority Cap. 442 [Rev. 1980] s.6.

In Part III, it was said that, despite the Lake Victoria region being shared among various interests, management of its natural resources hardly involved local participation and that this significantly inhibited the success of the colonial and post-colonial Environment and Natural Resource Management (ENRM) regimes. The ENRM regimes were shown to be state-centric entailing the deliberate estrangement of the local governments in the ownership and management of the local resources. Compliance with the ENRM regimes was enforced through repression, and this further delinked the local communities from any a sense of duty of care for the natural resources. Although local government systems were later introduced and gradually reformed to help support decentralised natural resources management, these reforms significantly fell short of mitigating the centralist paradigm that reigned through the successive regimes. Instead, the post independence governments significantly eroded the powers and legitimacy of local government. While the spirit of local government was rejuvenated in the 1980s, its re-introduction was not accompanied by the requisite legal and institutional reforms to enable the effective engagement of local government in ENRM. It is against this backdrop that this Part, shall be exploring the current environmental laws and policies with a view of ascertaining the extent to which they have been responsive to the concept of multi-level government and, most particularly, as in regard to the roles and challenges of local government in natural resource management.

CHAPTER EIGHT

Local Government and the Decentralisation of Natural Resources Management in East Africa

While the Traditional Natural Resource Management (TNRM) systems have, over time, been suppressed by successive regimes, Lind *et al* observe that:

> "…in many cases, newer approaches to environmental management remain fastened to old ways of understanding both environments and natural resource management."[1]

Issues such as local participation and the application of traditional knowledge, which have always been central in the TNRM regimes, are now among the internationally heralded principles in the re-thinking of new pathways for ENRM. Indeed, these issues are increasingly featuring in East Africa's environmental policies. As we shall see later, however, there is a missing link as the current institutional arrangements tend to sideline local government, which should ideally present a structural foundation for effective local participation. Instead, the little effort made towards decentralised natural resources management appears to be focused at fostering the involvement of incapacitated, informal and sometimes illegitimate structures. We argue for the case of local government as the downward link in a multi-level government arrangement. Local participation does not end at the involvement of the local institutions but also extends to their empowerment in terms of roles, authority and capacity.

[1] Jeremy Lind and Jan Cappon, Realities *or Rhetoric? Revisiting the Decentralisation of Natural Resources Management in Uganda and Zambia* (ACTS Press, Nairobi 2001).

It is against this background that this Chapter examines the extent to which the concept local government has been captured by the on-going reforms on the decentralisation of ENRM among the three East African countries. For purposes of broadening our understanding of decentralised ENRM, however, we explore not only the environmental laws but also the general legal and policy framework for decentralisation, with a focus on local government. This approach is premised on the argument that the decentralisation of ENRM does not only concern the environmental policies and laws but also the general framework under which they are intended to be operationalised. We review the national Constitutions, local government and environment laws. For purposes of enriching context in which the concept of local government is located, there is a discussion on decentralisation and local government in Africa. There now follows a brief discussion on the potential levels of disjuncture in the decentralisation process, to provide a better understanding of the discussion in this Chapter.

Potential Levels of Disjuncture in the Decentralisation Process

According to Andrews *et al* the effectiveness of decentralisation is based on a joined-up flow of service assignments.[2] The authors identify three levels at which disjuncture can occur in decentralisation programmes. The first is at the *theoretical level* where principles in normative literature on decentralisation are depicted in terms of the decentralised powers and functions.[3] It is at this level, for instance, where differences may occur in the conception of the definition, types and dimensions of decentralisation.

Secondly, there is the *legal level*, which encompasses the legal framework that mandates and implements the decentralisation programmes.[4] The importance of this level is well presented by the UNDP, which contends that the robustness of local

[2] Matthew Andrews and Larry Schroeder, 'Sectoral Decentralisation and Inter-Governmental Arrangements in Africa' (2003) 23 Public Administration and Development 29, 30.
[3] ibid.
[4] ibid., at p. 32.

government systems is greatly dependent on the clarity and level of protection embedded in the instruments that establish and operationalise them.[5] Legal mandate and clarity of power relations and scope of responsibility among different levels of government are not only crucial for the implementation of decentralisation but also in the management of conflicts that arise as a result. This partially explains why the proponents of local government are increasingly seeking for constitutional fortification of complementary systems in public governance.[6] Though it is argued that constitutionalisation of decentralisation protects it from various forms of threat, there are always justifications for recentralisation. In some instances functions or services that are legally decentralised are held back by bureaucratic tendencies and direct forms of inter-organisational conflict.[7]

Thirdly, there is the *practical level* which depicts the degree to which a given component is actually decentralised.[8] The transfer of services or sectors does not necessarily spell what components of it are actually decentralised.[9] Also, decentralisation of a sector or service may not take into account capacity issues in terms of the human, financial and physical resources, at the disposal of the decentralised units.[10] Andrews *et al* further observe that disjoints between theory and reality arise from various factors including intergovernmental politics, bureaucracy and local level incapacities.[11] Indeed, political commitment, exhibited in the form and level of support extended by the centre to local units, remains a core foundation for effective decentralisation. As we shall see later, however, several disjoints in the decentralisation process can be attributed to the elevation of state-centrism in local affairs management.

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[5] United Nations Development Programme (UNDP), 'Local Governance for Poverty Reduction in Africa' (Fifth Africa Governance Forum, Maputo, Mozambique, 23-25 May 2002).
[6] Dele Olowu, 'Local Institutional and Political Structures and Processes: Recent Experience in Africa' (2003) 23 Public Administration and Development 41, 44.
[7] Andrews op. cit., n. 2, at p. 36.
[8] Andrews op. cit., n. 2.
[9] ibid., at p. 30.
[10] Olowu op. cit., n. 6
[11] Andrews op. cit., n. 2.

Decentralisation and Local Government in Africa

Although it has been adopted in different forms,[12] since the 1980s decentralisation has been embraced by many African countries as a complementary system of government.[13] Unlike its earlier forms founded on administrative deconcentration, most of the new decentralisation efforts are linked to state democratisation and poverty reduction programmes that usually entail the transfer of political and fiscal powers.[14] Notwithstanding this, administrative deconcentration still remains widely practiced.[15]

The renewed interest in decentralisation in Africa is attributed inter alia to: failure of centralised public sector management; the need to address conflict resolution at sub-national levels; the push for local democratisation in decision making and management; pursuance of poverty reduction through equitable resource distribution; the absence of parastatals, many of which have since been privatised or liquidated; economic crisis and structural adjustment reforms; and the realities of globalisation.[16] Without undermining central government roles, Africa's renewed interest in decentralisation can be said to result significantly from donor pressure acting in concert with non-state domestic organisations, the private sector, civil society and various international organisations.[17] Nonetheless, not all decentralisation programmes have been initiated by donors. Uganda's decentralisation programme, for instance, was inspired by the informal Resistance Councils' system, which was used by the leadership of the current government to

[12] See, Richard C. Crook, 'Decentralisation and Poverty Reduction in Africa: The Politics of Local-Central Relations' (2003) 23, Public Administration and Development 77.
[13] James S. Wunsch, 'Decentralisation, Local Governance and Recentralisation in Africa' (2001) 21 Public Administration and Development 277. See also, J. Kirkby et al, 'Introduction: Rethinking Environment and Development in Africa and Asia' (2001) 12 Land Degradation and Development 195.
[14] See Jesse C. Ribot et al, 'Institutional Choice and Recognition in the Formation and Consolidation of Local Democracy' (2008) 6 (Special Issue) Conservation and Society 1
[15] See, generally, Wunsch op. cit., n. 13.
[16] Olowu (2003) op. cit., n. 6; See also, Kirkby, op. cit., n. 13; and Olowu Dele, *Decentralization Policies and Practices under Structural Adjustment and Democratization in Africa* (Democracy, Governance and Human Rights Programme Paper Number 4, United Nations Research Institute for Social Development 2001).
[17] Olowu (2003) op. cit., n.6.

manage areas that were under their control as a guerrilla army, before capturing state power in 1986. In fact, as Uganda's decentralisation programme was being rolled out, government objected to the model that was being pushed by the World Bank, to decentralise up-to district instead of sub-county level.[18]

Although pressures for its adoption are great, decentralisation faces a number of challenges and criticisms,[19] most of which concern its functioning rather than the principle itself. As seen in the discussion on the potential levels of disjuncture,[20] the challenges occur at the different stages of implementation as well as at different levels of the participating parties.[21] Often the failure of decentralisation is significantly blamed on central government in that, aside from taking a leading role in designing the decentralisation programmes, it possesses and controls the powers and resources that are required to run the programmes. The outstanding issue in this respect is the pseudo devolution of powers and functions, which is usually compounded by poor central-local relations. The principal laws on decentralisation are sometimes ambiguous or inadequate to enable the proper running of the decentralised functions.[22] This may be a deliberate outcome or an omission or may be due to lack of the required expertise in designing the decentralisation programmes. A study of twenty-one African countries, funded by the International Union of Local Authorities (IULA), revealed that although decentralisation was increasingly being adopted, crucial powers and functions were being retained at central government level, rendering the local councils more as functionaries than partners in the entire development process.[23] The 'power and control equation' that

[18] John-Mary Kauzya, *Political Decentralization in Africa: Experiences of Uganda, Rwanda and South Africa*, (Department of Economic and Social Affairs, United Nations 2007) p. 8.
[19] See Olowu (2003) op. cit., n. 6.
[20] See earlier discussion on 'Potential Levels of Disjoint'.
[21] For examples see, David Dent Dalal-Dayton and Oliver Dubois, *Rural Planning in Developing Countries: Supporting Natural Resource Management and Sustainable Livelihoods* (Earthscan, London 2005) p. 27-89; See also, Wunsch (2001) op. cit., n. 13; and Olowu (2003) op. cit n. 6.
[22] Wunsch (2001), op. cit., n. 13.
[23] Dele Olowu, *African Local Governments as Instruments of Economic and Social Development* (International Union of Local Authorities, The Hague 1988).

defines the relationship between central and local government continues to disfavour the later.[24] Such a scenario is what another study with similar findings refers to as the 'power retention' syndrome.[25] Generally, most local government operational challenges such as insufficient human, financial and physical capacity and administrative or political interference are associated with the refusal of the centre to cede reasonable power to the local units.[26] This is partially a result of conflicts between national and local socio-economic development needs, which according to Onyach-Oola, are inherent in long-term development strategies, and their resolution may require hard decisions.[27]

Aside from the challenges associated with the design and implementation phases, the tenure of decentralisation in Africa is often under constant threat of being scaled down or completely abolished. Partial or full recentralisation may occur at any stage of the decentralisation process.[28] Recentralisation is often based on the argument that decentralisation has failed to deliver the expected results. Such conclusions are often arrived at, however, without taking into account all the factors contributory to the failure. In fact, decentralisation is at times said to have failed even before it actually commences effectively.[29] In certain cases decentralisation fails to effectively take off because of a lack of the necessary institutional or legal adjustments to align it within the broader context of government. It is at times neutralised by elaborate supervision and control measures by the centre, which often degenerates into interference. At times, decentralisation programmes are too ambitious, in that a lot

[24] Morris Odhiambo, Winnie V. Mitullah and Kichamu S. Akivaga, *Management of Resources by Local Authorities: The Case of Local Authority Transfer Fund in Kenya* (Claripress, Nairobi 2006) p. 30.
[25] James Keeley and Ian Scoones, *Understanding Environmental Policy Processes: Cases from Africa*, (Earthscan, London 2003) p. 172.
[26] ibid.
[27] M. Onyach-Olaa, 'The Challenges of Implementing Decentralisation: Recent Experiences in Uganda' (2003) 23 Public Administration and Development 105
[28] Wunsch (2001) op. cit., n. 13, at p. 277.
[29] Jesse C. Ribot, *Waiting for Democracy: The politics of Choice in Natural Resources Decentralisation* (World Resources Institute, Washington, D.C 2004).

is expected from them within a short period of time, irrespective of shortfalls in the desired level of the implementation inputs.[30]

The failure of decentralisation programmes should not be blamed on only normative issues or the central government. Crook, for instance, observes that the democratisation process in Africa is facing an 'elite capture' problem. He believes that 'elite capture' has been deliberately constructed by ruling elites to establish and maintain power bases over the grass roots.[31] Power structures largely remain under control of local elites who are resistant to change and at times disinterested in the development of pro-poor policies.[32] In their study, Keeley *et al* observed that, certain local councils despite their potential were more pre-occupied with issues of revenue collection than substantially engaging in policy processes.[33] They argue that democratic decentralisation does not necessarily imply that available opportunities are optimally utilised.[34] In addition, local officials and leaders are at times found to be incapable of performing their duties and instead reign within highly bureaucratic systems that defeat the essence of decentralisation.[35]

On the other hand, the local communities have their own share of the blame. Although their responsiveness to decentralisation is greatly dependent on awareness campaigns, it can also be influenced by attitudinal, behavioural, and cultural conditions.[36] While the 'power lies with the people' idiom is cherished under decentralisation philosophy, the local population at times fails to be responsive to their roles. They may, for instance, fail to exert pressure on the local institutions for

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[30] See D. Rondinelli, J. Nellis and S. Cheema, *Decentralisation in Developing Countries: A Review of Recent Experience* (Management and Development Series No. 8 - Staff Working Papers No. 581, World Bank 1983) pgs. 62- 69.
[31] See Crook (2003) op. cit., n. 12, at p. 85.
[32] ibid.
[33] Keeley and Scoones (2003), op. cit., n. 25.
[34] ibid.
[35] Crook (2003) op. cit., n. 12, at pgs. 79-81.
[36] See Rondinelli (1983) op. cit., n. 30.

accountability.[37] They may resort to physical or social resistance methods that strongly impact on the decentralisation programmes.[38]

The positive relationship between decentralisation and local government in Africa has generally remained limited because of shortfalls in the legal and regulatory frameworks that govern the interrelationship among various actors.[39] This is often exacerbated by lack of local capacity, enthusiasm of the local officials and laxity among the local communities. Scepticism is rife as to whether Africa's new decentralisation programmes will consistently stand the test of time as a major platform for local service delivery.[40] As is the case with other service delivery sectors, successful decentralisation of natural resources is not only dependent on the policies and laws that create it but also the entire decentralisation framework and its operationalisation. In other words, an enabling legal and institutional arrangement is crucial for the decentralisation of natural resources management to be meaningful. Against this backdrop the rest of this Chapter explores various issues that concern local government power, capacity and autonomy. First, there is an overview of the institutional arrangement for local government in East Africa.

Decentralisation and Local Government in East Africa - The Institutional Arrangement

As shown in Chapters Five and Six, the concept of decentralisation and its manifestation in the form of local government have been attempted, since colonial times, in several forms. Although intermittently and variably attempted, local government through the successive regimes has been confronted with the problem of centrist government, which inevitably impacted on its effectiveness. Against this backdrop the next discussion focuses on examining the extent to which the current

[37] Olowu (2003) op. cit., n. 6; Crook (2003) op. cit., n. 12.
[38] Olowu (2003). ibid.
[39] United Nations Development Programme (2002), op. cit., n. 5.
[40] See, for instance, Dele Olowu, *Decentralization Policies and Practices under Structural Adjustment and Democratization in Africa* (Democracy, Governance and Human Rights Programme Paper Number 4, United Nations Research Institute for Social Development 2001).

local government institutional arrangement has mitigated the centralist paradigm by dispersing functions and authority to the local government units. Since sub-national regions can arguably be deemed to be part of the local government system,[41] this section begins with a brief exploration on the role of regional governments or administrative units in East Africa.

The Sub-national Regional Units

As part of the central government administrative machinery, Regional Administrations (RAs)[42] have traditionally been the intermediaries between the district or urban councils and central government. Unlike Uganda, Kenya and Tanzania have functional regional administrative systems that, since colonial times, have been actively engaged in local service delivery.[43] In Kenya, the regional sub-national units – Provincial Administrations - remain a major administrative tier of the central government playing a liaison role between the district administrations and central government. In Tanzania, the functions and powers of RAs were recently reduced to monitoring, coordination, advisory and technical support.[44] Uganda which dropped its regional (Provincial Administration) system in the late 1970s recently amended the Constitution to provide for regional government.[45] The law intended to operationalise this Constitutional amendment is, however, yet to be implemented.[46] Uganda also recognises various cultural institutions based on *de facto* geo-ethnic regional boundaries. Although they are not part of the mainstream central government system, many of these institutions participate in local service delivery and own and manage various natural resources that were returned to them under

[41] An example is the case where local governments come together to form a regional government.
[42] In this section the term 'Regional' is used to refer to the sub-national regions.
[43] Uganda had a similar system during her colonial times. It again re-emerged during the early 1970s and dropped after the 1979 liberation war.
[44] The Regional Administration Act 1997 repealed the Regions and Regional Commissioners Act 1962; Area Commissioners Act 1962 and Decentralisation of Government Administration (Interim Provisions) Act 1972, All of which subordinated Local Authorities to Regional administrations.
[45] The Constitution (Amendment) (No. 2) Act 2005 amending Articles 5, 176, 178 and 189 and the First, Fifth and Sixth Schedules of the Constitution of the Republic of Uganda 1995.
[46] The Regional Government Bill 2009 is still being debated by Parliament.

the Traditional Rulers (Restitution of Property and Assets) Act 2000.[47] The sub-national regional level is generally used as an administrative unit. Since we are interested in local government, therefore, we shall focus our discussion on the district and urban councils.

The Local Government Systems

While the local governments in Kenya and Tanzania are called Local Authorities, the collective term 'local government' is used to refer to all local government units.[48] In Uganda, local government is constitutionally founded and largely implemented through a single comprehensive law, the Local Governments Act 1997 (LGA).[49] The LGA establishes a five tier local government system comprising both rural and urban governments and administrative units.[50] Tanzania's three tiered local government system[51] is also constitutionally enshrined.[52] It is basically implemented by five pieces of legislation, of which the Local Government (District Authorities) 1982 and the Local Government (Urban Authorities) Act 1982 are the principal Acts.[53]

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[47] See s. 2 and schedule, Traditional Rulers (Restitution of Property and Assets) Act, Cap.247 [2000]; as for the forestry resources the same position is reaffirmed by s. 25 of the National Forestry and Tree Planting Act 2003. See also, Article 246 of the Constitution.

[48] Furthermore, Uganda's local government system consists of both local governments and administrative units. That notwithstanding, however, most of the discussion is focussed on the local governments. Unlike the Administrative Units, the Local Governments have legislative and executive powers that are excised through elected Councils and their organs. Also, the prefix 'Higher' is used in reference to the District Local Governments or the equivalent Urban Councils, while the rest are referred to as Lower Local Governments.

[49] The Constitution explicitly sets out the principles and operational framework for local government in the country See Ch. Eleven, Art. 176 – 207, Constitution of the Republic of Uganda 1995.

[50] The Local Governments in the rural are at District and Sub-county level, while in the Urban they are at City, Municipal and Division and Town Council levels. In the rural the Administrative Units are established at County, Parish and Village levels, while in the urban they are at Parish/Ward and Village levels. See s.3 and s. 45, Local Governments Act 1997.

[51] The Local Authorities tier is comprised of Urban Councils and the rural District Councils. The Councils are sub-divided into Wards, which form the second tier. The wards are further broken down to form the third tier. They are in, District Councils, subdivided into villages which are in turn divided into hamlets known as *vitongoji*. While in the urban they are subdivided into neighbourhoods called *mtaa*.

[52] Constitution of the United Republic of Tanzania 1977, Chapter Eight, Articles 145 - 146,

[53] The other Acts are: The Local Government Finances Act 1982; Local Government Services Act 1982; Local Government Negotiating Machinery Act of 1982; Also, the Regional Administration Act is greatly linked to the local government systems.

Kenya's Constitution does not explicitly provide for a local government system. It nonetheless, recognises their existence[54] and also entrusts some local authorities with responsibilities.[55] Kenya's predominantly single layered [56] local government system is based on the Local Government Act 1963, which although amended several times, is still inclined to the administrative deconcentration type of decentralisation.[57] Local service delivery is mostly coordinated or channelled through the central government's administrative structure, which is significantly based on politically hegemony.[58] The administrative arrangement is actually more widely spread, with structures from sub-location to provincial level. Local government is apparently undergoing review under the Kenya Local Government Review Programme (LGRP) that seeks to introduce fundamental changes.[59] Also, the 2004 draft Constitution, which has an entire chapter on devolved government, explicitly sets out the principles and framework for regional and local government.[60] It is worth noting, however, that decentralisation was among the controversial issues that led to disagreement and the consequential abandonment of the constitutional review process in 2004.[61]

[54] According to the constitution, "'local authority' means a municipal, county, town or urban council, or a council for any other area, established by or under an Act of Parliament;" s.123 Constitution of the Republic of Kenya 1963; See also, s. 2 Local Govemment Act (Cap 265).
[55] See, for example, Arts. 115 (1), Constitution of the Republic of Kenya 1963.
[56] That is District Councils in the rural and City, Municipal and Town Councils in the urban areas. They all function independent of each other. See Local Government Act (Cap 265).
[57] Local Government Act (Cap 265).
[58] See J. Barkan and M. Chege, 'Decentralising the State: District Focus and the Politics of Re-Allocation in Kenya' (1989) 27 Journal of Modern African Studies 432; Mwangi S. Kimenyi, *Efficiency and Efficacy of Kenya's Constituency Development Fund: Theory and Evidence* (W/P No. 2005-42, Department of Economics Working Paper Series, University of Connecticut, USA 2005); Chweya Lukedi, 'Constituency Development Fund, A Critique, The African Executive' <http://www.africanexecutive.com/modules/magazine/article_print.php?article=720> accessed 25 July 2008.
[59] Review of the constitution shall, however, remain paramount if such changes are to be meaningful.
[60] See Arts. 206-235, The Draft Constitution of Kenya, 2004 (Version circulated to delegates and commissioners of The National Constitutional Conference on the 23rd March 2004).
[61] The Constitutional review process was recently reinvigorated by the unveiling of a new Constitution Draft in November 2009.

In all countries, local governments are bodies corporate with perpetual succession and can sue or be sued.[62] They are governed, in Uganda and Tanzania, by elected councils that have: executive and legislative powers;[63] their own sources of revenue to supplement the central government transfers; their own budgets and expenditure plans;[64] and powers to recruit develop and discipline local staff.[65] Similar functions and powers are, to a much lesser extent, also entrusted to Kenya's local government, especially to the urban councils.

Although it is yet to be strengthened in Kenya, the institutional arrangement for local government presents enormous opportunity for harnessing decentralised ENRM in East Africa. The following discussion examines the extent to which this opportunity has been taken up by the emerging ENRM regimes.

Decentralisation and the Emerging Natural Resources Management Regimes

While decentralisation has been traditionally applied in the health, education, community development, feeder road works and agriculture sectors, attempts have recently been made to decentralise various aspects of natural resource management. As was seen in Chapter Five, however, decentralisation is not totally a new concept in the natural resources sector. In the recent reforms, however, attempts are being made to embody decentralised natural resource management in a wider and more institutionalised manner. In East Africa, such attempts have been particularly boosted by the fact that several reforms in the natural resources sector have coincided with the on-going decentralisation reforms. A major meeting point of these

[62] See, for the case of Tanzania, The Local Government (District Authorities) Act 1982 [Act No. 7 of 1982], s. 12 (1) (a) and (b) on District, s. 19 (a) and (b) on Townships, and s. 26 (2) on Villages; See also s. 12 (1) (a) and (b), The Local Government (Urban Authorities) Act 1982 [Act No. 8 of 1982]; In the case of Uganda see s.6, Local Governments Act (Cap. 246).

[63] See s.35-44 and s.148, Local Government (District Authorities) Act 1982; See also, s.19-28 Local Government (Urban Authorities) Act 1982; Part II and III, Local Governments Act (Cap. 243).

[64] See Local Government Finances Act (As amended) 1982 [Act 9/1982]; Part VIII, s. 77-85, Local Governments Act (Cap 243).

[65] Public Services Act, 2002 [Act 8/2002], which repeals the Local Government Service Act, 1982 and establishes the local government service department under the Public Service Commission; See also, s. 55, Local Governments Act (Cap. 243).

two reforms stems from the fact that they both claim to promote the interests and participation of local institutions and communities in the management of local affairs. The purpose of the discussion that follows is to review the current policy and legal regimes with a view of ascertaining the extent to which they embody principles and practices that are intended to mitigate state centrism in ENRM.

The Legal Foundation for Decentralisation Natural Resources Management

The legal foundation for decentralised natural resources is basically contained in three sets of legal instruments: the national Constitutions and local government and environmental laws and in policies. Drawing back to our central theme of multi-level government and our particular interest in local government at this moment, we shall be examining the extent to which each of these sets of instruments empowers and supports local governments as a means of decentralising ENRM.

Constitutional Foundations for Environmental Rights, Duties and Management

There are remarkable differences in the form and extent to which the East African countries enshrine environmental management in their Constitutions. In Uganda, among the wide ranging new issues introduced by her 1995 Constitution, are several substantive and procedural provisions that concern the ENRM. Other than the Articles, the section on 'national objectives and directive principles of state policy' also contains salient issues that are pertinent in shaping Uganda's emerging environment and natural resources management regime. It is worth noting that, prior to a recent amendment, the section on national objectives and principles was not legally enforceable. That notwithstanding, enforceability of this amendment remains a subject of debate, as it is yet to be in enacted.[66]

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[66] Article 8A of the amended Constitution reads as follows:

> (1) Uganda shall be governed based on principles on national interest and common good enshrined in the national objectives and directive principles of state policy.
> (2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.

To a reasonable extent, Uganda's Constitution attempts to spell out the roles, rights and duties of various stakeholders in ENRM. Principle XXVII requires the State to promote public awareness and also to manage natural resources in a manner that meets both development and environmental needs.[67] Article 39 provides that every citizen has a right to a clean and healthy environment. It is also the duty of every citizen to create and protect a clean and healthy environment.[68] Principle XIII and Article 237 (2) (b) enshrine the public trust doctrine that is increasingly becoming a cornerstone in protecting the environment from abuse by public trustees such as government. In addition to these provisions, the Constitution requires Parliament to enact laws that: provide for measures intended to protect and preserve the environment; embrace sustainable development; and promote environmental awareness.[69] Parliament has since enacted the National Environment Act as the framework law for environmental management and this has been followed with a review of several environmental laws and policies.[70] It is in the same spirit that environment management principles and structures have also been inscribed into other sector laws such as the Local Governments Act[71] and the Investment code Act.[72]

Although the law implementing the amendment is not yet in place, enforceability of this section arises from the fact that since it is referred to by an Article of the constitution, it then becomes part of it. However, whether legally enforceable or not the national objectives and directive principles of state policy have nonetheless remained fundamental in guiding Uganda's legislation and policy making processes since adoption of the constitution in 1995.

[67] Principle XXVII; See also, Principle XXI which requires the state to promote a good water management system. Constitution of the Republic of Uganda 1995 - National Objectives and Directive Principles of State Policy, 1995.

[68] Article 17 (1) (j), Constitution of the Republic of Uganda 1995.

[69] Art. 245, Constitution of the Republic of Uganda 1995.

[70] Examples include, Land Act (Cap. 227), Water Act Cap. 152, Forest Act Cap. 256, and Wildlife Act (Cap. 200).

[71] The Local Governments Act (Cap.243) has several relevant provisions on the involvement of local governments in environmental management. The Second schedule to the Act lists the following as being responsibilities of the Local Governments: Land administration, physical planning, environment and sanitation and the protection and management of streams, lake shores, wetlands and forests.

[72] s. 19 (1) (d) of the Investment Code Act (Cap. 92), for example, provides that provides that an investor may be required "to take necessary steps to ensure that the operations of his or her business enterprise do not cause injury to the ecology or environment."

The Constitutions of Tanzania and Kenya are less explicit on ENRM matters. That of Tanzania broadly provides that in order to combat wastage and squander, it is among the duties of society, to protect and safeguard natural resources, state property and property collectively owned.[73] It also requires the State to ensure that all public programmes and policies of its agencies are conducted in a manner that ensures that national resources and heritage are harnessed, preserved and used for the common good.[74] These provisions can, however, be limited by the provision requiring that:

> "Use of national resources places emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease;"[75]

This provision can be interpreted to mean that environmental concerns are secondary to the other aspects of human social development. The power of Article 9 is further affected by the fact that it falls under Part II - fundamental objectives and directive principles of state policy, whose provisions are, according to the Constitution, non-judicial.[76] Nonetheless, as observed by Mirisho, these constitutional provisions exhibit Government's commitment towards environmental management,[77] although such commitment would have been more robust had the provisions been judicially enforceable.

In the case of Kenya, the few provisions that relate to the environment and its management are generally stated in passing. It is, for instance, provided that a

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[73] Art. 27 (1) and (2), Constitution of the Republic of Tanzania 1977; See also, s. 6 Duty to Safeguard Public Property Act (Act No. 15 of 1984).

[74] See The Constitution of the United Republic of Tanzania 1977, Art. 9 (c) and (i), as amended by s. 6 of the Pursuit of Ujamaa and Self Reliance Act No. 15 of 1984 and s. 6 of Act No. 4 of 1992.

[75] Art. 9 (i), Constitution of the United Republic of Tanzania 1977.

[76] Article 7 (2) of Tanzania's Constitution explicitly states that:

> "The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter."

[77] Mirisho D. Pallangyo, 'Environmental Law in Tanzania; How Far Have we gone?' (2007) 3 Law, Environment and Development Journal 26.

person may be deprived of land if such property is to be used for the purposes of the carrying out work of soil conservation or the conservation of other natural resources.[78] Nonetheless, much hope lies in the new draft Constitution that dedicates an entire Chapter on ENRM matters. Amongst others, the draft constitution seeks to: establish a powerful National Environment Commission; enshrine environmental principles, rights and obligations; institute various conservation measures; and also strengthen the enforcement of international and national environmental laws.[79] On the whole, it is worth noting that unlike Kenya and Tanzania's Constitutions, which were adopted in 1963 and 1977, respectively, Uganda's 1995 Constitution is relatively new in view of the fact that environmental management is a new issue in Africa's constitutionalism.

In addition to the provisions that are specific on environment and natural resources, all the Constitutions have other provisions that relate to ENRM, especially in the enforcement of environmental rights and duties. Such provisions include those that relate to human and property rights, other substantive rights and freedoms, as well as the procedural rights of access to justice, information and the right to participate in decision making. For instance, Article 50 of Uganda's Constitution broadens the understanding of the common law principle of *locus standi*, which is critically important in public interest litigation.

It is also worth noting that all the Constitutions provide for appropriate institutional frameworks that are potentially supportive of environmental and natural resources management. In each country, the arms of government are built on democratic principles and their powers and functions are separated with the intention of ensuring institutional autonomy. Ideally, the executive, judicial and legislative organs

[78] Art. 75, Constitution of the Republic of Kenya 1963.

[79] See Chapter 8, Kenya Constitutional Draft, 2004 (Republic of Kenya, *The Proposed New Constitution of Kenya*, Kenya Gazette Supplement, 22nd August 2005, Nairobi - Drafted and Published by the Attorney-General Pursuant to s. 27 of the Constitution of Kenya Review Act (Cap 3A)). This draft arises from the draft adopted by the National Constitutional Conference on 15th March 2004.

of government are founded, in execution of their duties, on principles that are cognisant of public access and involvement in decision making processes. The three countries are, for instance, now being managed under a multi-party dispensation that allows for political representation at various levels.[80] Also, the justice systems allow for citizenry participation in the administration of justice.[81]

As can be adduced from several recent court cases,[82] constitutional provisions on the environment, though not yet fully dominant, are increasingly becoming instrumental in the development of environmental law and management in East Africa. Several of these cases attest to the fact that governments have for several reasons continued to overstep their boundaries in the enforcement of environmental justice.[83] As has been demonstrated, though there remain significant gaps, the constitutional foundation for ENRM is gradually being broadened. For purposes of effectiveness, however, this development must be supported by an enabling legal and institutional framework, such as multi-level government, which tends to broaden the level of participation in various ways. The constitutional provisions on local government and the decentralisation of ENRM are now reviewed.

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[80] See, Arts.71-75, Constitution of the Republic of Uganda 1995. (Uganda voted for a return to a multi-party political system through a constitutional referendum held on 28 July 2005); The Constitution of Kenya (Amendment) Act 1991, repealed s. 2A of the Constitution which had made Kenya a one-party state under the rule of the Kenya African National Union (KANU) as the sole political party. The new section 1A declared Kenya a sovereign multiparty democratic republic.

[81] Art. 127 of the Constitution of the Republic of Uganda 1995, for instance, requires Parliament to make law providing for participation of the people in the administration of justice by the courts.

[82] See, for example, *Festo Balegele and 794 others v. Dar es Salaam City Council*, Misc. Civil Cause No. 90 of 1991, High Court of Tanzania, Dar es Salaam; *Felex Joseph Mavika v. Dar es Salaam City Commission*, Civil Case No. 316 of 2002, High Court of Tanzania, Dar es Salaam; *Joseph D. Kessy v. Dar es Salaam City Council*, Civil Case No. 29 of 1988, High Court of Tanzania, Dar es Salaam; *Advocates Coalition for Development and Environment v. Attorney General*, Misc. Application No 100/2004, High Court of Uganda, Kampala; *Byabazaire v. Mukwano*, Miscellaneous Application No 909 of 2000, (Arising from suit No.466 of 2000), High Court of Uganda, Kampala.

[83] See, for example, *Siraji Waiswa v. Kakira Sugar Works (1985) Ltd.* HCCS No. 0069 of 2001, High Court of Uganda, Kampala and; *Advocates Coalition for Development and Environment v. Attorney General*, Misc. Application No 100/2004, High Court of Uganda, Kampala.

The Constitutions and the Decentralisation of Natural Resource Management

The Constitution of Uganda is the most pronounced on the devolution of natural resources management functions and powers to local government. By inference, the Constitution provides for an endless list of functions and services for which district councils are responsible. It thus states that:

> "District councils shall have responsibility for any functions and services not specified in the Sixth Schedule to this Constitution."[84]

Considering the limits set by the Sixth Schedule, this open clause places a lot of functions and services under the district councils. As in regard to the environment and natural resources, the functions and services reserved for the central government include various aspects concerning the management of land, mines, mineral and water resources, national parks and the environment in general.[85] This scope was broadened in a recent amendment that extended central government mandate over forestry and wildlife reserves from policy making to include the management aspect of these resources.[86] As shown in the Chapter Eight, however, the manner in which the Constitution distributes environmental management responsibility between the central and local government is unclear and at times confusing. Tanzania's Constitution is even less clear on the distribution of functions and powers between central and local government. It states that the functions of a local government shall be:

> "…to perform the functions of local government within its area; to ensure the enforcement of law and public safety of the people; and to consolidate

[84] Art. 189 (3), Constitution of the Republic of Uganda 1995.
[85] See Sixth Schedule, Constitution of the Republic of Uganda 1995.
[86] See Amendment 9 (b), Constitution (Amendment) (No.2) Act, 2005, that amends item 24 in the sixth schedule of the Constitution of the Republic of Uganda 1995.

democracy within its area and to apply it to accelerate the development of the people."[87]

Given such broad provisions, it is difficult to precisely derive the decentralised powers and functions that relate to the management of the environment and natural resources. As for Kenya, aside from vesting trust lands in County Councils,[88] its Constitution is generally silent on the role of local government in ENRM.

The Local Government Laws and Natural Resource Management

It is common practice for local government laws to specify the functions and powers of the local government units that they establish. Although local government laws in East Africa are largely concerned with public administration, the principles and institutions that they promote and implement are an invaluable basis for natural resources management. Among the functions and powers devolved by these laws are those that concern the management and utilisation of the environment and natural resources. In addition to restating the constitutionally devolved powers and functions, Uganda's Local Governments Act 1997 devolves several ENRM related functions and powers to various levels within the local government hierarchy.[89] As for Tanzania, in addition to the specifically devolved functions,[90] other functions concerning ENRM, may be derived from the broad provisions of the principal Local Government Acts, which require local governments to "promote the social welfare and economic well being of all persons within their areas of jurisdiction."[91] As for the

[87] Art. 146 (2) (a-c), Constitution of the Republic of Tanzania 1977.
[88] Chapter IX, Art. 114 – 110, Constitution of the Republic of Kenya, 1963 [2001 Revised Edition]
[89] The devolved functions that specifically relate to natural resources management include, activities and services that concern environmental sanitation, agriculture and fisheries extension services, forestry and wetland, physical planning, land administration, control of local hunting and fishing and protection of water resources. See Second Schedule of the Local Governments Act 1997 (Cap.243).
[90] The specifically provided functions include the regulation and control of swamps and marshland; land use and planning, water use, pollution and conservation, forest use and preservation, soil use, animal husbandry and agricultural activities, vermin and hunting. See s.118 (2), s. 1, 4, 5, 91,95, 98 of the first schedule and s.6, 23 and 24 of the Second Schedule of the Local government (District Authorities) Act 1982.
[91] Local government (Urban Authorities) Act, s. 16 (1), 54 (1) (b); and Local government (District Authorities) Act 1982 s. 32 (1) (b), 111 (1) (b) and 142 (1) (b).

village councils, their functions and powers are generally reinforced by section 142 (3), which empowers them to undertake measures that are necessary to enable them carry out their functions. Tanzania's principal laws on local government were amended in 1999 to explicitly provide that:

> "In the performance of their functions, local government authorities shall… provide for the protection and proper utilisation of environment for sustainable development."[92]

And also that:

> "It shall be the function of every district council… to take all necessary measures to provide for the protection and proper utilisation of the environment for sustainable development."[93]

In Kenya, the environment management related functions and duties devolved to the local governments include the establishment and maintenance of game parks and forests, prevention and control of bush and forest fires, and control of the excavation of local building materials.[94]

As for the institutional setup, although the local government laws do not specifically establish local structures for environmental management, they require various local councils to establish or designate standing or special committees to handle any issue

[92] See s.111A (2) (c) of the Local government (District Authorities) Act 1982 as amended by s.17, Local Government Laws (Miscellaneous Amendments) Act 1999; See also, s. 54 (d), Local government (Urban Authorities) Act, 1982, as amended by s.52, Local Government Laws (Miscellaneous Amendments) Act, 1999.
[93] See s.118 (g) of the Local government (District Authorities) Act as amended by s.20 Local Government Laws (Miscellaneous Amendments) Act, 1999.
[94] See Local Government Act (Cap 265), ss.155 (e) and (f) and 154 (d)(iii).

within their mandate.[95] However, due to scope of their mandate and the technical limitations on the number of committees that may be formed, it is common for the committees responsible for the environment to also handle other matters. Where the bundled responsibilities are closely related to ENRM issues, such arrangements have proved helpful in terms of coordination.[96] In the case of Uganda, however, it may be noted that section 16 of the National Environment Act 1995, provides for the establishment of separate environment committees at various local government levels. To avoid such a scenario, Tanzania's Environment Management Act 2004 designates the line local council standing committees to be the Environment Committees at their respective levels. By implication, therefore, this arrangement limits the environment committee membership to the councillors and thus fails to benefit or be legitimised by a criterion open to the inclusion of non-state actors. Generally, Tanzania and Uganda's local government laws tend to emphasize the higher and lower local governments as the monitoring and operative level for ENRM, respectively.[97]

As can be seen both the Constitutions and Local Government Acts fail to map out a clear picture as to functions and power of local government in ENRM. It is certainly arguable that the constitutions need not be detailed as they often provide for the legislatures to make the appropriate laws. Of late, however, Constitutions in Africa have steadily increased in the volume of text not for the sake of it but for purposes of fortification. It is argued that because they are *lex superior* in relation to ordinary laws and more difficult to change than ordinary legislation, Constitutions are pivotal for environmental law.[98]

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[95] For example see Local Governments Act (Cap 243) , s. 22 ; Local government (District Authorities) 1982 ss. 74, 75 and 79; ss. 42, 43 and 47, Local government (Urban Authorities) 1982; Local Government Act (Cap. 265), ss.91, 93 and 95.

[96] In Uganda, for example, the standing committees responsible for the environment are often responsible for the entire natural resource sector and in certain case the production sector.

[97] See the Second and Forth Schedule of the Local Governments Act (Cap. 243).

[98] Skagen Ekeli Kristina, 'Green Constitutionalism: The Constitutional Protection of Future Generations' (2007) 20 Ratio Juris 378, 380.

Environmental Policy and Laws and the Devolution of Environment Management Powers and Functions to the Local Governments

Since policies are deliberate plans of action that guide decisions in the achievement of desired outcomes, policies often form a basis for legislation. It is imperative, therefore, for us to discuss the current environmental laws in light of their accompanying policy frameworks. We shall first explore the environment management framework policies and laws and then the specific laws and policies on fisheries, water, wildlife and forestry.

Environment Management Framework Policies and Laws

While Kenya is yet to finalise its policy on environmental management, Uganda and Tanzania adopted their national environmental management policies in the mid-1990s with the objective of ushering in a new legal and institutional framework for environmental management. These policies clearly recognise and advocate for the engagement of local government in environmental management. Uganda's National Environment Management Policy of 1995 strongly asserts that a cross-sectoral and multi-level institutional arrangement is among the basic requisites for salvaging the deteriorating state of the environment.[99] In more definite terms, Tanzania's National Environmental Policy, 1997 states that,

> "Local authorities shall be responsible for overseeing planning processes and for establishing local environmental policies and regulations."[100]

It is in that spirit that Uganda's National Environment Act, 1995 (NEA) entrusts local governments with several environmental management powers and functions

[99] See s. 5.2, Republic of Uganda, *National Environment Management Policy* (Government Printers 1995).
[100] See s. 101 -102, United Republic of Tanzania, *National Environment Policy* (URT, Dar es Salaam 1997).

including: coordination; planning; budgeting; monitoring; awareness campaigns; information gathering; reporting, community mobilisation; legislation and law enforcement.[101] Similar functions and duties are also devolved by Tanzania's Environment Management Act 2004 (EMA)[102] that also goes further to devolve specific environment management functions to the local governments.[103] Under Uganda's NEA, however, the specific functions are largely devolved through the regulations that implement it.[104] Kenya's Environment Management and Coordination Act 1999 (EMCA) has the least to say on the participation of local government in environmental management. It basically limits the local government involvement to the issuing licences or permits for industrial or trade waste, pollutant discharges and emissions and waste disposal, which roles largely apply to urban councils.[105] Other functions are, through the District Environment Committees, vested in the districts, which, although always coterminous with county council boundaries, are actually central government administrative units and not local governments.

Notwithstanding their broad cognisance of the concept of decentralised natural resource management, the national environment framework laws remain faced with two major challenges concerning the role of local government in environmental management. First, these laws are yet to be fully implemented; many of the

[101] National Environment Act 1995, Cap. 153 (Uganda) [NEA 1995], ss. 14, 15, 16 and 18.
[102] Environment Management Act 2004 (Tanzania) [EMA 2004], ss. 36 and 42.
[103] For example, the management and regulation of liquid, gaseous and hazardous waste, protection of riverbanks, rivers, lakes and lake shores, participation in the identification of hilly areas prone to environmental degradation; and the management of land-use planning. See, EMA 2004, ss. 7, 55 (1), 58 (1) and 139.
[104] They include, the coordination, monitoring, protection and conservation of riverbanks, lakeshores and wetland resource by the local environment committees, which in turn advice their districts and the central government on the management of those resources. See The National Environment (Wetlands, Riverbanks and Lakeshores) Regulations (SI: 153-5), regs. 7 (1 and 2), 9 (1), 26 and 33 (1); On the involvement of District Councils in inter-district waste movement and participation of environment committees in licensing waste treatment plants or disposal sites, see Waste Management Regulations (S.I No. 52/199), regs. 6 (4-5) and 14; and on the participation of environment committees in the management of hilly and mountainous areas, see The National Environment (Mountainous and Hilly Areas Management) Regulations (SI: 153-6), regs. 4 (2), 5 (1), 5 (5), 12, 13 (1), 14 (1) and 15.
[105] See, The Environment Management and Coordination Act 1999 [EMCA 1999] (Kenya), ss.74, 75, 81 and 87.

regulations that are supposed to operationalise them are not yet in place. This has partially contributed to the lack of clarity as to the specific roles and powers of local government in ENRM. Secondly, the issue of legal precedence between the local government laws and the other laws that concern the decentralisation of ENRM remains contentious. While it is clearly provided in the framework laws that they take precedence over other laws,[106] in environmental matters, the practicality of enforcing such provisions remains elusive.[107]

Institutionally, the major meeting point between the environment management framework laws and local government is the establishment of local environment committees and coordination offices, which are discussed in the following section.

The Environment Committees

Generally, the institutional structure for decentralised natural resource management has been broadened by the various recent changes in the local government and natural resources management sectors. Although these changes have seen several local structures brought on board, [108] the establishment of Local Environmental Committees (LECs) stands out among the major institutional changes. Indeed, many of the devolved environmental management functions[109] and powers[110] are vested in the LECs. These committees are, in Uganda and Tanzania, established in cognisance of the general outlook of the decentralisation processes, and in

[106] s.108 of the National Environment Act 1995, states that:

> "Any law existing immediately before the coming into force of this Act relating to the environment shall have effect subject to such modifications as may be necessary to give effect to this Act; and where any such law conflicts with this Act, the provisions of this Act shall prevail."

Similar provisions are found in section 148 of the EMCA, 1999 and section 232 of the EMA, 2004.

[107] This issue was particularly emphasized by most of the local government officials interviewed in Uganda. See appendix 1 for a complete list of persons interviewed.

[108] The making of by-laws is, for instance, a wide ranging function exercised by the Local Government Councils in their own right as legal entities.

[109] See Waste Management Regulations, Part IX – regs. 52 (1), 55(1), 59; EMA 2004, ss.114-119, 123,126 and 127; NEA 1995, ss. 14, 16, 18, 35 (2), 37 (2), 38 (1), 39 (I and 2), 48, 49 (1) and 66 (3); EMCA 1999, ss. 30, 39, 40, 45 (1), 46 (1-2) and 47 (2-3).

[110] EMA, 2004 s. 41 (a); NEA 1995, s. 3 (3).

particular, the systems of local government.[111] They are provided for in accordance with the local government tiers established by the local government laws. Kenya's decentralised institutional framework is, on the other hand, based on the central government's provincial administration structure[112] which, unlike the local government system, has traditionally been the government's preferred channel for local service delivery. As elaborated below, however, the establishment of the LECs appears not to have mitigated the centralist paradigm, as they are variously subordinated to the central governments.

Kenya

Kenya's Environment Management and Coordination Act (EMCA) establish the LECs at two levels: the Provincial and District Environment Committees (PECs/DECs). It may be recalled at this point that, in Kenya, districts are administrative units of the central and not local government. Interestingly, both the PECs and DECs are appointed by the Minister responsible for the environment, who draws their membership from locally based central government ministries' staff, local authorities and other local stakeholders in environmental management.[113] The PECs and DECs are, respectively, headed by the Provincial and District Commissioners, who are political appointees of the Central Government.

The PECs are in addition to their roles of preparing Provincial Environment Action Plans and linking the districts with the centre, also generally responsible for the proper management of the environment within the province.[114] The DECs are basically responsible for the proper management of the environment within their

[111] EMA 2004 s. 37 and 38. The Act actually empowers already existing committees, established under the Local Government (District Authorities) Act 1982 and Local Government (Urban Authorities) Act 1982, with environmental management roles. In fact these committees largely derive their mandate from the Local Government Acts that establish them.
[112] See EMCA 1999, s. 29.
[113] The Local Authorities are, through a single slot, represented on the DECs under whose geographical jurisdiction they fall. See EMCA 1999, s. 29.
[114] EMCA 1999 ss. 29, 30, 39 and 40.

area of jurisdiction. [115] Owing to the subordinate nature of the administrative hierarchy under which they operate, however, the DECs are required to submit their environment action plans to the PECs, which in turn prepare the final plans that are sent to the National Environmental Action Plan Committee.[116] It is this national committee that has the final decision on the action plans. Judging by the reporting format provided under the EMCA, however, the district and provincial action plans are actually more akin to advisory notes than real action plans.[117]

Uganda

In Uganda, the National Environment Act, 1995 provides for the establishment of District Environment Committees (DECs), which in turn have powers to establish other Local Environment Committees (LECs).[118] In addition to the public servants and a few representatives of the civil society, the DECs and LECs are largely constituted of councillors.[119] The basic function of the DECs is to coordinate the environment and natural resources related activities of the District Councils.[120] The LECs are, on the other hand, mostly tasked with operative functions.[121] Aside from these general functions, both committees are also tasked with specific functions that especially

[115] Their specific functions include identification of environmentally sensitive hilly and mountainous areas, promotion of re-forestation and afforestation on self-help basis and involvement in the registration of environmental easements. See EMCA 1999 ss. 39, 40, 45, 46 (1-2), 47 (2-3) and 115.
[116] EMCA 1999, ss. 39 and 40.
[117] For the structure of the Action Plans see, EMCA 1999, s. 38 (a-l).
[118] The Local Environment Committees are established at Municipal, Town, Division, County and Sub-county levels or at any other lower level within the local government system. See NEA 1995, ss.15 and 16.
[119] As required by s.14 (1) of the NEA 1995, The National Environment Management Authority (NEMA) is required to, after consultations with District Councils, provide guidelines on the composition of the District Environment Committees. In that regard, efforts have been made to ensure that the environment committees are constituted in line with the traditional local government system. In most cases the District Council Committees responsible for the environment reconstitute themselves as environment committees after co-opting two civil society members and the required civil servants.
[120] The District Environment Committees are, required to, ensure that environmental concerns are integrated in all Council plans and projects; assist in the development and formulation of by-laws; promote the dissemination of information and; prepare annual district state of the environment reports. See NEA 1995, s.14.
[121] The Local Environment Committees are, for instance, required to educate and mobilise their people to conserve and restore degraded environmental resources through self-help initiatives; prepare environment management plans; monitor all activities to ensure that they do not have any significant impact on the environment; and subsequently, report any events or activities which have or are likely to have significant impacts on the environment. See NEA 1995, ss. 14, 16, 18, 39 (2) and 48 (5).

concern particular natural resources.[122] In exercise of their duties, the LECs have powers to: bring action in a court of law against any contravention of any section of the NEA; prevent action considered to be harmful to the environment; compel a public officer to enforce provisions of the Act; order an environment audit to be undertaken; and to seek court order in the interest of the environment.[123] As can be adduced from their functions and powers, the environment committees are instrumental institutions in the enforcement of environmental management within their jurisdictions. While the NEA was enacted thirteen years ago, however, the environment committees below the sub-county level have yet to be formed and, although, most district and sub-county committees are now in place, few, if any, are fully functional.[124]

Tanzania

In Tanzania, other than creating structures that operate in parallel with those established under the local government system, the Environment Management Act (EMA) 2004 designates the local standing committees concerned with the environment, as the Environment Management Committees (EMCs), at their respective levels.[125] The EMCs are established at the City, Municipal and District, Township, Ward and *Kitongoji* levels. At village levels, where there are no such

[122] They are, for instance, required to be involved in the identification of: wetlands of local, national and international importance; River banks, lake shores, hilly and mountainous areas that are at risk of environmental degradation; sites of cultural importance; measures for land-use planning; target areas forestation and re-forestation; and assess local disaster risks. See NEA 1995, ss. 35 (2)37 (2), 38 (1), 39 (1), 48, 49 (1) and 66 (3). More functions and powers of these committees are contained in the regulations that implement the NEA 1995. For example, See the National Environment (Mountainous and Hilly Areas Management) Regulations, (Statutory Instrument 153 – 6), regs. 4, 5, 11, 13(1), and 14 (2).

[123] NEA 1995, s. 3 (3).

[124] Interview with the District Environment Officer, Bugiri District (Bugiri, Uganda, 27 May 2006).

[125] EMA 2004, ss. 37 and 38. The standing committees referred to are the Urban Planning and Environment committees and the Economic Affairs, Works and Environment Committees established by s. 42 (1) Local government (Urban Authorities) Act (as amended) and s. 74 (1) Local government (District Authorities) Act (as amended), respectively. Also, each Standing Committee of Economic Affairs, Works and Environment of a Township Authority, established under s. 96(1) of the Local Government (District Authorities) Act 1982 (as amended), a special committee formed pursuant to section 107 of the Local Government (District Authorities) Act 1982 (as amended), as well as the Ward Development Committee established under s. 31 (1) of the Local Government (District Authorities) Act 1982 (as amended).

standing committees, the Village Development Committee doubles as the Local Environment Committee. In addition to their specific functions, [126] the EMCs are generally required to monitor, offer advice and to some extent, also regulate and enforce matters that concern the environment within their localities.[127] Since they derive their powers from both the environment management and local government laws, the EMCs have wide ranging powers including the powers to: initiate inquiries and investigations; seek information; resolve conflicts; inspect and examine premises; seize items; issue restoration orders; and also initiate criminal or civil proceeding against non-compliance with their directives.[128] As can be seen, because of their dual source of powers and functions, the EMCs are, unlike their equivalents in Kenya and Uganda, expected to be more powerful and efficient in enforcing their responsibilities. Their performance, however, remains challenged by the usual chronic problems affecting local institutions. These include: political interference at both national and local levels; lack of the required capacity; low enthusiasm at various levels; and more generally, ignorance and lack of awareness by the committees and other members of the public. That aside, the formation and operation of most EMCs has continued to be affected by the slow implementation of the EMA.[129]

As can be seen, while the establishment of LECs presents an enormous opportunity for the participation of local institutions and communities in ENRM, this arrangement is still faced with several challenges. Foremost, the subordination of LECs to the

[126] The EMA 2004 provides for the active involvement of local governments in the management of all types of waste and the protection of rivers, lakes, rivers banks, lake shores, coastal zone, environmentally sensitive areas, and hilly or mountainous areas at risk of degradation. See ss. 52 (1), 55(1), 59 and Part IX – Waste Management – ss. 114-119, 123,126 and 127.
[127] EMA 2004, ss. 37 and 38. The Act actually empowers already existing committees, established under the Local Government (District Authorities) Act 1982 and Local Government (Urban Authorities) Act 1982, with the environmental management roles. In fact these committees largely derive their mandate from the Local Government Acts that establish them.
[128] EMA 2004, s. 41 (a) – (f); See also, Local Government (Urban Authorities) Act 1982 (as amended), s. 55 (1) and (2); and Local Government (District Authorities) Act 1982 (as amended), s.118 (1) and (2). These provisions are cross referenced by s. 37 (2) of the EMA 2004.
[129] Interview with City Council Economist, Mwanza City Council (Mwanza, Tanzania, 12 April 2007).

central government undermines the very essence of their existence as institutions intended to champion local interests. Additionally, many of the committees are not yet in place and those that exist are barely functional. Also, as demonstrated in the next Chapter, the functioning and autonomy of these committees is critically susceptible to the problems of lack of capacity and resources that generally affect most local institutions. Owing to such challenges, although the provisions on the establishment of LECs are intended to improve on the landscape for local environment management, this is yet to be meaningfully translated into practice.

Having explored the framework laws on environmental management and local government, the following sections seek to ascertain the extent to which the principal laws on water, fisheries, forestry and wildlife management have elevated the cause for an institutional arrangement that provides for the effective engagement of local institutions in decentralised ENRM.

Fisheries Resources Policy Frameworks and Laws

As was seen in Chapter Three, the fishery of Lake Victoria is increasingly being faced with various forms of degradation. While fisheries activities were not a high priority among East Africa's colonial environmental regimes, they have recently become of major socio-economic importance. The commercialisation of fisheries and the resulting environmental degradation have gradually led to changes in the sector's regulatory regimes. Some of these changes have been shaped by the ongoing decentralisation and regionalisation processes. Although, to a small extent, the recent decentralisation programmes have seen some level of local government participation in fisheries management.[130] On the other hand, the revival of the EAC, in the late 1990s, has been at the centre of several efforts towards the development

[130] In Uganda, for instance, the locally deployed or field fisheries staffs of the central government were in the 1990s taken over by the District Councils, and as a result, the Districts become more involved in various fisheries management activities. In Tanzania, the Fisheries Department local personnel were, at the height of the country's radical decentralisation programme of the 1970s, placed under the Local Development Directors.

of a regional fisheries management regime, most particularly for the Lake Victoria fishery. Attempts continue to harmonise East Africa's fisheries laws and policies with a focus on co-management[131] and although there remain several discrepancies, there have been reasonable strides in achieving this goal.[132] As the regional fisheries management regime is discussed in Part V, we shall at this point focus on decentralised fisheries management. We shall first discuss the fisheries policies and thereafter the laws.

Tanzania and Uganda's new fisheries policies present a significant departure from the old fisheries management regimes, which emphasized centralised 'command and control' methods.[133] The policies envisage local government as a critical level in the enforcement of fisheries management. Tanzania's National Fisheries Sector Policy and Strategy Statement (NFSPSS), promotes the participation of local government in various activities aimed at protecting the fisheries resources from over exploitation.[134] Similarly, Uganda's Fisheries Policy states that:

> "Fisheries resources will be managed through devolved responsibility to local governments, whenever practical or advisable and under careful regulation."[135]

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[131] Generally see, for example, Lake Victoria Environmental Management Programme, *The Report of the Regional Task Force for the Harmonisation of Fisheries Legislation on Lake Victoria* (LVEMP, Entebbe Uganda 2002).

[132] Interview with then Commissioner for Fisheries, Ministry of Agriculture, Animal Industry and Fisheries and currently Executive Director Lake Victoria Fisheries Organisation (Entebbe, Uganda, 12 April 2007).

[133] Kenya had planned to adopt a new fisheries policy together with a master plan, by the end of 2008. These documents are, however, not yet adopted and it was also not possible to access their copies.

[134] These include: licensing of small scale fisheries operations; revenue collection, making fisheries by-laws; law enforcement; and generally, participation in fisheries protection and conservation. See United Republic of Tanzania, *National Fisheries Sector Policy and Strategy Statement* (URT, Dar es Salaam 1997), Annex 1. At the grass-root level, the policy seeks to improve the involvement of fisher communities in the planning, development and management of fisheries resources by, amongst other strategies, entrusting them with the management of fishing landing sites. The policy also requires the central government to facilitate the formulation of village by-laws targeted at enhancing sustainable utilization of fisheries resources. See *National Fisheries Sector Policy and Strategy Statement*,s. 3.3.8.

[135] Republic of Uganda, *The Uganda National Fisheries Policy 2004* (Ministry of Agriculture, Animal Industry and Fisheries 2004), s. 7 (d), at p. 16.

Although the Policy provides for direct central government intervention to back-stop insufficient capacity at the local levels, it stresses that local government remains important in ensuring controlled access and sustainability of the fisheries resource, and also in developing the socio-economic potential of the fisheries sector.[136] While placing significant emphasis on a decentralised approach to fisheries management, the policy seeks to distribute several management functions, duties and rights across different levels and forms of governance, where local governments are required to play various pivotal roles.[137] In sum, the policy observes that, in fisheries management, "the District acts as the primary link with the Centre."[138]

Surprisingly, such policy perceptions are not sufficiently captured under the management approaches and institutional arrangements established by the current fisheries laws and regulatory frameworks.[139] Notwithstanding the few pathways established within the wider context of the decentralisation programmes[140] fisheries management in all the three countries remains highly centralised and a responsibility of the central government.[141] In fact, the emerging fisheries management regimes are tending towards establishing a bi-modal institutional arrangement consisting of two major players: the central government and the Beach Management Units (BMUs) as the community level stakeholders.

Aside from the provisions on delegation and joint management agreements, Tanzania and Kenya's new fisheries laws do not directly confer any major function to

[136] ibid. s. 6.2.1, at p. 11.
[137] See, for instance, Policy area no. 2 of *The Uganda National Fisheries Policy 2004*.
[138] ibid s. 6.2.2, at p. 12.
[139] It may be noted that while Uganda adopted a new fisheries in 2004, its contents are yet to have a significant impact in the on-going review of her fisheries laws.
[140] For instance, Uganda's local government system maintains that, aside from the chief executives and their deputies, the District Council recruit all the staff working under them.
[141] Fisheries Act 2003 (Tanzania), ss. 3, 4 and 8; Fisheries Act 1989, (Cap. 378) (Kenya); Fish Act, (Cap. 197) (Uganda), s. 3; See also, the August 2008 Version of Uganda's draft Fisheries Bill.

local governments.[142] Likewise, judging from the recent drastic changes made on the draft Fisheries Bill 2004, which *inter alia* eroded the role of local government in lake fisheries,[143] a similar arrangement is likely to be maintained under Uganda's upcoming fisheries law.[144] Even where functions and powers are delegated to the local governments, such delegation remains subject to strict direction by central government. For example, in disregard of the local government personnel system arrangement, Tanzania's Act specifically requires that,

> "Any local authority officers appointed to discharge functions under this Act shall have regard to any directives and circulars issued by the Director [Fisheries]."[145]

We also see that a similar centralist approach underpins the relationships between central government and the community-based fisheries management organisations. As the co-management doctrine picked momentum in the late 1990s, the countries sought for a system capable of ensuring full-time local surveillance over the fishery, while at the same time maintaining the central government powers and interests intact. In that regard, the Beach Management Unit (BMU) system, which had been pioneered in Tanzania, was adopted to foster the co-management aspirations.[146] In Tanzania, central government can directly enter into agreement with any local BMU to manage part or whole of a specific fishery or to facilitate the formation other community management units or fisheries conservation associations.[147] In Uganda,

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[142] Fisheries Act 2003, ss. 5 (8), 8, 17 and 18: See also, Fisheries Act 1989, s. 18 (1).

[143] In stark contrast with that of August 2008, the 2004 version of the draft Fisheries Bill had provisions that proposed active involvement of the local governments in fisheries management. It for instance, sought to establishment Lake Basin Management Organisations as an advocacy, implementation and coordination platforms for the riparian local governments. See clauses 49 -52 of the 4th August 2004 version of the draft Fisheries Bill 2004.

[144] See the 4th August 2004 and 1st August 2008 versions of Uganda's draft Fisheries Bill.

[145] Fisheries Act 2003, ss. 5 (10) and 8; Fisheries Act, 1989, s. 3(2); See also, clause 86 of Uganda's draft Fisheries Bill 2004.

[146] Fisheries Act 2003, s.18; The Fish (Beach Management) Rules 2003, S.I No.35 of 2003 (Uganda); See also, Clauses 17, 18 and 44 (3) of Uganda's draft Fisheries Bill of August 2008.

[147] Fisheries Act 2003, ss. 18, 17 (s) and 57 (2) (x).

the Fish (Beach Management Unit) Rules, 2003 provide for the mandatory establishment of BMUs at each fish landing site.[148] However, while the executive committees of the BMUs are apparently democratically constituted[149] the draft fisheries Bill 2008 intends to hand the central government more control over the Units. It thus states that:

> "The Minister reserves the right to appoint or disappoint persons or group of persons to undertake management of any particular Beach Management Unit."[150]

As can be derived from the discussion, the emerging fisheries management regimes are poised to re-establish highly centralist fisheries management structures that are focused at the national and community levels, where the latter is under substantial control of the former. The establishment of BMUs as frontline local management bodies is certainly a healthy idea that should ordinarily tap into the benefits associated with grass root participation in resource management. Considering the apparent arrangements, however, there is a risk, assuming it is not intentional, that the BMUs may be delinked from the local government systems and the wider community setup under which they fall. Direct control of these units by central government undermines the essence of decentralisation and in the process stifles the opportunities for local intra-sectoral coordination, which cannot easily be attained without the active involvement of the local governments. More so, in contrast to the local government setup, locally, the BMU are accountable to their management and members and not the community as a whole.

[148] Fish (Beach Management Unit) Rules 2003, reg. 3.
[149] ibid, reg. 6.
[150] Draft Fisheries Bill 2008, Clause 18 (3).

Water Resources Management Policies and Laws

As was seen in Chapter Three, the Lake Victoria water resources are increasingly being degraded and this is mostly attributed to the weaknesses inherent in the Water Resource Management (WRM) regimes. Chapter Six argued that the lack of a multi-level government arrangement or rather state-centrism, has often contributed to several of the weaknesses inherent in the WRM regimes. We shall now review the current water policies and laws with a view to ascertaining the extent to which they depart from the predecessor regimes.

While water management regimes have traditionally been most concerned with water supply, the management of water as an ecologically important and vulnerable resource is increasingly becoming a priority policy area in East Africa. Uganda and Kenya recently enacted new water laws that brought about several changes in water resources management.[151] Although Tanzania is yet to finalise its new water law, its water resources management regime has been redefined through various administrative instruments and amendments to the existing laws.[152] Among the key features in the current regimes is the attempt to separate the institutional structures for water supply from those for water resources management.[153]

As in regard to the decentralisation of water resources management, the national Water Resources Management (WRM) policies of the three countries re-echo several of the guiding principles contained in Chapter 18 of *Agenda 21* of the Rio

[151] The principal legislation governing water resources in Tanzania is the Water Utilization 1974, as amended by the Amendment Act No.10 of 1981, Written Laws (Miscellaneous) Act No.17 of 1989, Water Laws (Miscellaneous Amendments) Act 1997 and General (Regulations) Amendment; In Kenya, it is the Water Act 2002 (Cap. 372); While in Uganda, it is the Water Act 1997 (Cap. 152).

[152] Tanzania is in the process of reviewing its water resources legislation with a view of coming up with three separate Acts. That is: The Water Resources Development Act, Rural Water Supply Act and Urban Water Supply Act, all of which are already in draft form.

[153] Other common features in the new regimes include the refocusing of water resources management on the basis of ecological zones, such as river or lake basins and catchment areas; and the establishment of sub-autonomous regulatory and management bodies.

agreement.[154] This includes the requirement to delegate WRM responsibilities to the lowest appropriate level, and this involves the decentralisation of various powers and functions to local governments, private enterprises and communities.[155] Tanzania's Water Policy of 2002, for example, outlines the need for equity and local participation in the decision-making processes that concern the use, distribution and sustainability of the water resources.[156] It emphasises the need to manage water resources through a multi-tier institutional framework that allocates WRM responsibilities at national, basin, catchment, district and user community levels.[157] The policy particularly requires district councils to be fully involved in the activities of Basin Boards and Catchment Committees, which are the core institutions in the country's decentralised WRM strategy.[158]

Notwithstanding the general shift in the management approach, the decentralised institutional arrangement for WRM is increasingly becoming more aligned to ecological than administrative boundaries. Kenya and Tanzania's water resource management regimes provide for integrated management frameworks that decentralise water management to water drainage basins and catchment areas. Kenya's Water (Catchments Board) Rules sub-divide the country into six river drainage basins based on hydrological boundaries, of which Lake Victoria catchment is one.[159] Tanzania's Water Act was amended in 1997, to provide for the establishment of Water Basin Boards that are administratively and financially autonomous.[160] These Boards manage the nine river basins that were upheld by the

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[154] See United Nations Conference on Environment and Development (UNCED), *Agenda 21: Programme of Action for Sustainable Development* (U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26, 1992).

[155] UNCED, Agenda 21, s. 18.12 (o) (i); See also, The Republic of Uganda, *National Water Policy* (Ministry of Water, Lands and Environment 1999); Government of Kenya, *National Water Policy* (Ministry of Water and Irrigation 1999); The United Republic of Tanzania, *National Water Policy* (Ministry of Water 2002).

[156] Generally see Tanzania's National Water Policy 2002.

[157] ibid. s. 4.10.

[158] ibid.

[159] The others are: Rift Valley, Athi River, Tana River and Ewaso Ng'iro North Drainage Basins.

[160] See Water Utilization Act 1974 (Tanzania), s.7 (2), as amended by s. 27 (b) of the Water Laws (Miscellaneous Amendments) 1997 (Act No.8 0f 1997).

Water Policy of 2002, as the country's Water Management Areas (WMAs).[161] Uganda is in the process of developing an integrated WRM based approach for the designated four major water catchment zones.[162] It is, on the other hand, also piloting decentralised WRM in three pilot districts.[163]

Notwithstanding such policy directions, however, aside from urban water supply that is largely entrusted with profit making or public utility parastatals, rural water supply and the entire spectrum of WRM basically remains a direct central government responsibility. While the mandate for WRM, in Uganda, is still being is exercised from within the mainstream central government public service structure, it is delegated in Tanzania and Kenya to the Central Water Board and the Water Resources Management Authority, respectively. Although these bodies are supposedly autonomous, they are under the direct control of central government,[164] which enjoys similar powers over other national and sub-national institutions concerned with WRM.[165] For the past several years, Uganda's attempt to directly engage the local government system in WRM has remained stuck at the pilot phase. The failure to roll out this programme is largely due to the fact that, despite its being cross sectoral nature, it has often been advanced as a sectoral programme and thus has

[161] The basins are Pangani ,Wami/Ruvu, Rufiji, Ruvuma and Southern Coast, all of which drain into the Indian Ocean, and Lake Nyasa, Lake Rukwa , Lake Tanganyika, Lake Victoria, and the Internal drainage basins of Lake Eyasi, Manyara and Bubu depression. See National Water Policy 2002, s. 1.3.

[162] According to the Catchment Management Strategy, the proposed water management zones include: Upper Nile – Aswa basin, Kidepo basin and some catchments within the Albert Nile; Albert – catchments discharging into lake Edward and Lake George and the downstream catchments discharging into Lake Albert; Kyoga – Kyoga Nile catchment and downstream of lake Victoria discharging into lake Kyoga and; Victoria – Lake Victoria Basin in Uganda. See, Callist Tindimugaya, 'IWRM Experiences and the MGD's in Uganda' (International Conference in Copenhagen - Managing Water Resources Towards 2015, 13th April 2007)

[163] See Republic of Uganda, 'Water Resources Management: Issue Paper No.5' (Joint GOU/Donor Review for the Water and Sanitation Sector Meeting, Kampala, 24-26th September 2002), section 4.2 at p. 9.

[164] See Water Act 2002, s.7 and Water Utilization Act 1974 (as amended), s. 5.

[165] In the case of Kenya, this point is well elaborated in Albert Mumma, 'Kenya's New Water Law: An Analysis of Kenya's Water Act 2002, to the Rural Poor' in B. Van Koppen, M. Giordano and J. Butterworth (eds), *Community-based Water Law and Water Resource Management Reform in Developing Countries (Comprehensive Assessment of Water Management)*, vol 5 (International Water Management Institute, CABI Publishing, Wallingford, UK 2007).

failed to attract the required synergy from the other sectors, both at national and the local levels.[166]

Generally, decentralisation in the water sector is largely limited to the management of certain water sources, most especially those that are commonly used for domestic and small-scale agricultural water supply. The local institutions are mostly concerned with water supply issues than WRM in general.[167] The involvement of local governments and communities in the management of large water bodies remains minimal despite the fact that the degradation of those bodies substantially follows by local activities. We also see that the effective participation of local governments and communities is further constrained by the fact that several of the structures for decentralised WRM remain under central government control. For example, the Regional Water Offices and Catchment Area Advisory Committees (CAACs) established under Kenya's Water Act are part of the central Water Resources Authority, which constitutes and pays them. [168] Central government control in some cases is exercised over community level organisations. In Uganda, although it is the responsibility of local government to organise the formation of water user groups and associations,[169] these local institutions are required to operate under the direction of the country's Director of Water Development. [170]

The centralist approach to WRM has not only stifled the active engagement of local government and communities,[171] but also undermined the importance of the informal structures in the management of local water resources. The suppression of

[166] See Republic of Uganda, Water Resources Management (2002) op. cit., n. 163, s. 4.2 at pgs. 9-10.
[167] Christopher Huggins, *Rural Water Tenure in East Africa: A comparative Study of Legal Regimes and Community Responses to Changing Tenure Patterns in Tanzania and Kenya* (African Centre for Technology Studies, Nairobi, Kenya 2002)
[168] Water Act 2002, s. 16.
[169] Although the main functions of the user groups and associations concern water supply management, they are also required to be involved in managing the sanitation aspects of the water sources. Water Act 1997, ss. 50-52.
[170] Water Act 1997, ss. 50-52.
[171] In the case of Kenya, for example, see Mumma (2007) op. cit., n. 165.

informal institutions in favour of new formal structures has undermined the strengths of the former, despite the fact that many rural communities have limited appreciation and access to the state-based systems.[172] Because water is a basic but scarce resource in the region, many local communities have for long operated informal water management systems, some of which continue to co-exist alongside the formal systems.[173] The strength of these informal systems lies in the fact that they are constituted and operated in response to local demands and realities.

State centralism in WRM has also stifled the need for coordination among the various potential players at the local levels. Since the informal systems operate within small boundaries, they are often faced with the problem of institutional coordination,[174] especially in the management of shared water resources. A similar challenge is, however, also being experienced within the formal structures. In Tanzania, for example, there is a duplication of effort and, at times, a confusion of roles between the new Water User Associations established under the Water Policy of 2002 and the Water Committees established under the village system.[175] In many cases, the community and local government water committees and offices continue to operate in a disjointed manner, without clear links with WRM, which is largely a preserve of the centre.[176] It is for such reasons that local government becomes important in providing a platform for the coordination within and among the formal and informal structures.

As can be seen, despite the legal and institutional changes that they introduce, East Africa's water laws and regulatory frameworks still maintain highly centrist approaches in water WRM. These approaches fall short of effectively tapping into the

[172] ibid. at pgs. 163 -164.
[173] See Charles S. Sokile, Willy Mwaruvanda and Barbara Van Koppen, 'Integrated Water Resource Management in Tanzania: Interface Between Formal and Informal Institutions' (International Workshop on African Water Laws: Plural Legislative Frameworks for Rural Management in Africa, Johannesburg, South Africa, 26-28 January 2005); Mumma (2007) op. cit., n. 165 at pgs.168-169.
[174] ibid.
[175] ibid. at p. 7.
[176] For the case of Tanzania and Kenya, for example, see Huggins (2002) op. cit., n. 167, at pgs. 21-28

organisational structures and values of the already existing informal and formal structures for water resource management at the grass root level. Instead, they seek to establish new parallel structures, whose values and mode of operation may not be easily appreciated at the local levels. Furthermore, the new laws also largely fail to substantially extend the local government functions and powers beyond the traditional roles of water supply to effectively encompass WRM.

Wildlife Resources Management Policies and Laws

Mainly because of its economic importance, the wildlife sector, since colonial times, has been of significant interest to the central governments. As seen in Chapter Three, however, the well-being of the wildlife resources continues to be threatened by various socio-economic pressures. As was also seen in Chapters Six and Seven, the threat partially accrues from the historical problem of state centrism, which has often blocked local participation in wildlife management. The discussion that follows seeks to ascertain the extent to which this problem has been addressed under the ensuing wildlife polices and laws.

As seen in the discussion in Part III, wildlife management in East Africa was, during the colonial and early post-colonial eras, a central government monopoly enforced through a mixture of conservationist and exploitative approaches. As such, local government and community participation in wildlife management has not only been minimal but also contentious. Basically, the contention has always accrued from the dissatisfaction of the local communities over their competing interests with the wildlife, especially over land. The local communities have always been restricted from benefiting from the wildlife resources as a source of food, income and livelihood in general. These two issues of 'importance' and 'competing interest' largely explain the core philosophies that have consistently reigned through the successive wildlife management regimes: conservationism and centralism.

With the exception of Uganda, wildlife management in East Africa is governed under relatively old laws.[177] The management regimes have continued, nonetheless, to be modified through: policy and administrative measures; other regulatory frameworks and sector laws; and, also international agreements.[178] Since the mid-1990s there have been efforts in each country to review the wildlife policies, with a view of re-aligning them with the pertaining local and global concerns that relate to wildlife management. In that regard, the reforms attempt to address several of the issues that have persistently contributed to the conflicts in wildlife management. This should not imply, however, that all the recent changes have been free of conflict. For instance, while acting under intense donor pressure, Uganda gazetted some of its large forests as strict nature conservation parks,[179] a decision that has been challenged by various conflicting interests at the local level.[180]

The current Wildlife Policies present a rather mixed position on the involvement of local government in wildlife management. Kenya's Wildlife Policy observes that the protected wildlife resources entrusted with local governments have been managed poorly, because conservation interests have often been comprised by the revenue generation potential of these resources.[181] Nonetheless, the policy also observes that the centralisation of wildlife management and conservation has contributed to

[177] Uganda's current wildlife law, The Wildlife Act (Cap. 200), was enacted in 1996, while those of Kenya and Tanzania were enacted in 1976 and 1974, respectively.
[178] Several regulations have, for instance, been adopted for the purpose of re-aligning the wildlife laws with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, to which the three East African countries are party. From the international perspective, all the East African countries are party. CITES which came into force in 1975 has particularly been instrumental in influencing the regulatory frameworks that concern the listing of endangered species and trade in wildlife and its products.
[179] In Uganda, for example, Kibaale, Mt. Elgon, Mgahinga and Bwindi impenetrable forests, were at the insistence of the United States Agency for International Development(USAID) transformed into nature conservation National Parks, in 1991.
[180] Jesse C. Ribot, Arun Agrawal and Anne Larson, 'Recentralisation while Decentralising: How National Governments Reappropriate Forest Resources' (2006) 34 World Development 1864, 1869; Kauzya John-Mary, *Political Decentralization in Africa: Experiences of Uganda, Rwanda and South Africa,* (Department of Economic and Social Affairs, United Nations 2007).
[181] See Government of Kenya, *Wildlife Policy (Final Draft - 17 April 2007)* (National Wildlife Policy Steering Committee and Secretariat 2007), s. 5.2.4.

several of the challenges being faced within the sector. Given this, the policy states that:

> "…wildlife conservation will be decentralised to the lowest level in order to empower communities and other stakeholders to participate effectively in the conservation planning, implementation and decision-making processes."[182]

Although this quotation refers to only conservation and not management, the commitment it presents fits well in guiding principle 3.3.1(i) of the same Policy, which requires wildlife resources to be managed and conserved in accordance to the principle of subsidiarity.

To some degree, Uganda's Wildlife Policy appreciates the need for increased local government participation in wildlife management. It thus states that:

> "Although most wildlife protected areas will remain under national management, this in no way lessens Government and UWA's [Uganda Wildlife Authority] obligation to work closely with district authorities and communities in the management of these areas. Approaches needing to be developed include collaborative management arrangements and, in some cases, the actual transfer of management to district authority."[183]

While maintaining the centralist spirit, the policy re-affirms that the management of National Parks and the core Wildlife Reserves remain the responsibility of central government.[184] The Policy is more equivocal as to the roles and level of involvement of local government in wildlife management. Although it introduces a few new dimensions in regard to the role of local governments in wildlife management, the

[182] ibid. s. 10.2.2.
[183] The Republic of Uganda, *The Uganda Wildlife Policy 1999 (Updated version, 2004)* (Ministry of Tourism, Trade, and Industry, Kampala 2004), s. 2.3.
[184] ibid.

policy appears to be particularly focussed on the nominal functions and services devolved under the Local Governments Act 1995.[185] Tanzania's Wildlife Policy is not much different on the specific and direct involvement of the local authorities in managing the country's vast wildlife resources.[186]

Despite the rhetoric on local government, the wildlife policies generally promote centrally controlled, stand-alone Community Based Organisations (CBOs) as the main platform for decentralised wildlife management.[187] Generally, the integration of local government remains minimal in wildlife management. Aside from, some isolated cases such as the Mara Game Reserve, which remains under the control of *Narok* County Council, no such arrangement has been brought about under the current wildlife management regimes.[188] As the transfer of ownership and management rights of this game reserve to the county council was in response to political pressure, such a case is not a clear reflection of the then government policy on wildlife management.

With regard to the role of local government, the wildlife laws are not significantly different to the wildlife policies. Although the wildlife laws have been recently reviewed, they largely remain centralist in approach. While upholding the 'gazette and protect' approach, these laws classify the wildlife areas as the basis against which wildlife use and management rights are allocated. Broadly, there are two classifications of the Wildlife Resource Areas. The first consists of National Parks and Game or National Reserves that are centrally managed by 'autonomous' central

[185] See Second Schedule of the Local Governments Act 1997, Cap. 243.
[186] See, The United Republic of Tanzania, *Wildlife Policy 1998* (Ministry of Natural Resources and Tourism, Dar es Salaam 1998).
[187] Wildlife Policy 1998, s. 3.4 at p. 27; See also, s. 4.0 of the policy.
[188] See discussion in Chapter. See also, L. Talbot and P. Olindon, 'The Maasai Mara and Amboseli Reserves' in Agnes K (ed), *Living with Wildlife; Wildlife Resource Management with Local Participation in Africa* (African Technical Department Series: Technical Paper No. 130, World Bank, Washington DC 1990) 69-71.

government agencies - the national wildlife authorities.[189] The second consists of Wildlife Areas (WA) that can be managed or sustainably utilised by either the local governments or communities or individual landowners or in either combination.[190] Because of the rigid nature of the classification system, the roles and stake of the local governments are confined to particular WAs. As such, their role and stake in the socio-economically and ecologically rich WAs remain nominal. In an attempt to address that gap Uganda's new wildlife law provides for the establishment of Local Government Wildlife Committees (LGWC), where district council so desires.[191] However, other than making proposals and commenting on wildlife use right applications,[192] the LGWCs are essentially advisory bodies with little stake in the management and utilisation of the wildlife resources. Moreover, although, these committees are required to submit their views to the Wildlife Board of Trustees for consideration, the law that establishes them[193] falls short of providing a mechanism capable of guaranteeing the incorporation of local interests into the final decisions.

That aside, central government presence and influence in such local structures undermines the essence of diversifying the decision-making base through decentralised management. In Kenya, for instance, the committees established at district level to handle compensation in lieu of injury, death and loss caused by wildlife, are appointed by the central government, whose staff are the majority on these committees.[194]

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[189] See Ngorongoro Conservation Area Ordinance 1959, Cap. 413 (Tanganyika), Wildlife Conservation Act 1974 (Tanzania); Wildlife Act, (Cap 200) (Uganda) ss. 4-5; Wildlife (Conservation and Management) Act 1976 (Kenya). Game Reserves in Tanzania are, however, directly managed by the Ministry of Natural Resources and Tourism.

[190] In Uganda, this classification includes wildlife sanctuaries and use right areas; while in Kenya it includes community sanctuaries, local game reserves and private conservancies; and in Tanzania it includes game controlled and partial game reserves. It can, however, be noted this category consists of Wildlife Areas that are, by far, less endowed than those in the first category.

[191] Wildlife Act 1996, (Cap. 200) (Uganda), s. 12.

[192] ibid., ss. 12, 13 (4), 31 and 32.

[193] Wildlife Act 1996.

[194] See, for instance, Kenya's Wildlife (Conservation and Management) Act 1976, s. 62 (2), on the appointment of District Wildlife Committees.

It is understood that there are legitimate reasons why certain WAs or wildlife resources should be centrally managed. Wildlife management may, for instance, require highly specialised expertise and equipment that may not be easily acquirable by local governments or communities. Due to their vastness, many of the WAs transcend various local boundaries and, as such it is difficult or even irrational for such WAs to be managed by fragmented units. Nonetheless, much as the need for centralised coordination in wildlife management remains abundantly clear, it is pertinent for the stake and participation of the local governments to be stepped up in light of all classifications of WAs within their respective jurisdictions. Most importantly, the efforts of allocating management and user rights should also be accompanied by equitable sharing of the accruing benefits. Wildlife being a major foreign exchange earner throughout East Africa,[195] to equitably share the accruing benefits could possibly be a means of enticing the local governments into attaching higher value to wildlife resources, and as such be more responsive to proper wildlife management.

Forestry Policies and Laws

Although it has occurred intermittently, decentralisation is not a new concept in East Africa's forestry management regimes. As seen in Part III, attempts have been made, since colonial times, to involve local stakeholders such as local governments, traditional cultural institutions and communities in forestry management.[196] The greatest percentage of forest cover, however, has always been centrally managed and the devolved forestry management functions and powers have also always been significantly encapsulated within highly centralised management systems. The role of local institutions has often been limited to the enforcement of centrally enacted laws that barely provided for local interests. As was also seen, increase in the degradation of the forestry resources has often been exacerbated by the lack of meaningful

[195] See discussion in Chapter Three on wildlife endowment and its importance.

[196] See also, Steve A. Nsita, 'Decentralisation and Forest Management in Uganda' The Intercessional Country-Led Initiative on Decentralisation, Centre for International Forestry Research available at <http://www.cifor.cgiar.org/publications/pdf_files/interlaken/Steve_Nsita.pdf> accessed 2 June 2008.

participation of the local communities in the management of the forestry resources and sharing of the accruing benefits. It is against this background that the following discussion examines the current forestry policies and laws with a view to ascertaining the extent to which they incorporate the concept of local government.

Since the 1990s, forestry management has been among the priority areas for reform in East Africa.[197] As with other recent reforms in the natural resources sector, the emerging forestry management regimes seek to restructure the institutional frameworks for forestry management, with due cognisance of the need for local government and community participation. The desire for such a shift in management approach is reasonably captured in the new national policies on forestry. Tanzania's Forests Policy of 1999 seeks to: strengthen the management local government capacity; establish mechanisms for local-centre coordination in forestry management; and also encourage sustainable direct and indirect use of forests by local governments.[198] Although Kenya and Uganda's forestry policies highlight the capacity challenges of local governments in forestry management[199] they, nonetheless, recognise their importance in protecting the forestry resources. It because of such a nexus that the policies call for improved centre-local synergy.[200]

In line with the recent policy shift, the new forest laws establish management structures that are largely based on the new dimensions in the classification of forests. The major classifications include: national or central or state; local or district; community or village; and private forests. Additionally are the forests that form part

[197] The process for reform in the forestry sector was significantly boosted by the adoption of the National Forestry Policies.Tanzania and Uganda adopted their national forestry polices, in 1999 and 2001, respectively. Although it first adopted a forestry master plan, in 1994, Kenya later adopted a forestry policy in 2007.

[198] See The United Republic of Tanzania, *National Forest Policy* (URT, Dar es Salaam 1998), s. 4.4.4 (Policy Statement 30).

[199] Government of Kenya, *Sessional Paper on Forestry Policy* (Sessional Paper No. 1 of 2007, GoK 2007) s. 1.6; The Republic of Uganda, *The Uganda Forestry Policy* (Ministry of Water, Lands and Environment, Kampala 2001), s.1.2.11.

[200] Forestry Policy 2007 (Pending adoption and bound to replace Sessional Paper No. 1 of 1968), s. 1.6; See also, The Uganda Forestry Policy (2001), s. 1.2.11.

of the Wildlife Areas, and these are commonly managed by or in conjunction with the wildlife management authorities. The nomenclature used in distinguishing the classification forests usually corresponds to the original holder of the management and, in certain cases, ownership rights.[201] This system of rights allocation has tended, at times, however, to be highly rigid. While there are provisions through which it can be decided otherwise, it often follows that the management of the large and major forests[202] is a central government responsibility,[203] thus limiting local government management rights to the smaller or minor forests. As such, the participation of local governments is greatly inhibited by the isolating nature of the classification approach, which opens-up at one end and closes-in at the other.[204] The rigidity in the allocation of management rights means that the cooperation and coordination between the national and decentralised forestry management frameworks is extremely constrained. Generally, the rigidity in the management rights' allocation criterion falls short of recognising the fact that, for ecological and socio-economic reasons, local governments and communities also have a high interest and stake in the management and utilisation of the large and major forests within their areas.[205]

While the forestry laws have various provisions through which local government can be involved in the management of the large forests, the invocation of such opportunities is often subject to the discretionary authority entrusted with central government. Participation of local governments is further compounded by the fact

[201] Under this method, resources management or ownership rights are determined and distributed in accordance to the classification of resources. For example, the management of forests classified as 'local' are vested in the local governments, while the 'central' or 'state' forests are a responsibility of the central government or its agency.

[202] In Uganda, for instance, 192 LFRs totalling about 5,000 hectares were as of 2008 shared among 80 District Councils. The central government, on the other hand, managed 542 CFRs totalling 1,455,130 ha. See Nsita 'Decentralisation and Forest Management in Uganda', op. cit., n. 196.

[203] That is the National Forestry Authority in Uganda, the Kenya Forestry Services in Kenya and for Tanzania, the Forestry and Beekeeping Division of the Natural Resources and Tourism Ministry.

[204] See, for instance, the findings in F. Muhereza , *Commerce, Kings and Local Government in Uganda: Decentralising Natural Resources to Consolidate the Central State* (Environmental Governance in Africa Working Paper Series No. 8, World Resources Institute, Washington, D C. 2003).

[205] For an area to be gazetted as a local forest in Uganda, for example, it should not exceed one hundred hectares. See the Forest Reserve (Declaration) Order 1998, S.I No. 63 of 1998 (Uganda).

that central government presence and influence remains prominent among the decentralised structures. On the other hand, decentralised forestry management is increasingly being perceived and embraced with a focus on privatisation and community based partnerships. Generally, as we shall shortly see, the inhibition of local government participation in the management of large forests is largely a legally founded issue.

In Uganda, the Central Forests Reserves (CFRs) are the responsibility of the central government managed by an 'autonomous' body, the National Forestry Authority (NFA). While the NFA may**,** in consultation with the respective local government(s), establish a Local Forestry Committee (LFC) for any given Forest Management Area (FMA), the chairperson of the committee is appointed by the NFA.[206] More so, the basic function of the LFCs is to advise the NFA, which is by no means bound by such advice nor is it obliged to consult with the local governments on issues that concern the FMAs under which they fall.[207] In other words, much as it is acceptable for local governments to give an opinion on the management and utilisation of any CFR within their jurisdiction, they are not part of the final decision.

The other method through which local governments can be involved in the management of CFRs is also rooted within the discretionary power of the central government. Uganda's Forests and Tree Planting Act 2003 provides for the declaration of joint management forest reserves whose management may be shared between two or more lead agencies.[208] The joint management provision, which is also applicable to Local Forests Reserves (LFRs), is important in fostering inter local government cooperation in the management of shared LFRs. Although this provision

[206] The National Forestry and Tree Planting Act 2003 (Uganda) s. 63.
[207] ibid., ss. 63-64.
[208] ibid., s. 6 (2) (c). According to s. 3 of the same Act, a Lead Agency may mean a person, Ministry, Government Department, Local Government Council or Administrative Unit, a Parastatal, Agency or person in whom functions related to the management of forests, trees or forest produce is vested.

has not been largely invoked,[209] it provides local governments with the opportunity to co-manage CFRs with the central government, but this holds only in as far as the latter is willing and ready to make such declarations.[210] The other provision, which is collaborative forest management,[211] is open to only forest-user groups and not the local governments.[212] The Act also provides for public participation in decision making,[213] but this is rarely done as a routine function.[214]

Under Kenya's Forest Act 2005, the allocation of forestry management and use rights is also based on the classification of forests. As in Uganda, the Act has provisions on the involvement of other parties in the management of the large forests which are under the control of central government. First, the Act attempts to decentralise the management of forestry through the establishment of sub-national Forest Conservancy Areas (FCAs) and Forest Conservation Committees (FCCs) for each FCA.[215] However, the FCCs whose chairpersons are appointed by the board of Kenya Forestry Services (KFS) have no representation of local government.[216] This arrangement defeats the requirement that the FCCs are, *inter alia*,[217] required to present to the Board local interests in forestry management and utilisation.[218] That aside, it is clearly stated that the FCCs are established to advise the KFS Board on all

[209] Interview with Senior Forestry Officer, National Forestry Authority (Name withheld on request) (Kampala, Uganda, 10 April 2007).
[210] National Forestry and Tree Planting Act 2003, s. 6 (2) (c).
[211] Collaborative Forest Management is in accordance to the National Forestry and Tree Planting Act 2003, s. 3 defined as "a mutually beneficial arrangement in which a forest user group and a responsible body share roles, responsibilities and benefits in a forest reserve or part of it."
[212] The National Forestry and Tree Planting Act 2003, s. 15.
[213] For example s. 49 (2) of the National Forestry and Tree Planting Act 2003 requires the preparation of the National Forest Plan to seek and take into account views of persons and organisations involved in forestry in the public and private sector, and in particular the views of persons whose livelihoods are dependent on the forest sector.
[214] Interview with Senior Forestry Officer, National Forestry Authority (Name withheld on request) (Kampala, Uganda, 10 April 2007).
[215] The Forests Act 2005 (Kenya), s. 12 (2).
[216] ibid.
[217] Other functions of the Forest Conservation Committees include: monitoring implementation of the Forestry Act and other related regulations; regulation of forestry management; reviewing and recommending forestry licenses; and recommending new forest creations. Forests Act 2005, s. 12 (1-3).
[218] Forests Act 2005, s. 12 (1-3).

matters relating to management and conservation of forests in FCA.[219] In effect, the FCCs appear to be less of local interest advocacy bodies than administrative units of the KFS, which determines and pays their allowances.[220] As the rules and regulations governing their procedures and functions are made by the minister responsible for forestry,[221] the autonomy of the FCCs is also potentially susceptible to central government influence.

The second opportunity for the involvement of local government in the management and utilisation of state forests lies in the provisions on joint and community management agreements.[222] As the case is in Uganda, however, invoking this provision is at the discretion of central government. While various management agreements have been signed, [223] the trend so far tends to suggest that the Forestry Service is more comfortable dealing with community associations than with local governments.[224] This probably explains why the provisions on the participation of Community Forest Associations (CFA) in the State Forests are arranged in a manner that is void of any intermediary roles by the local governments.[225] Thirdly, the Act embraces the procedural right of public participation, which is expected to present opportunities for the participation of other parties. Despite the elaborate corresponding procedure laid out in the Third Schedule, however, the Act's provisions on the issues that require public consultation are few and limited to none core areas. In the preparation and adoption of Forests Management Plans, for

[219] ibid., s. 12
[220] ibid., s. 12 (6)
[221] ibid., ss. 12 (6) and (7).
[222] Forests Act 2005, ss. 35 and 45.
[223] For example, see the various partnerships uploaded at <http://www.kfs.go.ke/index.html>, accessed 21 September 2008.
[224] As the case is in the management of other resources, community associations are preferred because, unlike local authorities, they are easily controlled and less organised when it comes to challenging central government decisions. Interview with Senior Forestry Officer, National Forestry Authority (Name withheld on request) (Kampala, Uganda, 10 April 2007).
[225] See Forests Act 2005, Part IV, ss. 46 – 49.

example, the Forestry Service is under no obligation to consult any party other than the FCCs.[226]

Tanzania's allocation of forest management, ownership and access rights is also founded in the classification approach. Other than the village forests which are owned and managed by the village councils, the allocation of forestry management rights for the national and local forest reserves is decided by the Director of Forestry, and approved by the minister responsible for forestry.[227] Unless decided in accordance to that provision, however, the management of local forests is automatically vested in the local governments under which they fall.[228] Where the management of forests is vested in the local governments, their management authority is partly subject to central government approval. The local governments have to seek, for instance, the Minister's approval prior to considering any application for concessions on forest land in the excess of two hundred hectares.[229] Further, although the Forests Act provides for joint forestry management and exploitation agreements, the local authorities are conspicuously not among the listed eligible parties with whom the centre can enter into agreement.[230]

The Act also provides for elaborate public consultations, some of which present the opportunity for other parties to be involved in the decision-making processes that concern the management of CFRs within their jurisdictions.[231] However, the participation of local governments in such consultations is not as prominently

[226] ibid. ss. 34 (1) and (5).
[227] The Forest Act 2002 (Tanzania) ss. 27, (1-2).
[228] It may be noted, however, that despite such an open provision on the allocation of management functions, all the National Forests Reserves (NFRs) have continued to be controlled by the central government.
[229] Forest Act 2002, s. 20 (3) (a).
[230] ibid., s. 16 (1).
[231] See The Forest Act 2002, s. 13; Community participation is, however, limited to local communities who obtain benefits from the forest reserve; See Forest Act 2002, s. 11 (3) (d) as cross-referenced by s. 13 (1) (d)

pronounced as that of the village councils.[232] It is important to recall at this point that, despite its ideological shift from socialism, Tanzania has maintained the village councils as the basic units for local planning and service delivery. However, now that these village councils no longer carry the corporate status, the higher local governments, which are legally accountable, should instead be entrusted with more defined powers and functions. This could possibly bring them to the forefront of natural resources management, especially in terms of overseeing the activities of the village councils. That said, while there is emphasis on Community Based Forests Management in Tanzania, such schemes are mainly focussed on village forests,[233] and thus leaving out the ecologically important and socio-economically endowed National Forests, which are managed by the Forestry and Beekeeping Division of the Ministry of Natural Resources and Tourism.

Conclusion

As has been seen, efforts towards the decentralisation of natural resource management in East Africa have been particularly boosted by recent reforms in the natural resources and local government sectors. These reforms present new dimensions that bring opportunities to address the historical problem of state-centralism in ENRM. They fall short, however, of presenting a robust institutional arrangement capable of supporting the effective participation of local government as a key downward link in a multi-level government framework. Although some policies tend to clearly spell out the importance of local government in ENRM, this is generally not well captured in laws and practice. Instead, we see continued central government influence over the local institutions and their decision-making processes. In addition to the generally centralised sectors such as that of fisheries and water

[232] The Village Councils are, for instance, required to be involved in the preparation of the national forestry management plans; declaration and management of local and national forest reserves; and in the establishment and management of village land forest reserves. See The Forest Act 2002, ss. 14, 23, 33 and 39. See also, objective 3 (b) and s. 16 (1-2) on Joint Management Agreements; Sec 80 (b) on Funding; and s. 102 (1) (a) on publication of information.

[233] See K. F. S. Hamza and E. O Kimwer., *Tanzania's Forest Policy and Its Practical Achievements with Respect to Community Based Forest Management* (Finnish Forest Research Institute, Mitmiombo Working Paper No. 50: 24-33 2007) pgs. 29 and 30.

resources management, central government maintains reasonable control and influence over the decentralised resources such as the local forests and wildlife management areas.

While there has been a remarkable increase in providing for the establishment of local bodies mandated with ENRM issues, it has been seen that most of these bodies are insufficiently empowered, aside from the fact that many of them are either redundant or not yet in place. Notwithstanding this, some of the institutional arrangements for decentralised ENRM emphasize the active participation of local institutions that are, unlike local governments, illegitimate and variously incapacitated. Generally, the frameworks for decentralised ENRM continue to be inhibited by several factors, many of these being policy oriented or legally founded with others accruing from implementation challenges. Drawing back to our earlier theoretical discussion at the beginning of this Chapter, we see that the recent effort towards the decentralisation of ENRM among the three East African countries is facing disjuncture from conception to implementation. Therefore, in arguing for the need of local government in ENRM, we see that salvaging the escalating level of environmental degradation in the Lake Victoria region not only depends on the existence of the local government system but also on its firm mandate and capacity to effectively engage in ENRM, as a component in the wider institutional arrangements of multi-level government.

CHAPTER NINE

The Challenges of Local Government in Decentralised Natural Resource Management

Chapter Four argued that environmental degradation in the Lake Victoria region is in part related to the lack of meaningful effective multi-level government. It has been seen in the previous Chapter that the paradigm of state-centrism continues to be maintained in the current ENRM regime. However, we also saw that an attempt has been made to decentralise various aspects on ENRM, some of which involve the participation of local governments. Building on the discussion in the previous Chapter, this Chapter discusses the operational challenges faced by local government in performing and exercising the functions and powers devolved to them. The discussion in this Chapter is premised on the argument that, in the same manner as other devolved powers and responsibilities, proper natural resources management does not only concern or depend on the legal and institutional frameworks for ENRM, but also the framework concerning the general functioning of local government as a public service delivery mechanism.

While this Chapter does not seek to undermine the fact that several ENRM powers and functions have been devolved to local governments, its purpose is two-fold. First is to demonstrate that several of the devolved powers and functions contain various inhibitions that have, at times, rendered them redundant. The second purpose is to demonstrate that the strengthening of decentralised ENRM equally requires the strengthening of the general decentralisation framework, in both design and practice. The Chapter is subdivided into two sections. The first section discusses the shortfalls in the frameworks for local government and how this is likely to impact on the decentralisation of natural resource management. Specific focus is in that regard placed on the local government powers and functions. The second section examines

some of the major cross-cutting issues that concern the general functioning of decentralised natural resource management. We explore the issue of local government capacity in terms of the legislative, administrative, financial arrangements.

Shortfalls in the Frameworks for Local Government and its Impact on the Decentralisation of Natural Resources Management

This section discusses the challenges that relate to the nature and manner in which ENRM is devolved to local governments. Since local governments basically derived their mandate from the general framework for local government, we first examine the arrangements through which local government powers and functions are defined. In doing so, we attempt to answer two crucial questions: Do local governments have a major input in the decisions that concern which powers and functions are devolved to them? Also, are there safety measures through which the devolved powers and functions can be protected from being unfairly recalled? We shall then explore the devolved powers and functions with a view of pointing out the issues that inhibit their implementation.

Security of the Devolved Powers and Functions

Since, security of power and functions is a motivating factor for performance, it is highly probable that local governments perform better once assured that their actions would not attract recall of any of their functions and powers by central government. As was seen in Part III, the de-motivation and eventual collapse of local government owed much to the fact that authority over the devolved powers and functions was solely a preserve of the central government. As we shall see shortly, however, the processes and instruments through which local government powers and functions are devolved remain underpinned with several claw-backs that variably impact on the ability of the local governments to perform and exercise their functions and power.

In all the three countries, local government powers and functions are scattered in various statutes and administrative instruments. While some of them are directly conferred by the principal local government laws, a significant part of the local government powers and functions is contained in subsidiary laws and administrative instruments, whose legislative origins are the preserve of the Executive. In some cases, however, the Executive is entrusted with excessive powers that may allow for the alteration of the schedule of devolved powers and functions, if they so wish. In Tanzania, for example, while the principal local government laws require central government to facilitate local authorities to perform and exercise their functions and powers in a manner that gives due recognition to the autonomy of the local governments,[1] they, on the other hand, empower the Executive with the discretionary powers to regularly review the devolved powers and functions.[2] Although the principal local government laws were amended to clarify on the distribution of functions and services between the central and local governments, this did not ameliorate the problem. For instance, while the amended Section 111A (3) of the Local Government (District Authorities) Act 1982, states that:

> "Nothing in this Act shall be construed as prohibiting local – government authorities from performing any function which is not the exclusive responsibility of the central government or any other local government authority."

Sub-section (4) of the same Section goes ahead to provide that:

> "For the purposes of subsection (3), the Minister may from time to time by Order published in the *Gazette,* specify for local government authorities any

[1] Local Government (District Authorities) Act 1982 (As amended) (Tanzania), Part VIIA and Local Government (Urban Authorities) Act 1982 (As amended) (Tanzania), s. 54 A.
[2] See, for example, Local Government (District Authorities) Act 1982, ss. 113 (2), 114 (1), 129, 147 and 148. See also, Local Government (Urban Authorities) Act 1982, ss.56, 57 and 71-76.

matters which are the exclusive responsibility of the central government and those of various levels of the local government authorities."[3]

The clear implication here is that the central government is at liberty to instantly alter the schedule of devolved functions and powers, and more so, without the obligation to consult with any affected party. Although such a provision can certainly be invoked in the interest of the local governments, we have to remain cognisant of the fact that because of the frequent centre-local conflicts that arise over natural resources management, such provisions may unequivocally benefit the centre. Under such arrangements, for instance, the Executive in Uganda exercised its legislative powers and, without consultation, amended the Local Governments (Resistance Councils) Act 1995, to effectively recentralise all forest areas of more than 100 hectares.[4]

As decentralisation takes root, conflicts between central and local governments are likely to increase. Since governments regulate the production and distribution of resources and wealth, it should not be surprising to find that a reasonable part of the central-local tension relates to natural resources. This may be more pronounced in a setting such as that of East Africa where natural resources are a driving force behind the national economies and local livelihoods. The likelihood of central governments using all legislative means at their disposal to arm-twist local governments over natural resource conflicts remains high. The worst scenario entails the dissolution of local government, and the following discussion explores the legal provisions on the dissolution of local governments, in each the three countries.

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[3] Local Government (District Authorities) Act 1982, ss. 111 A (3-4) and 168(c). See also, Local government (Urban Authorities) Act, ss. 54 (3) and (4).

[4] Amended by Local Governments (Resistance Councils) (Amendment of Second Schedule) (No. 2) Instrument of 1995. See also, Correspondence from Mr. E.D. Olet, Commissioner for Forestry, to all District Forest Officers dated, April 26, 1995, entitled Statutory Instrument 1995, No. 2; and The Forest Reserves (Declaration) Order of 1998 (Statutory Instrument No. 63) – done under the Forests Act 1964. This instrument gazetted by Statutory Instruments Supplement No. 23 of 11 September 1998 revoked the Forest Reserves (Declaration) Order of 1968, Statutory Instrument No. 176 of 1968.

Dissolution of Local Government: The Powers and Processes

In all the countries, the local government laws provide for the processes and circumstances under which a local government may be dissolved or its functions and powers temporarily or permanently passed over to another entity. It may be noted, however, that since such provisions are intended to hold public offices responsible for their inability to serve to expectations, they are neither peculiar to local government nor are they strange in the domain of public governance.[5] Aside from the punitive side, these provisions serve the purpose of enforcing accountability and responsiveness of the public offices. For purposes of ascertaining their vulnerability to abuse, however, we must review the procedures and powers that govern the processes concerning the dissolution of local governments or the denial of their exercise of their powers and functions.

In Tanzania and Kenya, the powers to dissolve any local government are entirely in the hands of the Executive, which manages the entire process from instituting the enquiries upon which their decisions may be based.[6] Uganda takes a rather more cautious approach, where the mandate of the Executive to dissolve a Local Council has to be sanctioned by the Parliament.[7] Certainly, concentrating dissolution powers in the Executive, without oversight of other arms of government, increases the probability of local government susceptibility to errant decisions that may even be personal in nature. Southwall *et al*, for instance, observe that Kenya's local government Ministers have often ferociously, in order to secure adherence to ministerial policy, or prosaically, in pursuance of political vendettas, deployed the

[5] The Constitutions, for example, provide for the removal of Presidents, censuring of Ministers, dissolution of the Cabinet or Parliament or re-calling individual members of Parliament. See the Constitution of the republic of Uganda1995, Arts. 96, 107 and 118; The Constitution of the People's Republic of Tanzania 1977 (as amended), Arts. 46A, 53A, and 90; and The Constitution of the republic of Kenya 1963, Arts. 12 and 59.

[6] Local government (District Authorities) Act 1982 s.169-173, and Local Governments (Urban Authorities) Act 1982, ss. 71 - 77; and Local Government Act 1977 (Cap. 265) (Kenya) , ss. 249-254.

[7] See Local Governments Act 1995 (Cap. 243) (Uganda), ss. 98-100.

weapon of dissolution that saw twelve local governments being dissolved between 1970 and 1992.[8]

Since environmental management and the sharing of benefits has often proved to be a trigger for conflict between central and local government, the unchecked handing of the powers from one arm of government to the other is not only potentially susceptible to abuse but also a disincentive in the effective implementation of local government functions and services. We have, however, seen that in all the three countries, devolution and withdraw of the local government powers and functions remain at the discretion of the central government.

Uncertainty in the Conditionally Devolved Powers and Functions

While most local government powers and functions are directly provided for in various instruments, others accrue from delegated responsibility, either upon initiation of the delegating authority or at the request of the local governments.[9] Often, the delegated powers and functions are conditional and, as such, the delegating authority usually retains substantial powers of control. As for the directly devolved functions and powers, they are either unconditional or subject to satisfaction of certain conditions or criterion.[10] While conditional devolution may legitimately be necessary and important, it may also entrench limitations that undermine the core purpose of devolution. At times, conditional devolution falls short of elaborating on the circumstances or extent to which the conditionality should apply, for instance, by providing a time schedule. Uganda's Local Government Act 1997, for example, devolves certain functions and services to the district councils subject to Sections 96 and 97 of the Local Governments Act 1997 and Article 176 (2) of the Constitution, whose subsection (a) states that:

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[8] Roger Southall and Godfrey Wood, 'Local Governments and the Return to Multi-Partyism in Kenya' (1996) 95 African Affairs 501, 508.

[9] See, for example, Local Governments Act 1997, ss. 31 and 32.

[10] See, for example, the Second Schedule to Uganda's Local Government Act 1997; See also, ss.38 and 39 of the same Act, which provides for the local government legislative powers.

> "The following principles shall apply to the local government system; - (a) the system shall be such as to ensure that functions, powers and responsibilities are devolved and transferred from the Government to Local Government units in a coordinated manner;..."[11]

While the principle, as stated in Article 176 (2) (a), serves the good intentions of ensuring appropriate preparations for smooth transition, its open-endedness makes it susceptible to being used as a claw-back clause to withhold or unnecessarily delay functions, powers and responsibilities that are otherwise supposed to be devolved. In other words, any devolution affected by this principle can be indefinitely postponed if it is said to conflict with the 'coordinated manner' requirement. The Act also falls short of defining the limits within which such a requirement can be applied. Aside from lacking a transition time schedule, it provides no mechanism through which local governments could petition against any unnecessary withholding of the supposedly devolved functions, powers and responsibilities. That aside, the scope of the phrase 'coordinated manner' is certainly difficult to define, especially in determining who is or should be responsible for ensuring that any given power or function is transferred or devolved in a coordinated manner. As Ribot observes, decentralisation operates in a wider setting of struggles and relations,[12] in that the synergies for implementing it in a coordinated manner can easily be lost in a 'blame game', among sectors and at various levels of government. It is additionally worth mentioning that, due to lack of specified enabling mechanisms, the Higher Local Governments (HLGs), which are required to also devolve various functions and

[11] Constitution of the Republic of Uganda 1995, Art. 176 (2) (a).
[12] Jesse C. Ribot, *Waiting for Democracy: The politics of Choice in Natural Resources Decentralisation* (World Resources Institute, Washington, D.C 2004) 6.

services to the Lower Local Governments (LLGs),[13] have not done so, and this has resulted in various services and functions being left unattended.[14]

Ambiguity in the Devolution of Powers and Functions

The inability of a law to clearly define the terms it uses may certainly raise interpretational problems in its implementation. This is the case with certain laws that 'provide' for the decentralisation of environmental management. The text used in decentralising environmental management functions and powers is in some cases unclear. The word 'local' has been used by certain laws as a prefix to describe or identify certain devolved services and functions. According to Uganda's Local Governments Act 1997, for example, attempts to distinguish some of the decentralised functions and services has been by prefixing the word 'local' against activities such as hunting, fishing, land management and environment protection; or natural resources such as wetlands and water resources.[15] The word 'local' can, however, be understood from various perspectives. As from the geographical perspective it connotes whatever belongs to or exists in a particular place or places,[16] which in the case of local government implies within the boundaries of a given local government. On the other hand, it may be understood in context of a particularly defined cluster of things, activities or resources. Uganda's Fisheries Bill 2008, for example, defines 'local fishing' from the perception of fishing method and purpose. It defines local fishing as "artisanal fishing for domestic consumption".[17] Aside from such an isolated case, the word 'local' is generally not qualified as it is variously

[13] See Part 4 and 5 (B) of the Second Schedule to the Local Governments Act 1997.

[14] This point was confirmed in interviews with the Fisheries Officers of Mukono and Kalangala Districts (Entebbe, Uganda, 11 April 2007); and interview with Mercy the Senior Planner, Jinja Municipal Council (Jinja, Uganda, 12 April 2007).

[15] As per the Second Schedule of the Local Governments Act 1997, Part IV, Items, 3, 5, 6 and 21, the District Council are required to devolve local fishing and hunting, protection and maintenance of local water resources, wetlands and water sources to the Lower Local Governments. And as per Part 5 (b), Item 24 of the same Act, the City and Municipal Council are also required to devolve local land management to the Division Councils.

[16] Della Thompson (ed) *The Concise Oxford Dictionary of Current English* (Ninth edn, Clarendon Press, Oxford 1995).

[17] See section on definitions in Uganda's draft Fisheries Bill 2005 (August 2008 version).

mentioned by the Local Governments Act. As ENRM involves several parties, such ambiguity has made it difficult to clearly distinguish the devolved, retained and shared responsibilities. Much could be borrowed from the devolution of functions and services in the health sector, where other than using ambiguous clauses such as 'local hospital', the Act clearly states that district councils are responsible for "hospitals, other than hospitals providing referral and medical training."[18]

Aside from causing confusion, the failure of the local government laws to clearly define what is devolved leaves gaps that can easily manipulated by other laws to pursue sectoral objectives or lines of thinking that may not actually be in local government's interest. We, for example, see that much as the Local Governments Act Cap 243, decentralises the control of 'local fishing' it falls short in defining what it entails, and the Fisheries Bill 2008 comes in ten years later to state that:

> "'Local fishing' means fishing without a fishing vessel, where fish is caught solely for consumption by the person engaging in the fishing and his or her family and not for the sale or barter of the fish caught."[19]

Notwithstanding such limitations, the Bill further seeks the regulation, management and control of local fishing, to be overseen by the Minister responsible for fisheries.[20] However, considering the socio-economic importance of fisheries to the local governments and also, the objects of establishing the local government systems in Uganda, it is unlikely that the framers of the Act intended to use the phrase 'local fishing' with such a restrictive perspective. That would otherwise imply that the Act was intended to scale back on the powers and functions that were already being

[18] Local Governments Act 1997, Second Schedule, Part 2 (2).
[19] See section on definitions in Uganda's draft Fisheries Bill 2005 (August 2008 version).
[20] Fisheries Bill 2005(August 2008 version), Clause 52; This does not significantly differs from the earlier versions of the draft Bill that also sought to subject local fishing to restrictions imposed by the Uganda Fisheries Authority, irrespective of whether or not they are included under a Fisheries Management Strategy. See for instance, Clauses 86 and 145 (s) of the 2004 version of the Fisheries Bill 2005.

enjoyed by the local governments under the predecessor fisheries management regime. In fact, the highly restrictive definition of 'local fishing' is just one of the myriad clauses in the new Fisheries Bill that clearly reveal the intention to fully recentralise fisheries management.[21]

Unclear Local Government Mandate

Certain functions and services are devolved without clear mandate as to what is actually expected of the role of local government. In Uganda, local government status in the management of forests, wetlands, vermin control and entomology, which is part of the conditionally devolved services and activities, continues to be unclearly defined.[22] As a result there have been persistent conflicts over the ownership and management of these resources.[23] The Local Governments Act Cap 243, for example plainly states without specifying the scope of responsibility that "district councils are responsible for forests and wetlands."[24] While these resources are devolved subject to Article 176(2) of the Constitution[25] and Sections 96 and 97 of the Act,[26] none of them gives any indication as to role of local government in forestry and wetlands management. Interestingly, the Act, on the other hand, requires district councils to devolve to the lower local governments;

"...the provision and control of soil erosion and protection of local wetlands..."

And also,

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[21] See Fisheries Bill 2005(August 2008 version).
[22] Local Governments Act 1997, Second Schedule, Part 2, item 5 (b) and (l).
[23] Interview with Senior Forestry Officer, National Forestry Authority (Name withheld on request) (Kampala, Uganda, 10 April2007).
[24] Local Governments Act 1997, Second Schedule, Part 2 (5) (l).
[25] This Article sets out the Principles to be applied in Local Government. None of them, however, clearly relates to the distribution of responsibility between the local governments and other parties.
[26] These sections concern the mandate of the line Ministries in relation to Local Governments. Section 96, which is elaborated by Section 97 requires that;

> "Ministries shall inspect, monitor and, where necessary, offer technical advice, support, supervision and training within their respective sectors."

"...the taking of measures for the prohibition, restriction, prevention, regulation or abatement of grass, forest or bush fires..." [27]

It remains unclear, therefore, whether local government responsibility in the management of the environment and natural resources is confined to only these functions and services. As mentioned earlier such gaps are not only capable of causing conflicts in law and practice, but also tend to create loopholes that can easily be exploited by other laws to disfranchise various aspects of local government mandate.

Inconsistencies in the Law

Most of the management related inconsistencies within the environmental laws stem from conflicts of interest among parties and this is often compounded by insufficient or lack of inter-sectoral coordination in the drafting of laws. In terms of decentralised natural resources management, the linkage among the environment management, local government and the resource specific environmental laws is insufficient. Notwithstanding the fact that the environmental laws have been incrementally enacted over years, it is expected and provided for that the environmental management framework laws not only to provide a framework for other environmental laws or other related laws, but actually take precedence on matters that concern the environment, especially in the event of their conflict with other laws.[28] The obvious implication is that the applicable laws enacted after these framework laws are expected to be consistent with that law, while those enacted before are expected to be reviewed or repealed to the extent of their inconsistency with the framework laws. As shown in this and the previous Chapter, however, there

[27] Local Governments Act 1997, Second Schedule, Parts 4 (3) and (5).

[28] s.108 of the National Environment Act 1995, states that:

"Any law existing immediately before the coming into force of this Act relating to the environment shall have effect subject to such modifications as may be necessary to give effect to this Act; and where any such law conflicts with this Act, the provisions of this Act shall prevail."

Similarly provisions are found in section 148 of the EMCA, 1999 and section 232 of the EMA, 2004.

are several inconsistencies between the sectoral and the environment management framework laws. Similar inconsistencies are also observed in relation to the local government laws, which should ordinarily establish the framework for decentralisation. Unfortunately, most of the inconsistencies disadvantage local government, especially in circumstances where local government law is subordinated to other laws. For example, Tanzania's laws on local government tend to subject the performance and exercise for the devolved functions and powers to other written laws, irrespective of whether they were enacted later or in a manner inconsistent with the principles of the decentralisation framework.[29] Under such circumstances, it becomes difficult, for the local government laws to maintain their own ground rules or standards for local service delivery.

[29] See Local Government (District Authorities) Act 1982, s. 112 (2), 113 (2), 118 (2) (n), 131 (1), 141, 148 and 155; and Local Government (Urban Authorities) Act 1982, s. 53 (1), 54 (2), 66 (1), 79 and 80 (2).

The General Institutional Challenges for Local Government Performance

The success of decentralisation or local government, which we are particularly interested in, is defined by both the design of the framework under which it operates and the process and manner in which it is implemented. As was seen in previous Chapter, the process of decentralisation is potentially susceptible to various forms of disjuncture, whose cause often accrues out of competing interests. The effectiveness of local government is thus dependant on several stakeholders including: the central government that is often the overarching authority; the local governments; non-state actors; and the recipient communities. Similarly, the success of decentralised natural resource management requires a concerted synergy among the various stakeholders, some of which have distinctive roles to play. For such synergy to be meaningful and facilitated, however, each of the key stakeholders must have the requisite legitimacy, authority and capacity. The issues of legitimacy and authority have been discussed earlier in this Chapter and in the previous one. Therefore the focus is now on the issue of local government capacity in terms of legislative, administrative, financial, technical, and infrastructural capacity.

Legislative Powers of the Local Governments

Despite an increase in the number of measures being used in ENRM, legislation remains, by far, the most commonly applied measure in East Africa. That aside, several of the other measures such as financial instruments and Environmental Impact Assessment (EIA), which are increasing being introduced in ENRM, are as well founded and implemented within legislative frameworks. Whether primary or delegated, legislative powers are critical in enhancing the ability of any form of government to effectively perform and exercise the functions and powers bestowed unto it. Empowering local governments with legislative authority is, therefore, a requisite for decentralised environmental management. As we saw in Part III, however, the local government systems of the colonial and early post-colonial era largely lacked the legislative authority to enable them effectively participate in

natural resource management. We shall now review the current legal and institutional frameworks with a view of ascertaining the extent to which they have empowered local governments with legislative authority, especially in matters pertaining to ENRM.

Sources of Legislative Authority

While a local government legislative mandate is commonly derived from various laws,[30] the laws that establish local government usually provide for the broader framework through which such powers can be exercised. In addition to the local government laws in our context it is necessary to also explore some environmental laws.

Tanzania's principal Local Government Acts provide for the district and village councils and urban and township authorities to make by-laws designed to carry into effect the purposes of any of the functions conferred by or under the Acts or any other written law.[31] The district councils may, in addition, make by-laws designed to promote and secure the good rule and orderly government and foster and maintain the health, safety and well-being of the inhabitants of their areas of jurisdiction.[32] In Kenya, local governments have powers to make by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety, good rule and government, prevention and suppression of nuisances and generally the well-being of their inhabitants.[33] While in Uganda, district councils may make local ordinances and urban, sub-county, division or village councils may make by-laws that relate to their powers and functions, as conferred under the Local Governments Act (LGA),

[30] See, for instance, The Forest Act 2002 (Tanzania), s. 31; Water Act 2002, s. 145; See also, the policy positions in of Tanzania's National Fisheries Sector Policy and Strategy Statement 1997, s. 3.3.8 and Uganda's Fisheries Policy 1999 (revised edition of 2004), Section 4 (B) (a) at p. 20.

[31] See The Local Government (District Authorities) Act, 1982 and Local Government (Urban Authorities) Act 1982.

[32] See The Local Government (District Authorities) Act 1982, s. 148 (1), 155 (1) and 163; Local Government (Urban Authorities) Act 1982, s.79 and 80.

[33] Local Government Act 1977, s. 201 (1).

Cap 243 and other laws.[34] A district council may, in addition, delegate its legislative powers to another council, trust fund or secretariat formed under Section 8 of the LGA and Article 178[35] of the Constitution.[36] This provision is particularly important in the management of shared interests and resources such as the Lake Victoria region, which transcends across local government borders.

Generally, the local government laws provide that ordinances and by-laws made under them may apply to the whole geographical jurisdiction of the legislative authority or any part of it or to a particular section or group or to regulate different matters in respect of different parts of its jurisdiction. For their enforcement, the ordinances and by-laws may create offences and penalties or impose fees.[37] Despite such wide ambit, however, the exercise of legislative power by the local governments is embedded with several limitations. The limitations may perhaps assist us in understanding why the by-law making powers largely remain unutilised or employed in a less than optimal manner, in as far as natural resource management is concerned. The following section explores the legal foundations of these limitations.

The Requirement for Local Governments to Seek for Approval

In addition to being significantly limited, local government law making is subject to central government approval. In Tanzania the by-laws made by district councils and urban authorities are subject to approval by the Minister responsible for local government, while those of the township authorities and village councils are subject to approval by the district councils in which they are situated.[38] Township by-laws are

[34] Local Governments Act 1997, ss. 38 and 39.
[35] The Constitution was under, The Constitution (Amendment) (No.2) Act 2005, amended to provide for the creation of Regional Governments (RGs) as the highest political authority in the region. The RGs are to among others required to play political, legislative, executive, administrative and cultural functions. By time of writing of this thesis, the law implementing this amendment was not in place as required by the amendment.
[36] Local Government Act 1997, s. 38 (6).
[37] Local Governments Act 1997, ss. 40 and 41; Local Government (Urban Authorities) Act 1982, s. 88; , Local Government (District Authorities) Act 1982, s.152.
[38] Local Government (District Authorities) Act 1982 s. 150 (3), 156 (3) and 164 (1); Local Government (Urban Authorities) Act 1982, s.81 (3).

further submitted to the Regional Commissioner for final consent.[39] In Kenya, all by-laws have to be approved by the Minister responsible for local government.[40] In Uganda, the Local Governments Act cap.243 does not explicitly state whether district council ordinances require central government approval. For them to become law, however, local bills passed by the district councils must be approved by the central government. Through the minister responsible for local government, the Bills must be forwarded for certification by the Attorney General, whose advice forms a basis for the Minister's opinion on whether the local bill contravenes or derogates from the Constitution or other laws made by Parliament.[41] The Act, however, falls short of prescribing a dispute settlement mechanism where an impasse occurs between the submitting Council and the certifying authority, in case the former is not satisfied or contests the opinion of the latter. It is implied that the opinion of the Minister is incontestable. The requirement for approval or scrutiny of by-laws is not only found in local government laws. Tanzania's Forest Act 2002, for example, requires draft copies of forestry related by-laws to be submitted to the Director of Forests for recommendation.[42]

Approval of a higher authority may be necessary and important, especially in ensuring that by-laws are consistent with other laws and regulatory frameworks. It may serve the purpose of reinforcing the required capacities that may be insufficient or generally lacking in local government. This requirement may at the same time, however, create an opening through which local government power can be eroded. Such checks may be intended or employed to ensure central government's ultimate control over local government, irrespective of the devolved legislative powers. The approval requirement could also become a handy tool for use by the central government in cases of conflict of interest with local government. Notwithstanding

[39] Local Government (District Authorities) Act 1982, ss. 156 (3) and (4).
[40] Local Governments Act 1997, s. 202 and 204.
[41] A similar procedure applies to the Lower Local Governments, which also have to seek the opinion of the next higher level Council, whose opinion may as well be subjected to that of the Minister. See Local Governments Act 1997, ss. 38 and 39.
[42] Forest Act 2002 (Tanzania), ss. 31 and 37.

the benefits of approval or consent from higher authorities, the complications and delays associated with such requirements may serve as a disincentive to by-law making. By way of example, it took over two years for a district council in Uganda to get central government certification of its by-law on environmental management.[43] In another example, a person who had, in Tanzania, been sued by a village council for burning and clearing part of a forest was acquitted because the village by-law had not been approved by the Prime Minister's Office.[44] It is worth noting that unnecessarily slow by-law making processes may particularly affect environmental management related issues, which at times require urgent attention.

Extensive Subjection of By-laws to Other Laws

Among the standard bench-marks in law making and implementation, good practice requires laws to not only be consistent with each other, but also observe the principle of superiority in their application. It is in that spirit that, the Local Government Acts require local ordinances and by-laws to be consistent not only with the Constitutions and the statute law, but also among themselves. While the consistency of by-laws with other laws may be necessary, it also raises the important issue of local autonomy, most especially on matters of legal precedence in light of the devolved functions, powers and responsibilities. While it is commonly provided that by-laws have to be consistent with statute law, this blanket provision, under a multi-level government arrangement, may raise more questions that it can answer. For example, what if a parliamentary law is inconsistent with local needs or desires of the District Councils? Or, what if the parliamentary laws hardly leave any flexibility for local government legislation? Or, what if a Parliament legislates on an issue that is supposedly devolved? Perhaps in effort to answer such questions, section 42 (2) of Uganda's Local Government Act emphasizes that;

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[43] The District's Environment Protection Bill 2004, which was passed and submitted to the Attorney General in 2004, was consented to in 2007. Interview with the District Environment Officer, Bugiri District (Bugiri, Uganda, 27 May 2006).

[44] J. Green, *Institutional Structures and Community Based Natural Resources Management in Tanzania* (Draft Report, World Resources Institute, Washington DC 1995).

> "For the avoidance of doubt, no ordinance shall be made in respect of any matter or issue for which adequate provision is made under the Constitution or any law made by Parliament except for ease of reference, in which case the ordinance shall reproduce the provisions of that article or law in its entirety."

Similar positions are contained in Kenya's and Tanzania's local government Acts.[45] Interestingly, many of the environmentally related devolved functions and responsibilities are already substantially covered under statute law,[46] implying that by-law making is constricted to the traditional sense of being a statute law enforcement instrument and not one that reflects local management interests.

Furthermore, the indiscriminate subjection of local government legislative powers to other laws renders the Local Government Acts inferior and incapable of guaranteeing the tenure of by-laws or the protection of local government functions and powers. Such vulnerability is, for instance, well exhibited in Tanzania's Forest Act, which suspends local government by-law making provisions considered to be inconsistent with its own provisions. Before setting out its own procedure, it requires that:

> "Notwithstanding any provisions concerning the making of by-laws contained in the local government [...] Act, a local authority exercising the functions of managing all or part of a national forest reserve or a local authority forest reserve or any forest land under the jurisdiction of a local authority shall, prior to making any by-laws applicable to any such forest reserve or forest

[45] See Local Government Act 1977, s. 202; The Local Government (District Authorities) Act 1982, s. 148; The Local Government (Urban Authorities) Act 1982 ss.79 and 80.
[46] For examples in the Ugandan case, for instance, see Nyangabyaki Bazaara, *Decentralisation, Politics and the Environment in Uganda* (Environmental Governance in Africa Working Paper No. 7, World Resources Institute, Washington, USA 2003) 7-14.

land... not proceed to make any by-laws until it has received and considered any such comments and recommendations ..."[47]

It is arguable that the Forests Act is the principal law in as far as forestry matters are concerned, but it should not be forgotten that Local Government Acts are, on the other hand, the primary laws on matters that concern local government. With regard to decentralised forestry management, for example, such nexus brings us to the pertinent question of legal superiority between local government and forestry laws. In other words are local by-laws able to place local interests at the fore without being unnecessarily deterred by central government laws? A leaf could probably be taken from the wildlife management regimes where, as seen in the previous Chapter, wildlife authorities have control or take precedence in the management of the natural resources found within the wildlife areas under their management. Although the wildlife authorities are, nonetheless, required to consult or work in partnership with other concerned authorities, such legal assurances have been instrumental in empowering wildlife authorities in the management of resources under their control.

Imposition of By-laws on Local Governments

The discretion of local governments to make by-laws that sufficiently reflect their own decisions or ideas is also constrained by the provisions that provide for adoptive, uniform or model by-laws. In Kenya, the Minister responsible for local government has powers to make adoptive by-laws in respect of any matter over which local authorities have power to make by-laws.[48] In Tanzania, the Minister may make by-laws for a particular local authority or uniform by laws for all local authorities.[49] Similar powers are also exercised in other sectors, such as the forestry sector where the Minister or Director responsible for forestry may prepare model by-laws in

[47] Forest Act 2002, ss. 31and 37; See also, Fisheries Act 2003, s. 58.
[48] Local Governments Act 1977 (Cap. 265), s. 210.
[49] Local Government (District Authorities) Act 1982, s.147, 149, 157 and 165; Local Government (Urban Authorities) Act 1982 ss. 82 and 83.

respect to the management of various forestry resources.[50] Other impositions on the local government are packaged as 'guidelines', some of which almost carry the force of law.[51] Although, the adoption of certain uniform or model by-laws or guidelines may be discretionary, the likelihood of local governments rejecting such by-laws seems to be low, because, as is noted throughout this Part, central governments maintains incentives and powers that can easily be invoked to ensure local government compliance. Among the key issues defining the centre-local power relations issues is the fact that apart from central government having reasonable control and 'disciplinary' powers over local government, the financing of the latter is largely dependent on the former.

The Local Government Financing Arrangements

As seen in Chapter one, success of decentralisation is crucially dependant on the financing arrangement of the decentralised units. As in regard to the dimensions of decentralisation, the financing arrangement is often referred to as fiscal decentralisation. It entails the transfer of financial authority to the local levels, to allow jurisdiction over funds transferred from the centre and greater authority to raise and spend own revenue.[52]

Local government performance is substantially dependent on the accessibility or availability of a sound financial base. Indeed, Ehtisham *et al* argue that resources are optimally allocated when the governments closer to the people are mandated with public expenditure.[53] In addition to central government transfers, local government

[50] The Forest Act 2002, ss. 31 (4), 35 (10), 37 (4) and 106 (1) (dd).
[51] Guidelines are often issued by the Central Governments in the exercise of their supervisory and advisory mandate over Local Governments.
[52] See, generally, Dele Olowu, 'Local Institutional and Political Structures and Processes: Recent Experience in Africa' (2003) 23 Public Administration and Development 41; Jennie Litvack, Ahmad Junaid and Bird Richard, *Rethinking Decentralisation in Developing Countries* (International Bank for Reconstruction and Development/World Bank, Washington, 1998).
[53] For the case of Uganda, for example, see argument in Ahmad Ehtisham, Brosio Giorgio and Maria Gonzalez, *Uganda: Managing More Effective Decentralization* (IMF Working Paper No. 06/279 2006) p. 3.

may be given taxation powers and the accruing revenue may be shared or fully retained.[54] This should, however, be accompanied by the ability to make and manage financing decisions.[55] In other words, the issues of availability and sufficiency of financial resources should be reinforced by the powers to spend and control local government finances without unnecessary or un-called for external interference.[56] Otherwise, the over-reliance of local government on central government transfers can weaken local accountability as blame for poor service delivery may be shifted to the centre. Over dependence can also be susceptible to political manipulation, especially if the funds allocation criterion remains at the central government's discretion.[57] Ehtisham *et al* argue that resources are optimally allocated when the governments closer to the people are mandated with public expenditure.[58]

As is the case with the management of other sectors, financial leverage remains critically important in the effective implementation of decentralised natural resource management. Local governments do not only require financial resources but also the leverage in deciding their allocation and release. Natural resources being a wide and cross-cutting sector of varying importance to several interests, significant financial resources are required to monitor protection on the one hand and mitigate exploitation on the other. Following this appreciation of the importance of financing powers and resources in natural resources, the following section explores the framework for financial decentralisation and its operation in each of the three countries.

Sources of Local Government Revenue

While local government powers to receive and collect revenues is derived from several sources, the framework for such entitlements is basically contained in the

[54] Olowu (2003) op. cit., n. 52.
[55] Litvack (2006) op. cit., n. 52, at pgs. 10-13.
[56] Paul Francis and Robert James, 'Balancing Rural Poverty Reduction and Citizen Participation: The Contradictions of Uganda's Decentralisation Program' 31 World Development 325.
[57] Ehtisham (2006) op. cit., n. 53, at p. 5.
[58] Ehtisham (2006) op. cit., n. 53, at p. 3.

local government laws [59] and seldom enshrined in the Constitutions, as is the case in Uganda.[60] These instruments provide for a broad spectrum of revenue sources including taxes, non-tax revenue, loans and donations. Local governments mainly solicit or raise their revenue from three sources: central government transfers; own locally raised revenue; and external or donor aid. Central government transfers are basically comprised of conditional and unconditional grants. While the locally collected revenue is often retained within the local government system, it is in some cases shared with central government.[61]

Despite the spectrum of revenue sources, central government transfers and donor funds are by far the main sources for local government financing. In Uganda and Tanzania, locally raised revenue hardly constitutes 10% of local government income. Worse still this percentage appears to be in steady decline. In Uganda, the locally collected revenue as a percentage of total local government revenue dropped from 36.4% to 13.6% between 1998 and 2004, while in Tanzania it dropped from 20% to 9.8% between 2002 and 2006.[62] Although it is possible that such a drop is a reflection of increased central government transfers, evidence shows that the abolition of various sources of local revenue sources, by the central governments, has significantly contributed to decreased local collections in both countries.[63] In Uganda, Graduated Tax, which was by far the major source of local revenue, was abolished in

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[59] See for, example, Local Government Finances Act 1982 (Tanzania), Part II and III; Local Government (Urban Authorities) Act 1982, s. 61, 62 and 66; Local Government (Urban Authorities) Act 1982, ss. 115,124, 128, 134 and 138; Local Governments Act 1997, ss. 77, 83 and 84; Local Government Act 1977, Part XV. See also, generally, Local Government Loans Act (Cap. 270) (Kenya); Local Authorities Transfer Fund Act 1998 (Kenya); Local Government Finances Act 1982 (Tanzania)and Local Authorities Services Charge (Cap. 274) (Kenya).

[60] Constitution of the Republic of Uganda 1995, Arts. 191, 192, 193 and 195. Also, Kenya's Draft Constitution is reasonably detailed on local government finance. See Chapter Fifteen, Draft Constitution of Kenya, 2004 (Version circulated to delegates and commissioners of the National Constitutional Conference on the 23rd March 2004).

[61] In the case of Uganda, for example, see the sections on revenue collection in the National Forestry and Tree Planting Act 2003 and the Fish and Crocodiles Act, Cap 228 [Cap.197] (as amended).

[62] See Per Tidemand, Jesper Steffensen and Hans Bjorn Olsen, *Local Level Service Delivery, Decentralisation and Governance: A Comparative Study of Uganda, Kenya and Tanzania in the Education, Health and Agriculture Sectors - Final Report* (Dege Consult 2007), Table 7, at p. 18.

[63] For the case of Tanzania see, Government of the People's Republic of Tanzania, *Coordinating Block Grant Implementation Team: Local Government Fiscal Review* (URT, Dar es Salaam, Tanzania 2004).

2005,[64] while in Tanzania, the Development Levy and a range of other local taxes were also abolished in 2003.[65] Although the abolition of local sources of revenue is usually accompanied by compensatory measures, such arrangements have often proved to be incommensurate with lost revenues, generating shortages and delays in their disbursement. It is commonly argued by central government that the 'rationalisation' or rather abolition of local taxes has often been necessitated by economic factors, such as: minimisation of administrative overheads; promoting income redistribution; and the reduction on the citizenry tax burden.[66] More than often, however, the abolition of local taxes is frequently politically triggered.[67] Notwithstanding the abolitions, political overtones have also caused confusion in the local tax regimes leading to low or no collection for some taxes.[68]

Local Government Budgeting and Expenditure Powers

The local government laws are, in all the three countries, reasonably detailed on local government budgeting and expenditure powers. Unlike the case in Kenya,[69] local governments are often mandated to develop and pass own budget estimates.[70] They are, nonetheless, expected to work within the guidelines provided by the centre, which are at times rigid.[71] While there has been a remarkable increase in central

[64] Constitution (Amendment) (No.2) Act 2005 (Uganda), s. 37.

[65] In Uganda Graduated Personal Tax contributed up to 75% of the local revenue. See Local Government Finance Commission, *A Case for Continued Collection of Graduated Tax, 2001: Allocation Principles, Formulae, Modalities and Flow of Central government Transfers* (Commissions Recommendations No.9, Local Government Finance Commission, Kampala 2003) 9. While Development Levy in Tanzania stood at about 30% of the locally generated revenue. See Fjeldstad Odd-Helge, *Fiscal Decentralisation in Tanzania, For Better or for Worse?* (Working Paper No.2, Chr. Michelsen Institute 2001) p. 3.

[66] See Government of the People's Republic of Tanzania (2004) op. cit., n. 63.

[67] For example, see Odd-Helge (2001) op. cit. n. 65; Odd-Helge Fjeldstad, *New Challenges for Local Government Revenue Enhancement: Formative Process Research on the Local Government Reform in Tanzania* (Project Brief No. 2, Chr. Michelsen Institute 2003). See also, Francis op. cit., n. 56, at p. 330.

[68] ibid.

[69] In Kenya, the local government annual and supplementary estimates are subject to central government control and approval. See Local Government Act 1977 (Cap. 265), ss. 212 and 213.

[70] See Local Governments Act 1997, s.77 and Local Government Finances Act 1982, s. 43

[71] In Uganda, for instance, the major capital development disbursements to Local Governments, such as the Poverty Action Fund, Plan for the Modernisation of Agriculture and Local Government Development Grants, have specific and strict guideline templates to be followed by the Local

government transfers, in Tanzania and Uganda, the reality that local government budgets are greatly dependent on conditional grants, enables central government to have influence over local government finances and spending decisions. In 2003, conditional grants constituted 95% and 88% of the local government grants in Tanzania and Uganda, respectively.[72]

Aside from high dependence on conditional grants, local governments' powers to make own financing decisions is mainly limited to locally raised revenue and unconditional grants. Nonetheless, the level of flexibility of these funds is also dependent on other factors. For example, local governments in Uganda are required, as a first priority, to use the unconditional grant to pay staff salaries and wages, which in certain cases takes up to 90% of the grant. Indeed, local government recurrent expenditure in all the three countries remains high. Its share of the total local government expenditure was for the period between 2001 and 2003 estimated to have ranged between 70 and 80%.[73] The meagre resources left after meeting the mandatory first line priorities are often expended on operational costs, such as payment of allowances, bills and transport operations.

On a positive note, however, efforts are being directed, though still on a minimal scale, towards broadening the discretion of local government spending powers. Uganda, for example, introduced the Fiscal Decentralisation Strategy (FDS), in 2003, which permits additional flexibility of up to 10% on selected conditional grants and this percentage is expected to gradually increase upon regular reviews.[74]

Governments. Infact, the release of funds for these programmes is largely based on a reward – punishment system.

[72] Steffensen Jesper, Per Tidemand and et al, *A Comparative Analysis of Decentralisation in Kenya, Tanzania and Uganda - Final Synthesis Report* (Dege Consult 2004), Table 4.4, at p. 36.

[73] ibid., Table 4.3, at p. 35.

[74] Interview with Principal Economist, Local Government Finance Commission (Kampala, Uganda 2 April 2007).

Public Expenditure vis-à-vis Local Government Financing

Although the devolved natural resources management functions and services remain comparatively low, the magnitude of local government responsibility is enormous across other sectors, many of which are instrumental in supporting environmental management. That notwithstanding, however, local government share in public expenditure remains extremely low. For the financial year 2002/03, for example, local government share of the total public expenditure was estimated to be 5.1%, 19.2% and 27.0%, and its share of the GDP was 1.5%, 4.7% and 5.7% in Kenya, Tanzania and Uganda, respectively.[75] Considering the volume of devolved functions and responsibilities, these figures clearly show that public expenditure is predominantly at central government level.[76] The figures are unrealistically low especially in Uganda and Tanzania, where the local government systems are more elaborate and active. That aside, allocation of the meagre local government finances across the sectors also tends not to be commensurate with the devolved responsibilities but with government's set priorities.[77] In fact, recent evidence in the region tends to suggest that decentralisation has always been more successful in the priority sectors of the central government. Due to their heavy dependence on central government for financing, local governments have often been forced into mimicking central government priorities.

Local Government Financing and Natural Resource Management

As is the case with other local government sectors, the financing of natural resource management can benefit from both locally raised revenues and central government transfers, though the latter is, by far, often the greatest. Also, although the district environment offices are part of the wider, national institutional structure for

[75] Steffensen et al (2004), op. cit., n. 72, Table 4.2, at p.34

[76] It may, however, be noted that the extremely low figures for Kenya can be attributed to the fact that few services are delivered through the Local Government system.

[77] In Uganda, the high priority areas, which are called Programme Priority Areas (PPAs) are, Primary Health Care, Primary Education, Rural Feeder Roads, Water and Sanitation.

environmental management, they are minimally supported by the centre.[78] As arguably a cross-cutting matter, natural resource management can always benefit from the funds allocated to other sectors.[79] That notwithstanding, the specific allocation of non-wage funds towards natural resource management remains crucial but comparatively very low in all the three countries.[80] In Uganda, for instance, such an allocation constitutes less than 1% of the non-wage sectoral grants.[81] Similarly, the support for natural resource management from locally generated revenues remains very low. Ironically, natural resources are, in many local governments, among the leading revenue sources. The implication of such an imbalance is that several local resources are being exploited for the purpose of revenue collection without much regard to environmental interest. In fact, revenue collection has in some cases, proved to be counter-productive to environmental interests. Resource management tools, such as permits and licences, are used more as revenue generation than regulatory tools.[82]

The local and central governments continue to clash over revenue accruing from natural resources, most especially in the forestry, wildlife and fisheries sectors. With little regard to the principle of self-sustenance or the 'plough back financing' approach, most natural resource management laws and policies tend to ignore local governments in the sharing of revenue accruing from natural resources. The much bigger revenue sources are usually a preserve of central government. In cases where

[78] This point was generally raised by several interviewees. It is among the issues that significantly count on the aspect of insufficient funding. See appendix 2.

[79] EIA and mitigations costs can, for instance, be incorporated into capital development project cost. Although this practice is on the increase, however, it is yet to attract reasonable resource allocation and interest across key stakeholders in project implementation and management.

[80] See Steffensen et al (2004), op. cit., n. 72, Table 4.3, at p.35.

[81] The natural resources sub-sector was recently considered among the programme areas earmarked to receive sector conditional grants, where each district council was expected in 2007/08 to receive a nominal annual grant of, Uganda Shillings 1.4 million (Approximately US$ 600). Interview Principal Economist, Local Government Finance Commission (Kampala, Uganda 2 April 2007).

[82] For instance, a senior fisheries official argued that the reason as to why fisheries management was being recentralised in Uganda is because Local Councils often issue fishing licenses without due regard to the aspect of controlling fishing capacity. Interview with then Commissioner for Fisheries, Ministry of Agriculture, Animal Industry and Fisheries and currently Executive Director Lake Victoria Fisheries Organisation (Entebbe, Uganda, 12 April 2007).

the local governments are involved in the collection of revenue accruing from centrally controlled natural resources, they are often considered more as commission agents than partners.[83] It is common practice for revenue realised from use or exploitation of natural resources to be part of the national consolidated fund and, therefore, not necessarily released back to service the revenue-generating resources.[84] Although the question of equitable sharing of benefits is one of the areas being addressed in the emerging resource management regimes, its implementation remains low and controversial. In Tanzania, for example, the villages, through the respective district councils, are entitled to 25% of any tourist hunting fees collected in lieu of any hunting undertaken within their jurisdiction. Similarly, the district councils are supposed to retain all revenue collections from local hunting permits.[85] According to some interviewees, however, the accuracy, frequency and timeliness in the implementation of such provisions leave a lot to be desired, as the statutory release of revenue sharing allotments to other beneficiaries appears to be subjected to the discretion of the central government or its revenue collecting agencies.[86]

Local Government Personnel Systems and Human Resources Management

As is generally the case in public sector management, the success of natural resources management is highly dependent on man-power availability and suitability. As was seen in Part III, among the major down sides of the state-centralism approach in natural resources management has been the shortage of manpower. As was also seen in Chapter One, among the key tenets of local government is its potential to attract and maintain a local manpower base. It is against this back drop that the following sections examine various aspects of the current local government personnel systems. We are most interested in the issues of loyalty and capacity

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[83] See, for example, Mniwasa Eugene and Shauri Vincent, *Review of the Decentralisation Process and its Impact on Environment and Natural Resources Management in Tanzania* (LEAT 2001) p. 21.
[84] ibid.
[85] Wildlife Conservation Act 1974 (Tanzania), ss. 5.2 and 5.3.
[86] Interview with Rugemereza Nshala, Lawyer's Environment Action Plan, Tanzania (Mwanza, Tanzania, 12 April 2007); and also, interview with Mercy Kyangwa, Senior Planner, Jinja Municipal Council (Jinja, Uganda, 12 April 2007).

which affect the ability of staff to serve local interests. In reviewing local government capacity challenges, the aspect of human resources shall generally be considered from the two perspectives of sufficiency and quality. Additionally we shall discuss also local governments' ability to attract, retain, control and direct their staff and other staff who serve within the local government system. While the local government human resource pool consists of technical personnel and political officials, or can even be extended to include other non-government actors and the community structures at large, our discussion shall be focussed on the local government technical personnel. We shall first explore the common local government personnel systems.

Local Government Personnel Systems

Generally, the local government personnel systems are commonly defined by three models. The *integrated model* entails central government deploying its own staff to serve in the local governments. This is often most emphasized at the senior levels as the recruitment of junior staff may be left to local government. As such, part of the local human resource base may not be motivated to serve local governments, as its loyalty may naturally be inclined towards the appointing authority, the central government. The second model, which is the *separated model*, allows each local government to employ, maintain and discipline own staff. Although this model is expected to bring about a staff cadre that is loyal to the employing local councils, it is potentially faced with the pitfall of being unable to attract quality staff since such persons are usually in short supply, and also usually unwilling to serve in remote or 'small' places. Thirdly, is the *unified model*, which allows intermediate levels of government, such as federal states, regions or districts the responsibility of employing and managing own staff. This model, which has particularly been popular

among recent decentralisation reforms in Africa,[87] also faces challenges similar to the separated model.

The local government personnel systems differ significantly among the three countries. Uganda's separate personnel system stands among the landmarks of the country's decentralisation programme. With the exception of the appointment of the chief executives and their deputies, which was recently re-centralised,[88] all local government staff are appointed, supervised and disciplined by the local governments through the District Service Commissions.[89] In Tanzania, the local government employment scheme remains turbid and unclear. While an amendment of the Public Service Act, removed the draconian provision of vesting disciplinary authority over local government staff in the district Chief Executive Officers, the Act still upholds an integrated personnel system.[90] The local authorities, through their employment boards,[91] facilitate recruitment of their own staff apart from the chief executives, who are appointed by the centre.[92] Despite numerous amendments and policy reforms,[93] Tanzania's local government personnel system continues to be highly contentious, and its streamlining seems to be far from being over.[94] Unlike the case in Uganda, Tanzania's central government still maintains reasonable control over the staff management function in the local authorities, especially for the senior positions.[95] Central government can transfer local government staff, for instance, 'in

[87] Olowu Dele, 'Local Institutional and Political Structures and Processes: Recent Experience in Africa' (2003) 23 Public Administration and Development 41, 45.
[88] See Constitution (Amendment) (No.2) Act 2005 (Uganda), s. 36.
[89] The District Service Commissions are established and empowered by the Constitution (1995), Arts. 198; and Local Governments Act 1997, ss. 54 and 55.
[90] See The Public Service (Amendment) Act 2007 (Tanzania).
[91] The board is comprised of two local government nominees and three central government staff.
[92] Public service Act 2002, ss. 5 (1) (a) (iii) and 9 (3).
[93] Other than the Public Service Act 2002 other instruments that have attempted to address the issue include: the Written Laws Amendment Act 2003; the Written Laws (Miscellaneous Amendments) (No 3) 2004; the Public Service (Amendment) Act, 2007.
[94] For a more detailed discussion see, Ole Therkildsen et al, *Staff Management and Organisational; Performance in Tanzania and Uganda: Public Servant Perspectives - Final Report* (Danish Institute for International Studies 2007).
[95] See Per Tidermand, *Decentralisation, Governance and Service Delivery in East Africa, Tanzania Country Report - Tanzania Case Report* (Dege Consult 2007).

the public interest'.[96] In Kenya, the Public Service Commission has delegated to local governments the power to appoint and have control over staff in salary scale 10 and above, who are actually junior staff. Senior staff is appointed by central government through the Public Service Commission in consultation with and the Ministry of Local Government (MoLG).[97] In addition, a significant number of central government personnel are posted by their respective ministries to work within the district as part of the Provincial Administration system. Generally, local government in Kenya is operated through an integrated personnel system.

While there is leverage for local governments to recruit staff, central governments retain the power to appoint the senior, managerial positions and particularly those of the chief executives. Owing to the fact that the chief executives are instrumental in the local government decision processes, there is no doubt that the personnel models tend to provide for an arrangement that is susceptible to undue central government influence in local government matters.

Staff Adequacy and Quality

In all the three countries, public service sector employment constitutes a significantly high percentage of total formal employment. In Tanzania and Uganda, it stood at 35% and 42%, between 2003 and 2005, respectively.[98] During the same period, the local government share of the total public service labour force stood at 64% and 87% in Tanzania and Uganda, respectively[99] while that of Kenya, in 2002, stood at a low percentage of 13.7%.[100] Kenya's low percentage is because of its administrative deconcentration model of decentralisation and the integrated personnel system,

[96] Public Service Act 2002, s. 24 (1).
[97] See Constitution of the republic of Kenya 1963, Art. 107 and Local Government Act 1977 (as amended), ss. 107-114.
[98] See Therkildsen (2007) op. cit., n. 94, Table 3, at p. 28.
[99] ibid; See also, Jesper Steffensen et al, *A Comparative Analysis of Decentralisation in Kenya, Tanzania and Uganda– Tanzania Country Study* (Dege Consult 2004) Table 5.1, at p.117.
[100] Van't Land Gerhard, Steffensen Jesper and Naitore Harriet, *A Comparative Analysis of Decentralisation in Kenya, Tanzania and Uganda – Kenya Country Report* (Dege Consult 2004) Table 5.1, at p.88.

both of which concentrate public service staff at the central government level. Even though Uganda and Tanzania's percentages appear to be high, they are, in terms of actual numbers, disproportionate to the functions and services devolved to local governments.[101] Moreover, a reasonable percentage of local government is taken up by the education and health sectors, leaving a much smaller number to be shared among the remaining, majority of sectors. In Tanzania, for example, teachers constitute about 66% of the entire local government labour force.[102]

The problem of staff adequacy and quality is also brought about by problems that are inherent within the local government system. There is, foremost, the problem of an inefficient recruitment processes. [103] In Kenya, for instance, the local government vacancy rate has at times reached 60% due to the slow, highly inefficient and partially centralised staff recruitment process.[104] Additionally, vacancy filling in some local governments has often proved to be lopsided. While junior positions are often overstaffed there are persistent vacancies among the higher, technical positions.[105] Also, local governments are critically faced with the challenge of attracting and maintaining capable personnel in the required numbers. This has normally been brought about by poor pay, poor living conditions, job insecurity and remoteness of certain local government units. While the public service pay structure has been unified in Uganda and harmonised in Tanzania, local governments in Kenya have continued to pay much lower than other Government services.[106]

On the other hand, the setting of staff structures and standards is largely a central government function. Despite the merits, the structures and standards are at times rigidly set, allowing limited flexibility to accommodate local customisation

[101] ibid., at p. 23.
[102] Steffensen (2004) *Tanzania Country Study* op. cit, n. 99, Table 5.1 at p.117.
[103] Van't Land, et al (2004) *Kenya Country Report*, op. cit., n. 100, at p. 90.
[104] ibid., at p. 22.
[105] Kenya's staff rationalization programme instituted by the Ministry of Local Government Circular No. 2/2004, 28 April 2004, has had minimal impact on the influx of overstaffing at local levels, as the problem appears to be politically motivated.
[106] Van't Land et al (2004), *Kenya Country Report*, op. cit., n. 100 at p. 23.

requirements. For example, although Uganda's recent local government reform programme allowed for customisation, the limits remained high for certain district councils, forcing them to downscale staff in some of their priority areas.[107] In all the three countries, the environment management sector is poorly staffed. In Uganda, for example, the district environment offices, which are the only designated local government environment offices, are run by one or two officers.[108] The other aspects concerning the general functioning of the regional and district environment offices are discussed in the following section.

The Regional and District Environment Offices

Notwithstanding the fact that there are several regional and district offices mandated with responsibilities that concern the management of the environment,[109] the new environment management regimes establish field offices that are specifically concerned with the general management and coordination of environmental matters within their respective jurisdictions. The functions, powers and method of operations of these offices, however, vary among the three countries.

Kenya was the first to designate environment officers at district level - District Environment Officers (DEOs).[110] The DEOs were, through the District and Provincial Commissioners, responsible to the President's Office and not the environment ministry or the National Environment Secretariat.[111] This misplacement in the line of command and lack of technical expertise largely contributed to the inefficiency and subsequent failure of the DEOs in attending to their duties as was provided for under

[107] Interview with Senior Planner, Jinja Municipal Council (Jinja, Uganda, 12 April 2007).
[108] Government of Uganda, *Final Report on the Restructuring of Local Governments in Uganda* (Ministry of Public Service 2005).
[109] The other offices dealing with matters concerning environment management include: forestry, fisheries and water offices, some of which are established at both the regional and district levels.
[110] The first District Environment Officers (DEOs) were in 1988 appointed, under auspices of the District Focus Strategy for Rural Development, as part of the President's Office administrative staff.
[111] The National Environment Secretariat was established in 1971 administratively established as an advisory body on matters that concern management of the environment and natural resources.

Circular No. 2/88 of the District Focus Strategy.[112] More so, the DEOs operated without clear policy guidance on environmental management.[113] After the coming into force of the EMCA, the District and Provincial environment offices were transferred to National Environment Management Authority (NEMA). As the case is with most central government ministries and agencies in Kenya, NEMA directly controls its field officers. These field officers are also linked to the local governments, but the relationship is loose and basically on a collaborative arrangement. While the current system appears to have addressed the earlier problem of using non-technical staff in local environment management, there is still inadequate integration between institutional frameworks for local environment management and that of the local governments.[114] Although, some urban and county councils have their own environment officers, they are structurally detached from the mainstream institutional arrangement for ENRM and this has often impacted on coordination among the various levels of government. [115]

In Tanzania, the Environment Management Act (EMA) establishes both regional and district environment offices. The structural arrangement and relationship of these field offices with the centre is, however, substantially different from that of Kenya, in that it attempts to allow the district offices more autonomy and power. The Regional Environment Secretariats are basically responsible for coordinating environmental activities within the region as well as advising and serving as a liaison office between

[112] The District Environment Officers were required to offer administrative support in the coordination different government ministries and departments with the aim of integrating environmental considerations in all development processes. See Susan Bragdon, *Kenya's Legal and Institutional Structure for Environmental Protection and Natural Resources Management: An Analysis and Agenda for the Future* (Economic Development Institute of the World Bank 1992) p.13. See also, Government of Kenya, *District Focus Strategy for Rural Development* (Circular No. 2/88, GoK 1988).

[113] Bragdon op. cit., n. 112 at p.26; See also, Government of Kenya, *District Focus Strategy for Rural Development*, op. cit., n. 112.

[114] Although natural resources management is largely under central government control, the County Councils are constitutionally entrusted with the management of Trust Lands and some of the natural resources found on them. See Constitution of the Republic of Kenya 1963, Art. 115 (1).

[115] Interview with Provincial Director of Environment, Nyanza Province, (Kisumu, Kenya, 23 April 2007).

the local authorities with the central government.[116] Each HLG is required to have an environment office run by an Environment Management Officer (EMO) appointed by the respective council. The EMOs of the LLGs and administrative units, are supposed to be designated by the district councils from among the local public officers.[117] The EMOs are required to be involved in a wide range of activities that include: ensuring enforcement of the EMA; promoting environmental awareness; monitoring the preparation, review and approval of Environmental Impact Assessments (EIAs); environmental information gathering and reporting; and reviewing by-laws on environment management. They are also required to report to the NEMC and Environment Directorate on the implementation of the EMA.[118] The basic function of the LLG and administrative unit EMOs is to coordinate environmental protection activities within their areas of jurisdiction.[119] As can been seen, Tanzania's environment management framework laws provide an extended framework for local environmental management. However, probably due to the fact that the framework law came into force only recently, most of these structures are hardly in place.[120]

In Uganda, the National Environment Act (NEA) establishes the field-based environment offices only at the district level. As is the case in Tanzania, the district environment offices are run by officers appointed by their respective district councils.[121] Although the DEOs are part of NEMA's broader institutional structure, they are, in accordance to the standard local government organisational structure, district council personnel that, through the District Natural Resources Officer, are responsible to Chief Administrative Officer (CAO). In addition to being secretaries to the DECs and technical advisors to the LECs, the DEOs are required to gather environmental information; promote environmental awareness and liaise with NEMA

[116] Environment Management Act 2004 (Tanzania), ss. 34 and 35.
[117] ibid. ss.35, 36 and 39.
[118] Ibid., s. 36 (3).
[119] Ibid., s. 40.
[120] This was confirmed through several interviews carried out during the two field visits to Tanzania (July 2006 and April 2007).
[121] National Environment Act 1995 (Cap 153) (Uganda), s. 15.

on all matters that concern the environment.[122] The NEA is unclear, however, on whether DEOs have the mandate to enforce its provisions without having to liaise with NEMA. Such lack of clarity, if read together with section 15 (2) (h) of the National Environment Act 1995, which requires district councils to consult NEMA prior to prescribing other functions for the DEOs, may be interpreted as implying that ultimate control of the DEOs' actions is a preserve of NEMA.

[122] ibid s. 15 (2).

Conclusion

It has been seen that while there have been significant changes in the decentralisation frameworks of all the three East African countries, many of the factors that inhibited the predecessor decentralisation arrangements still persist. Of particular interest in our discussion is the elevation of the paradigm of state-centrism in both natural resource management and local government. Notwithstanding the fact that natural resources management largely remains under central government direct control, central government presence remains strong in decentralised ENRM. That aside, the efforts towards the engagement of local government in various aspects of ENRM is surrounded by several inhibitions in both law and practice.

On the other hand, though the success of decentralized ENRM is also dependent on the general institutional framework for local government, local governments are faced with several capacity problems, many of which appear to accrue from central government reluctance to disperse authority. Although several attempts have been made to transfer administrative, legislative and financial powers to local governments to enable them to perform their duties, enjoyment of these powers remains limited. While legislative autonomy might aid the enforcement of ENRM, local government legislative powers continue to be subjected to central government control. Such lack of local autonomy is also apparent in the financing arrangement and, to a certain extent, in the staffing of the local governments.

As earlier mentioned, our argument for the case of multi-level government in ENRM does not only concern the existence of the institutions, but also their ability to perform. We see that as the Lake Victoria region comprises various local government units, the need to strengthen and support their participation in ENRM remains critical.

PART V

The Regional Legal and Institutional Framework for Natural Resource Management

This thesis is reviewing multi-level government in the management of the environment and natural resources of the Lake Victoria region. It argues for a multi-level government arrangement that engages the effective participation of the local and regional levels of government. Having discussed local government in the previous two chapters, the next two chapters discuss the regional, legal and institutional arrangements relevant in the management of the Lake region. The discussion is focussed on the East African Community (EAC) - hereinafter simply referred to as the Community.

It was demonstrated in the previous Part that while there have, in the recent past, been major strides in embracing the concept of decentralised governance in the form of local government, this development has not significantly filtered into the natural resource management regimes in all the three East African countries. The national Environment and Natural Resource Management (ENRM) regimes generally still revere state-centrism and fall short embracing, in any significant manner, the concept of multi-level government in ENRM.

This Part seeks to examine whether similar circumstances exist within the regional, legal and institutional framework. It builds on the earlier argument that the rational distribution of powers and functions is central to the effectiveness of the ENRM regimes. It thus attempts to answer research question (5), which seeks to examine the extent and level of success of the recent legal and institutional developments, at regional level, in addressing the issue of state-centralism in ENRM.

Since our geographical area of study is trans-boundary, and shared among three East African countries that incidentally also share a regional integration block, the justification of focusing on the EAC, is obvious. Considering its legal status, structure and mandate, the EAC passes for a regional level tier of government, and fits well in our conceptualisation of the term multi-level government. As the concept of multi-level government is not only about institutions but also the legal frameworks that define their interaction, this Part will focus its discussion on institutions and laws. Similarly, since the success of ENRM does not only depend on environmental regimes, we shall also consider some other major issues that concern the general functioning of the EAC. Chapter Eleven will show, however, that unlike the case at the national levels, efforts continue to be exerted towards the development of a regional regime specific to the Lake region.

CHAPTER TEN

Organs of the East African Community: Their Roles and Challenges in Environment and Natural Resource management

"Any study of the effectiveness of environmental law and policy depends on the general appreciation of the institutions concerned, their role in the formulation and development of law and policy in environmental protection matters and in the policing of these rules."[1]

While this thesis is focussed on natural resource management and particularly in the Lake Victoria region, it recognises that ENRM regimes are often part of a wider, legal and institutional framework on which they greatly depend for their success. In examining the aspect of regionalism in the management of Lake Victoria region, therefore, it is prudent to explore also the legal and institutional framework that drives the concept of regionalism in East Africa. This Chapter is focussed on discussing the core organs of the East African Community and some of the major processes that guide their operations. This discussion is premised on the fact that, as the case is with other areas of cooperation, the development and operation of a good ENRM regime over the Lake region requires input from each of the Community's organs.

For purposes of understanding the EAC in the wider context of regionalism in practice, however, the Chapter begins with an overview of the revival and challenges of regionalism in Africa. It then explores the policy, administrative and technical organs of the EAC and particularly; the East African Court of Justice (EACJ); and the East African Legislative Assembly (EALA). Also discussed are the Community's decision-making processes and financing arrangements, both of which are central in supporting the good functioning of the Community organs.

[1] David Hughes, *Environmental Law* (Fourth Edition edn, Butterworths Lexis Nexis Bath, UK 2002) p. 33.

A Brief on the Emergence and Challenges of Regional Integration in Africa

Regionalism or inter-governmental cooperation among the African modern states can be traced far back to colonial rule at the beginning of the 20th Century. Although East Africa was under one colonial power – Britain, for the greatest part of its colonisation, it was not until after the Second World War that regional cooperation became more defined and rooted in this region. The spirit of regionalism carried on into the post-independence era and later was influenced by Pan-Africanism.[2] In addition to the call for African unity against political aggression, the newly independent countries envisioned political freedom as a 'golden opportunity' for making-up for the 'time lost' in terms of economic development. As such, the issues of Pan-Africanism and economic development have always been at the centre of the quest for regionalism in Africa.[3]

In addition to the establishment, in 1963, of the continent-wide Organisation of African Unity (OAU),[4] a loose form of cooperation that was essentially focussed on political unity in the fight against colonialism and 'external' exploitation, the early post-colonial era was also marked with the emergence of various Regional Economic Co-operations (RECs). These included the *Union Douaniere des Etats de l'Afrique et l'Ouest* (UDEAO) established in 1966 as a Customs Union of the West African States; the *Union Douanière et Économique de l'Afrique Centrale* (UDEAC) created in 1964 to bring together the Central African states; the Southern African Customs Union (SACU) and Common Monetary Area (CMA) established, in 1969 in southern Africa: and for the East African states, the East African Community (EAC) established in 1967.

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[2] Pan-Africanism is a philosophy that seeks for the unification of African peoples and states into a global African community. It was between 1950s and 1970s a major driving force behind various socio-political movements championed by African leaders and notable personalities.

[3] Margret Lee, 'Regionalism in Africa: A Part of Problem or a Part of Solution' (2002)10 Polis 1, 8.

[4] The objective the OAU were, inter alia, to rid the continent of the vestiges of colonisation and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations. See Organisation of African Unity (OAU) Charter 1963, done on 25 May 1963, in the City of Addis Ababa, Ethiopia.

Establishment of these RECs was largely championed by the Economic Commission of Africa, which later promoted the 1980 Lagos Action Plan for the Economic Development of Africa (LAPEDA) that saw the creation of the Preferential Treatment Area (PTA) in 1981 and Economic Community of Central African States (ECCAS) in 1993.[5] As in the predecessor arrangement, the LAPEDA was aimed at ensuring that each African country fell under a sub-regional REC.

Mainly because of nationalist tendencies among the leaders, however, the dream for an economically and politically united Africa faded and the same fate befell the sub-continental RECs,[6] making them either redundant or leading to their total collapse. Ironically, some of the RECs turned out to be sources of regional conflict and tension.[7] Subsequently, the 1970s were marked by low activity in regional cooperation. At the height of trade liberation, in the 1980s, market integration was explicitly discouraged by the International Financial Institutions (IFIs), which were bank-rolling the Structural Adjustment Programmes.[8]

Regionalism efforts in Africa were reinvigorated during the 1990s and, to-date, 14 RECs exist[9] and are recognised by the African Union (AU), which although is also a 'loose' intergovernmental organisation, has broader mandate than its predecessor, the OAU. As before, the existence of and operations of these RECs is also tied to a continent-wide economic cooperation framework – The African Economic Community (AEC) Treaty (Abuja Agreement) 1991, which aims at the total integration

[5] See Table 4 entitled 'Structure of African Regional Groupings', in Food and Agriculture Organisation (FAO), *Africa in Regional Integration and Food Security in Developing Countries: Training materials for agricultural planning - 45* (FAO, Rome 2003) p. 114.
[6] ibid.
[7] See Timothy M. Shaw, 'Regional Cooperation and Conflict in Africa' (1975) 30 International Journal 671
[8] Lee (2002) op. cit., n. 3, at p. 9.
[9] The current major Regional Economic Communities in Africa include: the Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern Africa Development Community (SADC) and The Community of Sahel-Saharan States (CEN-SAD).

of the African economies by the year 2025. The establishment of AEC is likely to have been a response to similar developments elsewhere, including the establishment of the North American Free Trade Agreement (NAFTA) in 1994 and the strengthening of the EU since the late 1980s.[10] As can be seen, aside from a few self-initiatives decided at sub-regional levels, many of the post independence regional blocks were a creation of 'external' parties, and, as Oyejide observes, the adopted structures and mechanisms were probably unsuitable.[11] Many regional integration arrangements actually tended to mimic complex models that are inappropriate in the African setting.[12]

Despite the increasing scope of attention given to regionalism, economic factors remain central to the new forms of regionalism. To Jenkins *et al*, new regionalism in Africa, which is complementary to the process of globalisation, has been ignited by the fears of marginalisation, relatively small markets and the protectionist policies of powerful economies and economic integrations.[13] Jenkins *et al* observe that the common problems to Africa's regionalism include: poor designs that do not take into account members' incentives to comply; membership to more than one group, thus the problem of multiple allegiance and differences in approach or objectives; disagreements over tariffs; conflicts between regional and national priorities; and incompatible political interests.[14] On the strength of such recurring problems, they believe Africa's major challenge lies in creating and maintaining successful cases of regional integration.[15]

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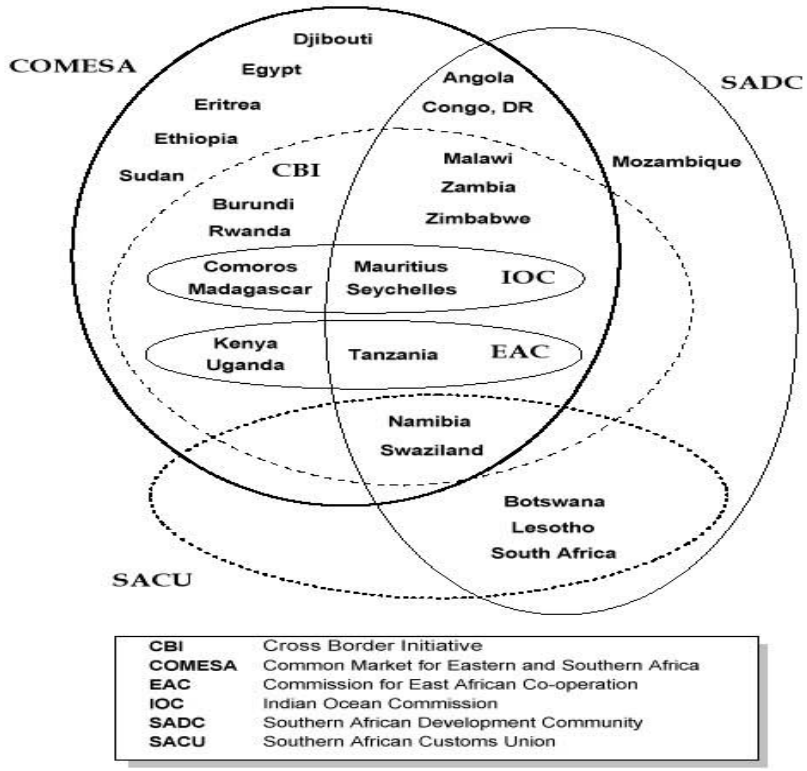
[10] Lee (2002) op. cit., n. 3 at p. 9.
[11] Oyejide T. Ademola, *Policies for Regional Integration in Africa* (Economic Research Papers, No.62, The African Development Bank, Abidjan, Côte d'Ivoire 2000) 7-10.
[12] ibid.
[13] Carolyn Jenkins and Thomas Lynne, 'Creating a Sustainable Regional Framework for Development: the South African Development Community' in Belshaw Deryke and Livingstone Ian (eds), *Renewing Development in Sub-Saharan Africa: Policy, Performance and Prospect* (Routeledge, London 2002) 389 – 408.
[14]Carolyn (2002) op. cit., n. 13, pgs. 389-408. See also, Economic Commission for Africa (ECA), *Assessing Regional Integration in Africa* (ECA Policy Research Report, Addis Ababa, Ethiopia 2004) 71.
[15] Carolyn (2002) op. cit., n. 13, pgs. 389-408.

The United Nations Economic Commission for Africa inter alia singles out the problem of strong state-centrism. It generally observed that Africa's regional blocks lack the supranational authority required to implement and enforce collective decisions and policy convergence.[16] This has been exacerbated by the problem of multiple memberships, which is illustrated in Figure 1 below.

Figure 1: The Overlapping Regional Arrangements in Eastern and Southern Africa



Source: J. Fajgenbaum et al. (1999)[17]

As regional blocks continue to re-emerge in Africa, the old alliances seem to be un-dissolved as new ones emerge. Multiple and overlapping memberships have proved

[16] ECA (2004), op. cit., n. 14, pgs. 71-72

[17] J. Fajgenbaum et al, *The Cross-Border Initiative in Eastern and Southern Africa* (International Monetary Fund, Washington, D.C 1999).

to be major draw-backs in regional integration,[18] especially in the early stages, which are pertinent in setting out the benchmarks for integration. As shown in Table 4, below, each of the EAC member states is a member to two other major regional blocks. Though arguably these blocks differ in objectives, multiple memberships certainly exert pressure on a country's resource capacity and can also generally be a source of conflicting interests.[19]

Table 4: Overlapping Membership to Regional Economic Organisation Among the East African Countries

	EAC	SADC	COMESA	IGAD
Uganda	v		v	v
Kenya	v		v	v
Tanzania	v	v	v	

EAC = East African Community, IGAD = Intergovernmental Authority on Development, SADC = Southern Africa Development Community, COMESA = Common Market for Eastern and Southern Africa,

Indeed, the Economic Commission for Africa believes that the acclaimed benefit of multiple regional memberships is blurred by its potential for harm.[20] This can be both a problem in itself and also a symptom of other problems. Aside being a potentially compromising factor for legitimacy, subscribing to more than one regional organisation may be interpreted also as providing a potential exit strategy in case the anticipated benefits for cooperation are not forthcoming or in the event of a fall out

[18] See 'Overlap and EPAs Bedevil Regional Integration' *Oxford Analytica Daily Brief Service* (Oxford, 15 September 2006) and 'International: Regionalism Will Shape Global Politics' *Oxford Analytica Daily Brief Service* (Oxford, 15 May 2009) available at http://www.proquest.com/ (accessed March 19, 2010).

[19] For example, SADC to which Tanzania is member has Protocols that concern the management of fisheries, forestry, shared water courses and wildlife Management. Tanzania is also member to the EAC, which has a consolidated Protocol on the Management of the Environment and Natural Resources. The likelihood that there may be areas of conflict between these two regimes remains high and certainly a complicated matter to handle under a dual arrangement.

[20] ECA (2004), op. cit., n. 14, at pgs. 39-55

with any of the arrangements.[21] Countries may also have multiple subscriptions in anticipation of maximising all available opportunities. Because of such state-centric thinking, therefore, regionalism is seen as a platform for the sake of national gain, something that is likely to re-channel effort and resources that would have been expended on the core objectives of cooperation. That said however, as the objectives and cooperation approaches vary among regional blocks, the impact of multi-membership is largely dependent on whether such membership poses conflicting interest.

As seen, regionalism in Africa is still not strongly founded and is largely focused on economic integration. The rest of this Chapter shall focus on the discussion of the new East African Community (EAC) with a view of attempting to ascertain the extent to which its mandate and functioning extends further than the economic objective. Since they stand at the centre of implementing the Community's mandate, the key EAC organs shall also be discussed, particularly in regard to their power and roles. The EAC has the three basic arms of government; the Executive, Legislature and a Court. Such an institutional set up makes it stand out, even among the few regional blocks that significantly differ from the traditional models, which are often limited in their scope for regional cooperation to advance economic objectives. That said, the existence of the three basic arms of government does not necessarily mean that they are reasonably functional as their effectiveness can be restrained by the state-centrism paradigm.

Following the discussion in Part III, the existence of these three arms of government is not a new concept in the history of regional cooperation among the East African countries. We saw, however, that the effective performance of these organs was overshadowed by the reluctance of the Partner States to allow reasonable regional autonomy by ceding a level of their sovereignty. It is against this background that this

[21] See Andrea Goldstein and Ndung'u S. Njuguna, *Regional Integration Experience in the East African Region* (Development Centre Working Papers 171, OECD, Paris 2001).

Chapter examines the extent to which the Partner States have ceded sovereignty to enable the new EAC to function as a supranational entity.

The New East African Community (EAC)

Regional cooperation is implemented through an institutional framework at the centre of which is some form of over-arching institution. Ideally, the powers and functions of these institutions are shaped by the objectives of the cooperation. In reality, however, this may not be the case as the actual functioning of regional cooperation is often influenced by many other factors, whether or not these are provided for by the objectives. The purpose of this discussion is to examine the EAC institutional arrangement with a view of identifying the major factors that are likely to inhibit its effectiveness as an autonomous international institution. Since our interest concerns the strengthening of the concept of multi-level government, we focus on ascertaining whether the EAC setup, unlike its predecessors, has been able to mitigate the historical challenge of state-centrism.

Revival of the East African Community

Fifteen years after the collapse of the East African Community, its revival was set in chain with the signing, on November 30, 1993, of the Agreement for the Establishment of the Permanent Tripartite Commission (PTC) that became operational in March 14, 1996. The PTC was established as an interim measure intended to pave way for a permanent, broader and more defined form of cooperation. In 1999, the new East African Community was, established by the East African Community Treaty, hereinafter referred to as the EAC Treaty or simply as 'the Treaty'. The Treaty entered into force on 1st July 2000 and was initially signed by Uganda, Kenya and Tanzania, and later by Rwanda and Burundi.[22] While the predecessor cooperation agreements were usually concluded in high political circles,

[22] Rwanda and Burundi became members of the EAC in July 2007. For the reasons elaborated in the Introductory Chapter, however, the scope of this thesis does not extend to these two countries.

efforts were made to subject the 1999 Treaty to consultations.[23] Since there was no subsequent circulation of a consolidated copy of the collected views, however, it becomes difficult to ascertain the extent to which the consultations contributed to the final agreement. Also, the initial consultations had an elitist focus that largely left out the grass root populations, which were turned to, nonetheless, when views were being sought on transforming the EAC into a political federation.

Objectives and Principles of the East African Community

Generally, the EAC is a regional cooperation institution of broad-based competence. Broadly stated, its objectives are focussed on the commitment to develop "policies and programmes aimed at deepening and widening cooperation in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs."[24] Generally, the EAC's objectives are intended to simulate a high degree of regional integration. In comparison to other regional cooperation bodies in Africa, the EAC's objectives are unique in that they transcend economic matters and place reasonable weight on other areas of cooperation that are usually less emphasised. Although the economic objectives remain at the forefront of the new Community, the EAC Treaty 1999, unlike the predecessor agreements, introduces a wide range of other areas of cooperation including that of Environment and Natural Resources Management (ENRM).[25] This thinking is intended to gradually move the Community towards a political federation. Article 5 (2) thus explicitly states that;

> "…the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common

[23] See Kamanga Khoti *Some Constitutional Dimensions of East African Cooperation* (State of Constitutional Development in East Africa Project, Kituo Cha Katiba, Undated) p. 17.
[24] See Treaty for the Establishment of the East African Community (EAC) 1999, Art. 5 (1).
[25] Other areas of cooperation include Trade, Finance and Monetary Issues, Industrial development, Tourism, Meteorology, Human Development, Wildlife, Defence, Science and Technology, Agriculture and Food, Infrastructural Development, Energy, Legal and Judicial Affairs and Cultural Matters. See EAC Treaty 1999

Market, subsequently a Monetary Union and ultimately a Political Federation..."[26]

The Treaty provides for both fundamental and operational principles. As is the case with objectives, the Community's principles are also expressed in broad terms. The fundamental principles are: mutual trust; political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance; equitable distribution of benefits; and co-operation for mutual benefit.[27]

For the purposes of achieving its objectives, the Community is committed to a number of operational principles. The economics related principles such market-driven cooperation and export oriented economy tend to stand out, but the principles of subsidiarity; variable geometry; asymmetry; and complementarity and equitable distribution are also highlighted.[28] These principles essentially arise from cognisance of the lessons learnt from the collapse of the former Community. As such the Treaty tends to emphasise the need for equity, equality and rationalisation of the accruing benefits and impacts of the integration.[29] As for the environment and natural resources management, it is among the objectives of the Treaty for the Community to ensure:

"...the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States"[30]

[26] EAC Treaty 1999, Art. 5 (2).
[27] ibid, Art. 6.
[28] ibid, Art. 7.
[29] For example see Preamble and Article 77of the EAC Treaty 1999.
[30] EAC Treaty 1999, Art. 5 (3) (c).

While these are clearly outlined, however, it remains important to ascertain how the achievement of such objectives and principles is provided for from the holistic perspective of the Community's institutional setup. In that vein the following sections explores the pivotal organs of the Community, with particular interest on their potential contribution and roles in environmental management and related challenges. We shall be evaluating how the establishment of the Community has influenced the disposition of the concept of state-centrism, especially in matters that are mandatorily or potentially of regional concern.

Organs of the East African Community

The institutional structure of the EAC basically consists of both politicians and technocrats.[31] Guided by the principle of separation of powers,[32] the Treaty directly establishes: the Summit of Heads of State; the Council of Ministers; the Coordination Committee; the Sectoral Committees; the East African Court of Justice; the East African Legislative Assembly and; the Secretariat of the East African Community.[33] The Treaty, nonetheless, has flexibility provisions that allow for structural and jurisdictional changes, if subsequently agreed upon by consensus.[34] Article 9 (1) (h), for instance, gives the Summit powers to create other organs of the Community. Membership on the policy and decision making organs of the Community is solely by virtue of office held at national level, while the legislature, Court and Secretariat are constituted on individual merit. The following sections explore the core Community organs with a view discussing their roles and challenges relating to ENRM issues. As earlier mentioned, the purpose of this discussion accrues from the argument that, as

[31] See EAC Treaty 1999, Chapters 4-10.

[32] The principle of separation of power is based on the works of a 17th-18th Century French political thinker, Baron de La Brède et de Montesquieu, commonly referred to simply as Montesquieu. Montesquieu argued that as a means of enforcing checks and balances, governmental powers should be divided into three arms; the Executive, Legislature and Judiciary, which organs should be separate but inter-dependent. He contended that influence of one arm should not be able to exceed that of the other two, either singly or in combination. Although Montesquieu's model was based on government at state level, it is widely applicable and used in local and regional government systems.

[33] EAC Treaty 1999, Art. 9 (a-g).

[34] Article 27 (2) of the Treaty, for instance, empowers the Council of Ministers to extend jurisdiction of the East African Court of Justice, through the enactment of a Protocol.

with the case in other areas of cooperation, the EAC's role in the management of the Lake Victoria region is not only dependent on its direct interventions in ENRM but also the functioning of the general framework that establishes it as a regional institution.

The Policy, Executive and Administrative Organs

As is the case with the rest of its mandate, EAC's ENRM regime is implemented under a framework of policy, executive and administrative decisions. As such, the Summit of Heads of State, the Council of Ministers, the Coordination Committee, the Sectoral Committees and Community Secretariat while having varying powers and roles, are instrumental in enhancing the Community's roles, potential and success in ENRM. We now explore the powers and functions of each of these organs with a view of ascertaining the likely challenges with which they may be faced in exercising their expected roles in ENRM. Particular interest is also taken in ascertaining the extent to which some of these organs may be used in the propagation of the paradigm of state-centrism that has often compromised the concept of multi-level government in ENRM.

The Summit

Similar to the arrangements under the predecessor's forms of cooperation, the Summit, which is the supreme organ of the Community, is constituted of the Heads of State of the Partner States. The major function of the Summit is to:

> "Give general directions and impetus as to the development and achievement of the objectives of the Community."[35]

The Summit has the executive powers to: appoint and remove from office the judges, president and vice president of the Court of Justice; assent to Assembly bills with

[35] EAC Treaty 1999, Art. 11 (1).

vetoing rights; exercise the prerogative to admit new members and grant observers status; determine the terms and conditions of the members of the Legislative Assembly; appoint the Secretary General and deputies and also determine their terms.[36] Furthermore, the Summit is classified along with the Assembly and Court as an institution of the Community that is not necessarily bound by Council regulations, directives and decisions.[37] It also has powers to suspend, expel or issue sanctions to any Partner State. It should approve all Protocols and has the final word on any amendment to the Treaty. It is also the duty of the Summit members, as Heads of State, to oversee the ratification process of the amendments in their respective countries.[38] Although the summit enjoys the discretion to delegate its powers, this prerogative does not extend to the giving of general direction to the Community; appointment of judges; assenting to bills; and admission of new members of observers in the Community. [39] By having direct control over the key offices and organs, the Summit has, at its exposure, virtually ultimate control over the entire decision-making process of the Community. Moreover, in the exercise of most of its powers and duties, the Summit is under no obligation to consult and remains insulated from challenge. As can generally be seen, the Summit is generally established as a powerful organ of the EAC.

The Council of Ministers

Article 13 of the Treaty establishes the Council of Ministers (CoM) as the policy organ of the Community. The CoM consists of the Ministers from Partner States responsible for regional co-operation and plus such other Ministers as each Partner State may determine.[40] Currently, the CoM is constituted of the specially designated Ministers of East African Affairs, from each Partner State. Unlike the defunct EAC where the

[36] ibid., Arts. 3(5) (a), 9, 10, 14(3) (C), 16, 24(1) and (4), 25 (5), 26 (1), 51 (2), 67 (1) and (5), 68 (2) and (5), 143, 146 (1), 150 (5-6) and 151 (2).
[37] ibid., Art. 16.
[38] ibid., Arts. 16, 151 (2) and 147 (1).
[39] ibid., Art. 11 (9).
[40] ibid., Art. 13.

East African Ministers were fully based at the Community headquarters, each Partner State has established a fully-fledged Ministry of East African Affairs.

Other than the Summit, the CoM also wields vast decision-making powers. It is required to: make policy decisions; initiate and submit bills; give direction to the Partner States and Community; consider the Community's Budget; and generally act on instructions from the Summit.[41] It is within its mandate to make regulations, issue directives, take decisions, make recommendations and give opinions, all of which are binding on Partner States and the Community, with exception of the Summit, EACJ or EALA. [42] It also has powers to establish Sectoral Councils from among its membership and in conformity with this provision a Sectoral Council responsible for sustainable development of Lake Victoria basin was established.[43] Since its establishment the CoM has passed several decisions relating to ENRM, some of which are specific to Lake Victoria region.[44] As shall later be seen in this and the next Chapter, the powerful arm of the CoM in EAC's decision-making process has in some cases proved to be a vehicle for the entrenchment of state-centric approach in regional matters.

The Coordination Committee

The Coordination Committee, which is the highest technical committee, is made up of the chief executives (Permanent Secretaries) of Partner States' ministries responsible for regional co-operation and other permanent secretaries as may be

[41] ibid., Art. 14 (3).
[42] Ibid., Art. 14.
[43] Protocol on Sustainable Development of Lake Victoria Basin 2003, Arts. 34 and 35.
[44] These include: (a) Implementation of the Lake Victoria Environmental Management (regional) Project; (b) Adoption of a Comprehensive Strategy for the control/eradication of water hyacinths on Lake Victoria, December 1996. (c) Establishment of a Sectoral Committee for Environment in April 1998 and its transformation, in April 2002, into the Committee of Environment and Natural Resources (ENR). (d) Signing, in October 1998, of the Memorandum of Understanding (MoU) on cooperation in Environmental Management on whose basis the Protocol on Environment and Natural Resource Management was developed and adopted. (e) The third CoM sanctioned operation of the Lake Victoria Development Programme (f) Development of Regional Environmental Impact Guidelines for shared Ecosystems in November 2001 (g) Development and adoption of the project on the Mt Elgon Regional Ecosystem Conservation project (MERCEP) in November 2001. See, generally, East African Community, *Policy Brief on Environment and Natural Resources* (EAC Secretariat, Arusha 2005).

determined by individual Partner Sates.[45] Apart from implementing decisions of the Council, this body acts as the intermediary body between the Council and Sectoral Committees, hence forming a high-level link between the politicians and technocrats.[46] It also oversees the functioning of the sectoral committees.

Sectoral Committees

In pursuance of Article 20 of the Treaty, several Sectoral Committees have been established. These committees are basically required to set out priorities and prepare implementation programmes that are passed on to the Coordination Committee for consideration and onward submission to the CoM. The sectoral committee responsible for environment was, on the directive of the CoM, among the first to be established.[47] Its mandate was, in 2002, expanded to handle water resources management, hence the change in name to Environment and Natural Resources Sectoral Committee.[48] This committee is composed of line officials of the Community and senior officials drawn from the national ministries responsible for water, fisheries, environment, forests, and tourism and wildlife. In the spirit of stakeholder involvement and participation, the private sector and regional non-governmental organisations are also represented on this committee.[49] The structure and mandate of the sectoral committee on the environment and natural resources is now clearly spelt out in the recently adopted Protocol on ENRM.[50] The Protocol on the Sustainable Development of Lake Victoria Basin also provides for various sectoral committees to be established.[51]

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[45] This has now changed to the Permanent Secretaries of the newly established Ministries of East African Affairs in each Partner State.
[46] EAC Treaty 1999, Arts. 117 and 18
[47] It was not possible to access the particular Council directive that established the committee. This information was, however, given in interview with Director of Productive and Social Sector of the East African Community (EAC Secretariat, Arusha, Tanzania 22 March 2007).
[48] The Sectoral Committee is supported by specialist technical working groups in the four fields of: Terrestrial ecosystems; Aquatic ecosystems; Policy, Legal and institutional and; Pollution issues.
[49] Refer footnote n. 47.
[50] Protocol on the Environment and Natural Resources 2006, Arts. 36 and 37
[51] Protocol on the Sustainable Development of Lake Victoria Basin 2003, Art. 37 (3); See also, Art. 3, which sets Protocol's scope.

The Secretariat to the Community

In terms of its powers and functions, the Community's Secretariat does not significantly differ from its predecessors. Headed by a Secretary General as the chief executive, the Secretariat is the executive organ of the Community. Through various specialist offices and staff, the Secretariat attends to the administrative, clerical, planning and financial management matters of the Community. It is basically the facilitating, advisory, and coordination organ for the Partner States and other Community organs and institutions. The Secretariat is also the central planning entity and outreach point for the Community.[52] There are two important functions of the Secretariat worth further exploration. In accordance with Article 71 (1) (e) and (l), the Secretariat is required, through the Coordination Committee, to coordinate and harmonise the policies and strategies that relate to the development of the Community, and also to implement decisions of the Summit and the Council. While these are important functions, especially in lieu of enabling the secretariat to take on a more assertive role, the extent to which these functions can be actualised appears to be limited. Given the institutional and legal technicalities contained in various Community instruments the Secretariat is particularly tied to attending to the functions that relate to Community organs and institutions and not those that may involve direct contact with the Partner States. Therefore, while it is provided that:

> "The Partner States agree to co-operate with and assist the Secretariat in the performance of its functions as set out in Article 71 of this Treaty and agree in particular to provide any information which the Secretariat may request for the purpose of discharging its functions."[53]

This provision is clearly short of the strength required to compel the Partner States to comply with the Secretariat's demands in the exercise of its duties. As can be seen,

[52] ibid, Arts. 66 (1) and 71 (1).
[53] EAC Treaty 1999, Art. 74 (4).

emphasis is placed on the provision of information, which may be but a small portion of what the Secretariat may require from any given Partner State, in the enforcement of the Community agenda.

The Secretariat houses two important offices of the Community: the office of the Secretary General and that of the Counsel to the Community. With assistance from a number of deputies decided by the Council, the Secretary General is the accounting officer of the Community and secretary to the Summit, while the Counsel is the principal legal adviser to the Community.[54] Although the Secretary General is vested with several functions that require making important decisions, many of these are subject to direction of either the Summit or the Council. For example, the requirement for the Secretary General to refer a matter to the EACJ for infringement or breach of the Treaty by any Partner State has to be sanctioned by the Council.[55] However, considering that Council decisions are largely arrived at by consensus,[56] the practicability of enforcing this important provision appears to be farfetched.

Although the Partner states must protect their interests by being part of the decision making structures and processes, it appears that this concept is over stretched to enable the passage of decisions of a regional outlook that may be unpopular with the Partner states. This preposition is actually reinforced by the fact that decision-making of the Summit and Council is bound by the rule of consensus.[57] When considering the membership of the policy organs in line with the extent of their mandate, we see the strong presence of the national governments at the centre of the decision-making structure and processes of the Community. As will be seen shortly, this state-centric

[54] See Articles EAC Treaty 1999, Art. 67-69.
[55] EAC Treaty 1999, Art. 29.
[56] EAC Treaty 1999, Art. 15 (4). While Article 15 (5) requires the Protocol on decision-making to be concluded within a period of six months from the entry into force of the Treaty [By January 2001], efforts to get a copy of the Protocol were fruitless. However, having failed to get commitment from any official whether such a Protocol existedit is highly probable that it is not yet in place.
[57] EAC Treaty 1999, Art. 12 (3) and 15 (4). See also, Art. 148 that also provides for exceptions on the issue of consensus in decision making.

decision making model underlies several of the challenges being faced by the other Community organs.

The East African Court of Justice

The East African Court of Justice (EACJ) is established under Article 9 of the EAC Treaty, as the judicial body of the Community. It is an international court functioning under a regional cooperation framework. Its initial responsibility is to ensure adherence to law in the interpretation and application of and compliance with the EAC Treaty.[58] Originally comprising six judges, the number rose to ten, following the accession of Rwanda and Burundi to the Community in June 2007. The judges are appointed by the Summit, while the Court Registrar is appointed by the Council of Ministers. [59] The Court operates on an ad hoc basis since its business is conducted as and when need arises.[60] The judges are not resident and continue to hold and attend to their respective offices at national level. As it awaits a permanent seat, the Court and its Registry are seated in Arusha, Tanzania, while the High Courts of the Partner States apparently serve as its sub-registries.[61] Prior to exploring the challenges of the EACJ, the following section enlightens us on the role of the judiciary in Environmental management.

The Judiciary and Transboundary Environment Management

The existence and steadily increasing development of environmental law has inevitably necessitated the creation of matching judicial systems. While it has been common for environmental management regimes to have in-built arbitration systems, the use of courts of law and special tribunals in the management and

[58] EAC Treaty 1999, Arts. 23 and 27 (1).
[59] The Judges are appointed from among sitting judges of any national court of judicature or from jurists of recognised competence.
[60] Interview with Registrar of the East African Court of Justice ((East African Community Secretariat, Arusha, Tanzania, 10 July 2006).
[61] ibid.

settlement of environmental matters is on the increase.[62] This is a result of increased awareness of the potential for cross-border disputation over shared natural resources and the increasing emergence of the Multi-national Environmental Agreements (MEAs) and other related agreements that provide for dispute settlement mechanisms.[63] As is the case with other branches of law, judicial systems have proved to be instrumental in the enhancement, interpretation and application of environmental law. It is because of such pivotal functions that the judiciary has greatly contributed to development and implementation of environmental law and ENRM, in general. Commentators are increasingly advocating the establishment and operationalisation of supra-national environmental courts.[64] Despite the importance and growing acceptability of environmental law, however, there remains considerable scepticism as to the benefits and effectiveness of international environmental litigation in environmental management.[65] To some, litigation is a confrontational process that fails to appreciate the sensitivities attaching to environmental matters. It is argued that environmental management can best be addressed through mechanisms based on cooperation among interest parties.[66] Despite their conflicting core arguments, these two perspectives do not rule out their co-existence within the same regime. After all, courts of law may play many other roles, beyond dispute resolution, including giving advisory opinions.[67] It is against this background that we now explore the roles and challenges of the EACJ in view of their likely impact on ENRM.

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[62] Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) p. 2.

[63] Cesare Romano, 'International Dispute Settlement' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 1039. See also, Stephens (2009) op. cit., n. 62 at p. 2.

[64] See, generally, Amedeo Postiglione (ed) *The Global Environmental Crisis: The Need for an International Court of the Environment* (International Court of the Environment 1996); See also, Alfred Rest, 'The Indispensability of an International Environment Court,' (1998) 7 RECIEL 63.

[65] See Stephens (2009) op. cit., n. 62 at pgs. 10-12.

[66] Abrah Chayes, Antonia H. Chayes and Ronald B. Mitchell, 'Managing Compliance: A Comparative Perspective' in Edith B. Weiss and Harold K. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Accords* (Massachusetts Institute of Technology 1998) 39.

[67] See, for instance, Articles 14 (4) and 36 of the EAC Treaty 1999.

Role of the East African Court of Justice

Given its mandate as a regional judicial body, the EACJ is expected to play an important role in ENRM. First, this role is boosted by that fact that a significant part of the EAC law concerns ENRM. Although national courts are also expected to play an important role in enforcing Community law, the EACJ remains the main custodian of Community law. Secondly, with increasing interest in environmental litigation in the region, the need for enhancing and broadening the Community's environmental law jurisprudence has become apparent. There is no doubt that litigation, especially in public interest, is increasingly becoming a major tool in environmental management. As such, a regional court can become an instrument in reinforcing the national judicial systems in the protection against the infringement of individual and community rights, privileges and duties in the enjoyment of environmental goods.

Thirdly, as there are several shared environmental resources within the Community, the EACJ is likely to be better placed to handle transboundary disputes that arise over such resources. Fourthly, as a legitimate regional institution, the EACJ is well placed to provide another level of appeal, especially in the event of loss of confidence in the national legal systems. Since national governments have been accused over time of interfering with litigation processes or dishonouring their outcome,[68] the existence of a supra-national judicial level can also serve as a check on State excesses. Fifthly, as is the case for the national courts, the EACJ is also expected to substantially contribute to the development of environmental law within the region. As East Africa's environmental jurisprudence develops, the invocation of the discretionary

[68] The Advocate Coalition for Development and Environment (ACODE), for instance, observes that in *Siraji Waiswa v. Kakira Sugar Works* (1985) Ltd. (HCCS No. 0069 of 2001, High Court of Uganda), the principal plaintiff was persistently intimidated leading to his withdrawing interest in the case. In this case and the related one of *ACODE v. Attorney General* (Misc. Cause No. 0100 of 2004, High Court of Uganda), a group of local agro-forestry farmers petitioned government's decision to issue a land use change permit to a private company that sought to convert forest land into a sugar plantation. Government lost the latter case and was required to rescind its decision. ACODE, however, further observes that government has, to-date, not honoured this court decision. See Godber Tumushabe et al, *Constitutional Reform and Environmental Representation in Uganda: A Case Study of Butamira Forests in Uganda* (Policy Research Series No.10, ACODE 2004) p.4

judicial powers will certainly be required in the enforceability of various environmental and other supporting laws. Lastly, it is part of the EACJ's mandate to offer advisory opinions,[69] participate in arbitration and out of court settlements,[70] and assist in the harmonisation of laws,[71] all of which are of critical importance for the improvement of the ENRM regimes in the region.

Despite such a wide range of roles and importance, it shall shortly been seen that the EACJ remains faced with several challenges, many of which can be attributed to the inheritance of state-centrism within the regional cooperation frameworks. As this thesis is about rationalisation of powers and functions in a multi-level government arrangement, the purpose of the discussion that follows flows from the argument that EACJ's contribution in ENRM is not only confined to the regional environmental law jurisprudence but also the general functioning of the Court.

Institution of Proceedings to East African Court of Justice

As a major landmark towards ensuring access to justice in matters that concern the Community, the Treaty provides for various ways through which proceedings to the EACJ can be instituted. Suits can be filed by a Partner State, the Secretary General of the Community or by a legal or natural person.[72] Contrary to the common practice in international courts,[73] procedure for obtaining justice in the EACJ can be accessed by legal or natural persons, resident in any Partner State, without necessarily passing through their respective Governments.[74] Partner States can make reference to the Court against any other Partner State for breach of any of the provisions of the Treaty or against any legal instrument of the Community considered to be *ultra vires*

[69] East African Community Treaty 1999, Arts. 14 (4) and 36.
[70] Ibid., Art. 32.
[71] ibid., Art. 126
[72] ibid., Art. 29-30.
[73] See African Courts and Tribunals' Brief on the 'Court of Justice of the East African Community' available at <http://www.aict-ctia.org/courts_subreg/eac/eac_home.html>, accessed 6th January 2007.
[74] See EAC Treaty 1999, Art. 30.

or unlawful.[75] The Secretary General may also make reference to the Court against any Party that fails to fulfil its Treaty obligations. [76] Reference by the Secretary General has to, however, be sanctioned by the Council.[77]

Furthermore, Tribunals and other Courts in Partner States may also refer to the EACJ, any matter requiring the interpretation or application of the Treaty, or validity of directives, decision, regulations or actions of the Community and its institutions.[78] Also, the EACJ may, upon request by the Summit, Council or Partner State, give an advisory opinion regarding a question of law arising from the Treaty so long as it affects the Community.[79] This is one of the non-judicial criteria used by the Court to evaluate cases brought before it. The other, is the hearing of arbitral cases between parties as may be provided for by agreements made under the EAC framework.[80] For instance, the Protocol on the Sustainable Development of Lake Victoria provides for reference to the EACJ in the event that negotiations between disputing parties fail.[81] Despite, such an unusual opening, however, the EACJ has not seen a substantial number of suits filed before it. This may be partially explained by the some of the challenges discussed below.

Popularity of the Court

While the EACJ was inaugurated in November 2001 and its Rules of Procedure and Arbitration Rules enacted a year later, the first case filed before it was in December 2005.[82] To the surprise and concern of many, only a handful of cases have been filed

[75] EAC Treaty 1999, Art. 28.
[76] ibid., at p. 29.
[77] See Paragraphs 2 and 3 of Article 29 of the EAC Treaty 1999.
[78] EAC Treaty, Art. 34.
[79] ibid, Art. 36.
[80] ibid, Art. 32.
[81] See Protocol on Sustainable Development of Lake Victoria 2003, Art. 46 (2); See also, Protocol on Environment and Natural Resources Management 2006, Art. 40.
[82] The plaintiffs alleged that the Council of Ministers interfered with the functions of the Assembly when it withdrew from the Assembly various Private Members Bills which had already been tabled in the House for debate. They also challenged composition of the sectoral committee on legal and judicial affairs that spear-headed the move. See EAC press release available at <http://www.eac.int/news_2006_10__EACJ_delivers_first_judgment.htm> accessed 6th January 2007

with the Court and none of them directly concerns the environment.[83] The Court's Registrar attributes such extremely low caseload to the "wait and see" syndrome that normally faces many new institutions. He also believes that potential dispute generating Community laws have yet to be passed[84] and by 2007 there were about three such laws.[85] He, nonetheless, also concurs with the common belief that the Court and its scope of activities have not been widely publicised.[86] That said the restrictive nature of EACJ's initial jurisdiction has also inevitably impacted on its ability to reach the public.[87] This issue probably explains the steady increase of the calls for expansion of EACJ's jurisdiction, especially among the legal fraternity.[88] One lawyer, for instance, observes that:

> "The East Africa Court of Justice is shadowed by lethargy of half measures and controls that threaten to deny it the independence that it requires for proper performance of its functions. Member states have in several ways limited the area of competence of the court in a bid to minimize interference by it in their affairs."[89]

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[83] This information was confirmed by officials of the EACJ registry (Names withheld on request) (East African Community Secretariat, Arusha, Tanzania, 21 July 2006).

[84] John Eudes Ruhangisa, *The State of Constitutional Development in East Africa: The Role of the EAC - 2003* (Annual Evaluation of Constitutional Development in East Africa, Kituo Cha Katiba 2003) (The Author is the Registrar East African Court of Justice).

[85] These are: The East African Community Customs Management Act 2004; and The Standardisation, Quality Assurance, Metrology and Testing Act 2006; and the East African Community Competition Act, 2006.

[86] Benson Tusasirwe, *The East African Community and Constitutional Development* (Kituo cha Katiba Resource Centre, Kampala, Uganda, 2002) p. 7.

[87] See EAC Treaty 1999, Art. 27(1) and (2). The issue of EACJ's limited jurisdiction is further discussed in this Chapter.

[88] This advocacy has been particularly championed under auspices of the East African Law Society. See meeting proceedings of the Annual General Meeting of the East African Law Society (Dar es Salaam, February 2003).

[89] T. O. Ojienda, 'The East Africa Court of Justice in The East African Community: A Focus on Institutional Structure and Function in the Integration Process' The East African Law Society Series, p. 9 at <http://www.ealawsociety.org/Joomla/index.php?option=com_content&task=view&id=25&Itemid=46 > accessed 12 May 2005.

Whether it is a deliberate ploy, as insinuated in the above quotation, or not, the underlying fact is that the restrictive nature of EACJ's jurisdiction has also made its accessibility limited. We shall further discuss the issue of jurisdiction after the next sub-section.

Independence of the EACJ

Autonomy and independence are crucial factors in facilitating EACJ's role as the overall guardian of justice on matters that concern the Community. Independence does not only ensure Court's effectiveness and efficiency, but also retains public confidence in the judicial system. While the Treaty expends reasonable effort towards ensuring EACJ's independence there remains both operational and structural issues that potentially challenge its independence and autonomy.

Among the major issues concerning the autonomy of the EACJ is the appointment and removal of judges, which has been 'interpreted' to be at discretion of the Summit of Heads of State.[90] For example, while the Treaty requires the removal of a Judge to be based on recommendations of an *ad hoc* independent tribunal,[91] the Summit pushed for an amendment intended to allow them powers to suspend judges under investigation in their home countries. The amendment also provides that a judge of the EACJ who is also a public officer in a Partner State simultaneously ceases being a judge if removed from national public office on grounds of misconduct, inability, resignation, bankruptcy or conviction of an offence involving dishonesty or fraud or moral turpitude.[92] It is feared that this amendment is intended and likely to allow the Summit reasonable influence over the EACJ, by holding to ransom or intimidate individual judges.[93] In other words, the suspension or eventual removal of

[90] EAC Treaty 1999, Arts. 24 and 26.
[91] The *ad hoc* independent tribunal has to be consisted of three eminent Judges drawn from within the Commonwealth of Nations. See EAC Treaty 1999, Art. 26 (2) and (3).
[92] This is as per the proposed amendment to Article 26 of the EAC Treaty 1999.
[93] See remarks by Tom Ojienda, President of the East African Law Society, quoted in Ngige Francis, 'Lawyers Criticise Proposed Amendments to the EAC' *The Standard Newspaper* (Nairobi, 13 December 2006).

an EACJ judge could actually be solely engineered at Partner State level. It is, in fact, widely believed that, the amendment was initially intended to enable the Kenya Government to get rid of its two judges who were on the bench that ruled against it in an election petition.[94] This belief can actually be collaborated by the hasty manner in which the amendment was passed.[95] Kenya's discontent with its judges arises from EACJ's ruling that granted an interim injunction that restrained[96] the recognition of nine of Kenya's nominees to the 2nd EALA as duly elected members of the Assembly.[97] Following Court's strong recommendation that the amendments be revisited at the earliest opportunity for review of the Treaty, it remains unclear whether they are actually in force. Although the amendment has been variously challenged, this example shows the extent to which the Partner states can swiftly conspire to push for their national interests.

Jurisdiction of the Court

The EACJ significantly differs from the defunct Court of Appeal for East African (CAEA), whose jurisdiction was confined to appeals arising from decisions of the National Courts on both civil and criminal matters other than constitutional matters and the offence of treason in Uganda and Tanzania, respectively.[98] Although it is supposed to eventually be broadened to include other original, appellate, human

[94] See Ruling of the EACJ in *Prof. Peter Anyang' Nyong'o and 10 Others v. The Attorney General of Kenya and 5 Others,* Reference No. 1 of 2006, EACJ.

[95] Following a directive of the Summit, which met on the 30th November 2006, the Attorney generals of the then three Partner States of the EAC met on the 7th December 2006 to consider the draft amendments to the Treaty. The recommended amendments were forwarded to the Council that approved them the following day. A day after, on the 9th December 2006, the proposed amendments were submitted to the Partner States and all of them replied in affirmative within three days. On 14th December 2006 the amendments were adopted by the Summit and within three months all the Partner States ratified the amendments and deposited their instruments of ratification with the Secretary General.

[96] See Judgment in *East African Law Society and others v. the Attorney Generals [Partner States] and the EAC,* Reference No. 3 of 2007, EACJ.

[97] Parties within Kenya's ruling National Rainbow Coalition (NARC) filed an application before the EACJ claiming Kenya's National Assembly had breached provisions of the EAC Treaty by endorsing Kenya's representation to the 2nd East African legislative Assembly (EALA). It was alleged that the submitted list of NARCs five members was different from that endorsed by the coalition. See *Prof. Peter Anyang' Nyong'o and 10 Others v. The Attorney General of the Republic of Kenya and 5 others,* EACJ 1/2006, filed on 27th November, 2006.

[98] See discussion, in Chapter Six, on the early post colonial regional institutions.

rights and other jurisdictions,[99] EACJ's jurisdiction is basically still confined to the interpretation and application of the Treaty.[100] As observed by Tusasirwe, however, though future expansion of the court's jurisdiction is probable, its current jurisdiction is too narrow to make it effectively operational and useful to the Community.[101]

Expressing fears that narrowness of the Courts jurisdiction could make it appear more of a political Court,[102] the Court's Registrar argues that a wider jurisdiction would better place EACJ in handling the issues of regional interest which are perceived to be sensitive at national level.[103] The Community has indeed noted by itself that EACJ's limited jurisdiction has affected the effectiveness of its legal and judicial systems.[104] It has, for instance, affected Court's active involvement in the development and harmonisation of East African jurisprudence through judgments, decisions, arbitration and advisory opinions.[105] It has indeed been argued that EACJ's apparent jurisdiction does not cover the entire corpus of EALA legislation.[106] It

[99] East African Community Treaty, 1999 Art. 27(2).

[100] The Court also has jurisdiction over disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations; Disputes between the Partner States regarding the Treaty, if the dispute is submitted to it under a special agreement; Disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party and; Disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court. See EAC Treaty 1999, Arts. 31 and 32.

[101] Tusasirwe (2002) op. cit., n. 86 at p.7.

[102] Ruhangisa (2003) op. cit., n. 84 at p.13.

[103] ibid.

[104] See East African Community, *East African Community; Treaty and the Challenges of the Community* (EAC Occasional Papers No.3, EAC Secretariat, Arusha 2003) p. 38.

[105] As can be deriving from its powers and duties enshrined in the EAC Treaty 1999, the EACJ has the mandate and potential of guiding the development and harmonisation an East African jurisprudence. According to Article 28 (2), for instance, the Court is required to determine the:

> "legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power."

See also, Article 30 of the same Treaty.

[106] Terlinden Ulf, *African Regional Parliaments - Engines of integration and democratisation?* (Friedrich-Ebert-Stiftung Bonn, Germany 2004) p. 9.

remains unclear as to whether the Court has the mandate to cover human rights and Common Market tribunals, both of which are central in the integration process.[107]

In an effort to broaden its jurisdiction, the Legal and Judicial Sectoral Council directed the EAC Secretariat to oversee the development of an appropriate instrument.[108] Subsequently, the Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice, [109] commonly referred to as the 'zero draft' was, in 2005, drafted. The protocol was expeditiously drafted on conviction that it was logical to extend EACJ's jurisdiction prior to the enactment of the Customs Union Act 2005, which was anticipated to trigger trade related disputes.[110] Consultations on the draft Protocol have taken much longer than had been anticipated.[111] It is believed the issue of 'over expanding' EACJ's jurisdiction has caused jitteriness among the Partner States,[112] leading to the extended appellate jurisdiction provided for under the original draft to be dropped in the subsequent drafts.[113] When asked why jurisdiction of the EACJ had not yet been extended, the then reigning chairman of the Council of Ministers is quoted to have retorted that the 'Court (must) be given time to grow'.[114] The delay in extending EACJ's jurisdiction continues to be of concern both within the

[107] See East African Community, *Mid-Term Review for EAC Development Strategy (2006 - 2010)* (EAC Secretariat, Arusha, Tanzania 2009) sec. 7.1.4.5 at p. 89.
[108] See East African Community, *Report of the Legal and Judicial Affairs Sectoral Council of 24th November 2004* (REF: EAC/SC/01/2004, East African Community, 2004).
[109] Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice 2005.
[110] Interview with Counsel to the Community, East African Community (East African Community Secretariat, Arusha, Tanzania, 17 July 2006). See also, Ogalo Wandera, 'Reaping the benefits of the East African Community: The East African Legislative Assembly Perspective' (Annual Conference of East African Lawyers, Dar es Salaam, Tanzania, 20-23 February 2003).
[111] The Legal and Judicial Affairs Sectoral Council sitting on the 24th November 2006 had targeted the consultation to end within nine months and that is by August 2005. See Note 12 of the *Report of the Legal and Judicial Affairs Sectoral Council*, REF: EAC/SC/01/2004.
[112] Interview with a member of the Legal, Rules and Privileges Standing Committee of the East African Legislative Assembly (Kampala, Uganda, 10 July 2006).
[113] See Wandera (2002) op. cit., n. 110.
[114] ibid.

general public and Community structures.[115] A Member of the EALA, for instance, observed that:

> "…We seem to be at the mercy of the Council of Minister in respect of Jurisdiction." [116]

While it is felt that EACJ's appellate jurisdiction should transcend Treaty matters to cover all civil and criminal matters, as the case was with the defunct CAEA, it is feared also that such opening up may generate unmanageable workload. Justice Bossa, for instance, expresses fears that it would be challenging for the EACJ to take on a combined jurisdiction by playing the role of a court of justice and at the same time being a human rights and appellate court.[117] Having a wider jurisdiction is one thing but being able to effectively handle it is another. It is, therefore, important for the plans for an expanded jurisdiction to think about Court structures. As the issue of an expanded jurisdiction continues to be debated, however, one might think of Europe, which presents one of the cases of distributed jurisdiction. Here the European Court of Justice handles matters arising from the functioning of the European Union under the European Community Treaty[118] while the European Court of Human Rights specifically deals with human rights issues as provided for under the European Convention on the Protection of Human Rights 1950.[119] While it can be argued that comparing the EACJ with similar but long established Courts may be premature, doing so broadens the Community's thinking on possible alternatives as the efforts of broadening its judicial system takes shape.

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[115] See for, example, minutes of the proceedings of the Annual General Meeting of the East African Law Society (Dar es Salaam, February 2003). See also, Ruhangisa (2003) op. cit., n. 84 at p.15; and Wandera (2002) op. cit., n. 110.

[116] See Wandera Ogalo (2002) op. cit., n. 110.

[117] Bossa Barungi Solomy, 'A Critique of the East African Court of Justice as a Human Rights Court' (Conference on Human Rights Institutions in East Africa, Arusha, Tanzania, 26 October 2006).

[118] See details in the consolidated version of the Treaty on European Union and of the Treaty establishing the European Community, Official Journal of the European Communities (C 321 E/36), Art. 35 (ex. Article K.7).

[119] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art. 19.

On the other hand, there are other challenges regarding the practicability of extending the appellate jurisdiction to the EACJ. The three Partner State have differences in their legal systems some of which are substantial. For example, while Uganda has two appellate courts, the High Court and Supreme Court, Tanzania and Kenya have one each. Extending appellate jurisdiction to the EACJ may, therefore, require extensive review or reconstitution of the national legal systems. Substantial efforts and resources would certainly be required to bring such institutional and legal disparities into consonance with each other.[120] Pointing out these challenges is not intended to portray defeat, but rather to show that the issue of extending EACJ's jurisdiction, especially to the widest possible limits, requires a concerted effort and broader outlook. Much depends on the political will of Partners States, which is a must for cessation of the requisite powers and the in mobilisation of necessary resources. Meantime, it is worth noting that EACJ's operations were recently boosted by reconstituting its structure into a Court of First Instance with jurisdiction as per Article 23 of the Treaty and an Appellate Division with appellate powers over the Court of First Instance.[121]

Relationship of the EACJ with National Courts

Jurisdiction of national courts is ousted wherever the Treaty confers it on the East African Court of Justice.[122] Article 34 of the Treaty encourages national courts to request the EACJ to give a preliminary ruling on issues concerning the interpretation or application of the provisions of the Treaty and the validity of the regulations, directives, decisions or actions of the Community. Since it is not mandatory for the national courts to seek for preliminary rulings, however, there are fears that Community Law could variably be interpreted and implemented by the Partner

[120] Wilbert Kaahwa, 'Perspectives on Racism, Racial Discrimination, Xenophobia and Related Intolerances: The Role of the East African Community' (East Africa Law Society Regional Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance at Arusha, August 2001) 9-12.
[121] East African Community, 'Joint Communiqué of the 8th Summit of EAC Heads of State' *EAC Press Release* (Arusha, 30th November 2006).
[122] EAC Treaty 1999, Art. 33.

States, thus leading to confusion and conflicting decisions.[123] The possibility of such a scenario is reinforced by the fact that national Courts and the EACJ are not adequately linked to each other in the Treaty.[124] Precedence of EACJ decision only takes effect if the matter at hand relates to interpretation and application of the Treaty.[125] That notwithstanding, national courts' decisions could also solely hold because discretion of where to file a suit lies with litigants.

The challenges being faced by the EACJ draw clearly manifest the central issue of this thesis, which is state-centrism *vis-à-vis* the dispersal of powers and functions in a multi-level government set-up. The threats to the Court's autonomy, its limited jurisdiction and unclear relationship with national courts can certainly impact to environmental management. Notwithstanding the issue of constrained jurisdiction, however, the EACJ recently, in *James Katabazi and 21 others v Secretary General of the East African Community*,[126] pronounced itself as having jurisdiction in any matter that can explicitly be derived from the holistic confines of all Treaty provisions. The Judgment brings to light the relevance of the Treaty's objectives and operational principles as guides in the definition of EACJ's scope of mandate. It was thus stated that:

> "Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have [...] while the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation."[127]

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[123] Ruhangisa (2003) op. cit., n. 84 at p.14.
[124] While the EAC Treaty1999 has something to say about the jurisdiction and preliminary rulings of National Courts, it falls short of clearly linking them with the EACJ. See Articles 33 and 34.
[125] EAC Treaty 1999, Arts. 8 (4) (5) and 33 (2).
[126] Reference No. 1 of 2007, The East African Court of Justice, Arusha.
[127] See judgment in *James Katabazi and 21 others v Secretary General of the East African Community* (The East African Court of Justice, Reference No. 1 of 2007) at p. 14.

As environmental litigation can be variably approached, inclusive via human rights law, such an interpretation provides a broadened platform for the involvement of the EACJ in environmental protection and management matters. The question remains as to the extent to which this doctrine will be sustained and whether it will always be widely respected.

East African Legislative Assembly

The East African Legislative Assembly (EALA) is the chief legislative organ of the Community.[128] It was inaugurated in November 2001, with an original membership of twenty seven elected members and five ex-officials.[129] As is the case with the EACJ, its membership increased following the enlargement of the Community,[130] and it now contains 45 elected members. In establishing the EALA, the Treaty attempts to address some of the problems that incapacitated the proper functioning of the predecessor regional assemblies. [131] Unlike them, full members of the EALA are elected, although not by universal adult suffrage.[132] Also, the EALA enjoys more powers and functions, especially in respect to its legislative mandate, which is in fact highly rated even among its current equivalents in Africa, as most of them are concerned with advisory, oversight and investigative functions.[133] It is indeed argued

[128] EAC Treaty 1999, Art. 49.

[129] The ex-officials, whose number increased to seven following the enlargement of the Community include: The ministers responsible for regional cooperation from each Partner State, the Secretary General of the Community and the Counsel to the Community. See EAC Treaty, Art. 48 (1) (b).

[130] Each Partner State is represented by nine members who should not be members of the national legislatures, thus the number of 45 full members. See EAC Treaty 1999, Arts. 48 (1) (a) and 50 (1).

[131] See discussion in Chapter Six and Seven giving a historical account of regional cooperation in East Africa.

[132] According to the Clerk to the Assembly the desire to elect EALA members through universal adult suffrage continues to be a key concern among several stakeholders. Implementation of universal suffrage is, however, faced with the challenges of being too costly and the difficulty in reconciling the national elections calendars. Interview with Clerk to the East African Legislative Assembly (East African Community Secretariat, Arusha, Tanzania, 21 July 2006).

[133] The other regional Parliaments or Assemblies include: ECOWAS-Parliament, SADC Parliamentary Forum, Pan-African Parliament, Inter-Parliamentary Union of IGAD, and Network of Parliamentarians of the Economic Community of Central African States.

that the EALA stands out as the only regional assembly in Africa with proper law-making powers.[134]

Aside from this legislative function, the EALA is also required to: liaise and enhance cooperation with Partner State legislatures; debate and approve EAC budgets; evaluate annual reports of the Community, including audit reports of the Audit Commission; and recommend to the Council of Ministers any affair of interest to the Community.[135] Furthermore, it has the mandate to debate and make recommendations on reports submitted by the Council. Reports that concern the environment and natural resources are initially reviewed by the Committee on Agriculture, Tourism and Natural Resources,[136] before being discussed in plenary.

The EALA does not only have a broad but also a reasonably powerful mandate that positions it as a core institution in the decision-making processes of the Community. However, the exercise of such a mandate requires an enabling environment and this can best be attained with the support of other Community organs and generally, the Partner States. As this thesis is about the strengthening of the concept of multi-level government through the dispersal of authority from the state to other levels of government, we shall be particularly interested in discussing the actual and potential roles of the EALA and its capacity to perform them.

Role of the EALA in Environmental Management

As seen in the preceding section, the EALA has a broad mandate, which, if put to good use, can significantly contribute to the shaping of a sound regional environment management regime. The Assembly's importance in natural resources management is well captured by a senior official of the EAC, who while discussing the role of

[134] Terlinden (2004) op. cit., n. 106 at p. 8.
[135] EAC Treaty 1999, Art. 49.
[136] This committee is among EALA's seven standing committees. The others are the Accounts; General Purpose; House Business; Legal, Rules and Privileges; Regional Affairs and Conflict Resolution; and Trade Communication and Investment committees.

national and regional assemblies in forestry management, urges the EALA legislators, in the interest of the environment, to make use of their mandate and good offices to: legislate and vote; educate and influence public opinion; lobby government and the private sector; mobilise and allocate resources; and intervene in dispute resolution.[137] Notwithstanding, such a broad and powerful mandate, however, the EALA is faced with various challenges that continue to impact on its general performance. While the challenges include those that relate to matters of capacity and resources, in line with the scope of this thesis' scope we will focus on issues that concern the distribution and rationalisation of powers and roles between the Partner States or their representatives on the one hand and the Assembly on the other. Prior to that discussion, however, let us first explore further the Assembly's major function of law making.

Role of the EALA in the Development and Harmonisation of Community Law

As a legislative body, the EALA is among the Community's organs required to substantially contribute to the development of Community law, through processes such as legislation, law review, harmonisation and approximation. We shall be discussing these processes concurrently. Although EALA members can also initiate bills, the Assembly's major role is to debate and pass bills.[138] Article 126 (b) of the Treaty requires Partner States to take the necessary measures to harmonise all their national laws that pertain to the Community. The fact that the EALA is mandated to liaise with the national assemblies,[139] presents a great opportunity for it to play a coordinating role in the harmonisation processes. Aside from this non-legislative role, the Assembly has a mandate to enact Community framework laws as a means of facilitating the harmonisation processes. As was the case with the East African

[137] Tom Okurut, 'The Role of the National and Regional Legislators' (Regional Consultation Workshop on Establishing a Permanent Protected Forest Estate in East Africa, Mombasa, Kenya, 23nd -23rd June 2005) - The author of this paper is a long serving senior officer of the EAC, where he first served as head of the Lake Victoria Development Programme and is presently the Executive Secretary of the newly established Lake Victoria Basin Commission.
[138] EAC Treaty 1999, Art. 14 (1)
[139] See EAC Treaty 1999, Article 49 (2) (a).

Customs Union Act 2005, however, the EALA can make legislation that is directly enforceable in the Partner States. Direct legislation by the Community presents the opportunity of avoiding the laborious and time wasting negotiations that normally underpin law and policy harmonisation processes.[140] In fact, despite the numerous Treaty provisions across the several sectors of cooperation,[141] policy and law harmonisation has proved to be an uphill task. The Community's Registrar observes;

> "Indeed the exercise to harmonise and or approximate the laws of Partner States may not be an easy one for it involves a number of state organs and institutions ..."[142]

Although not explicitly stated, this quotation points us to the fact that state organs and institutions may have own goals to achieve, which may not necessarily tally with those of the Community. Legal harmonisation or approximation may, therefore, entail a painful 'winning and losing' process. This reality is often heightened when it comes to forfeiting other goals for the common good of the environment.[143] Indeed, while there have been various efforts, to-date, not a single sector can be said to have significantly attained the desired level of law or policy harmonisation or approximation.[144] As we see in the next Chapter, the forfeiture factor seems to explain why Community law has tended towards allowing Partner States wide discretion in determining their national environment management regimes even where shared resources are concerned.

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[140] This point was particularly supported by all the EAC officials interviewed. See Appendix 2.

[141] In matters that concern the environment, for example, policy and law harmonisation is in accordance to the EAC Treaty supposed to be undertaken in the areas of; Inland water ways transport (Art. 94(r)), Meteorological services (Art. 100 (1)(f)), Agriculture (105 (2)(a)), Seed multiplication (Art. (106)(e)), Livestock multiplication (Art.107 (e)), plant and disease control (Art.108), food security (110)(b), trade and movement of toxic materials (Art.113(2), natural resources management (Art.114), and wildlife management (Art.115).

[142] Ruhangisa (2003) op. cit., n. 84 at p. 27.

[143] See, generally, the discussion on the development and environment nexus in Chapter Four.

[144] This was confirmed in an interview with the District Fisheries officer, Bugiri District (Bugiri, Uganda, 20 March 2007); and also, the interview with a fisheries officer with Nyanza Province, Kenya (Name withheld on request) (Kisumu, Kenya, 2 April 2007).

While direct legislation by the Community has been seen as a better alternative to legal harmonisation, this option faces challenges. As the initiation of Bills is largely a preserve of the Council,[145] some recent experiences tend to suggest that the likelihood of the Council to initiate and forward Bills that, while in the common good, may affect their national interests, appear to be slim.[146] This perhaps explains why the Council appears to be more comfortable with the national commitments at the regional level to be enshrined in Protocols, which are less formal agreements,[147] and not Acts of the Assembly.[148] Assembly members have the other option of proposing a motion or introducing any Bill into the Assembly, so long as it relates to Community matters.[149] That notwithstanding, however, the Council's assertion that the Assembly is only expected to initiate private member's Bills that do not have political or cost implications on the Community is on record.[150] While the EALA has fiercely contested that position and subsequently accused the Council of usurping its legislative function, [151] several private members' bills have been withdrawn at the insistence of the Council. Nonetheless, even though a Bill is privately initiated and successfully passes by the Assembly, the final decision as to whether it is to become law lies with the Summit or more particularly, the Heads of State of the Partner States. A bill lapses if any member of the Summit withholds assent upon its first re-submission.[152] The straightforward message here is that the final decision on what constitutes Community law lies mainly with the Partner States.

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[145] EAC Treaty 1999, Art. 14 (3) (b).
[146] See discussion in the following sub-section of this Chapter.
[147] David Hughes, *Environmental Law* (Fourth Edition edn, Butterworths Lexis Nexis Bath, UK 2002).68
[148] See EAC, East African Legislative Assembly, *Official Report of the Proceedings of the East African Legislative Assembly, 59th Sitting (First Assembly, Fifth Session - 6 December 2005)* (East African Community 2005).
[149], EAC Treaty Art. 59.
[150] See Council of Ministers defence in the case of *Calist Mwatela and others al v. East African Community* Application No. 1 of 2005, EACJ. See also, East African Legislative Assembly (2005) op. cit., n. 148; and Terlinden (2004) op. cit., n. 106.
[151] East African Legislative Assembly (2005) op. cit., n. 148
[152] EAC Treaty 1999, Art. 63.

Relations between the Council of Ministers and the Assembly over Legislation Matters

In addition to having its own legislative powers, the Council is also part of the Assembly. As such, the need and benefits for a good working relationship between these two organs cannot be overstated. EALA's legislative functions are already discussed in the previous section. As for the Council, in addition to initiating bills, it is also within its mandate to make regulations, issue directives, take decisions[153] and recommend protocols for approval to the Summit of Heads of State.[154] By placing different legislative roles at various power centres, the Treaty attempts to exhibit a degree of legislative flexibility, which nonetheless requires a high level of cooperation among the concerned organs. We shall, however, shortly see that the events that lead to the *Calist Mutwala et al v. EAC* case presents clear evidence that such flexibility could be a weakness that can be exploited in the interest of the Council.

Irrespective of whether the situation has changed, the case of *Calist Mwatela et al v. EAC*[155] remains crucially important in understanding not only the soured relations between the Council and Assembly, but also the fact that such conflict arises from power struggles and unclear demarcation of boundaries between organs that are required to play similar roles. We shall not review for the merits of the case but rather the circumstances under which it arose.

In 2004, four private members Bills were initiated from within the Assembly.[156] Expressing its dissatisfaction, Council argued that many provisions in these bills were likely to commit the Partner States in a manner that, in the name of a common Community position, would require substantial revisions of national laws and

[153] ibid., 14 (3) (d).
[154] ibid., Article 151 (2).
[155] See *Calist Mwatela and others al v. East African Community,* Application No. 1 of 2005, EACJ.
[156] The Bills are: the East African Community Trade Negotiations Bill (2004) (The Trade Negotiations Bill), The East African Community Budget Bill (The Budget Bill), The East African Immunities and Privileges Bill (The Immunities and Privileges Bill) and The Inter-University Council for East Africa Bill (The Inter-University Council Bill).

policies.[157] Following a lengthy hustle, the EALA at the insistence of the Council,[158] agreed to have the bills withdrawn. This was, however, on the understanding that Council would present alternative Bills, a promise that was reneged on. To the anger of the legislators, Council instead replaced the bills with protocols, yet the effectiveness of protocols had always been a concern of the Assembly.[159] Council argued that, as understood under Article 151 of the Treaty, Protocols serve the purpose of addressing Community issues in the same manner as Acts of the Assembly. As a result a dispute arose between the Council and the Assembly, prompting three members of the latter, against the wishes of the former,[160] to seek court redress and thus the *Calist Mwatela et al v. EAC* case. In its judgment, Court stated that although Council can withdraw bills from the Assembly, the correct procedure had not been followed in handling the matter. It was also noted that decisions of the Council were not expressly binding on the Assembly. The Court, however, also clarified that the Assembly has no power to legislate on matters on which the Partner States have not surrendered sovereignty.[161]

Two issues, from many, can be picked out of this historic, first case to be filed before the EACJ. First, the case reveals a lack of coordination between the Council and Assembly. It is unimaginable that four important Bills were debated by the Assembly allegedly without input or even the knowledge of Council, which is the policy organ of the Community. This observation is not to insinuate that Council has to partake in private members bills, but rather to emphasize that close intra-institutional working

[157] It was not possible to get copies of the Bills. Additional information was, however, provided in an interview with a Member of the 2nd East African Legislative Assembly (East African Community Secretariat, Arusha, Tanzania, 26 July 2006). The information was later confirmed by a staff member of the EAC secretariat, during an interview held on the same day at the same venue.

[158] The Council had argued that it was not fitting for such Bills which had wide political and financial implications on the Community to be presented as private member's Bills. See ruling in *Calist Mwatela and others al v. East African Community*, Application No. 1 of 2005, EACJ. See also, East African Legislative Assembly (2005) op. cit., n. 148

[159] East African Legislative Assembly (2005) op. cit., n. 148, at pgs. 6-7.

[160] See motion moved by the Chairperson of the Committee on Legal Affairs, Rules and Privileges in op. cit. n. 158 at pgs. 1-5.

[161] See judgement in *Calist Mwatela and others al v. East African Community*, Application No. 1 of 2005, EACJ.

relations can be a healthy undertaking that often diffuses actual and potential conflicts. Secondly, there is the revelation of a power struggle, which, according to the plaintiff's arguments, was tantamount to interference by the Council.

Interestingly, the struggles between the Council and EALA over legislative powers seem to be far from over. The Council is contemplating seeking an advisory opinion from the EACJ, over EALA's propositions on the long overdue Lake Victoria Basin Commission Bill. Among the contested propositions is the intention to remove Ministers from the management of the Commission.[162] In fact, some of the underlying issues and impacts of this conflict cannot be better stated than in the words a member of the EALA, who happens to be a lawyer. He stated, in one of the Assembly's proceedings, that:

> "Mr Speaker, sir, protocols cannot and have never governed relationships between individuals and states [...] what we are saying, therefore, is that since a protocol cannot create rights and obligations between individuals and states, the only place that it can be done is in this Assembly. So, Mr Speaker, if you look at the protocols that have been drafted [...] I do not know who by, but given to the Council of Ministers, there are no rights created, there are no obligations created, there are no offences created and there are no remedies created. [...] protocols on their own have no force of law between individuals and states. Mr Speaker, sir, why is it that the Council of Ministers is afraid to bring those Bills here so that we can clothe them with the force of law? And we say, Mr Speaker, sir, that there is an attempt to legislate through protocols in this Community and thereby avoid bringing Bills into this House, either out of fear or out of a sinister motive to empower the Executive with legislative powers!"[163]

[162] Catherine Bekunda, 'Ministers go to Court over Victoria Protocol' *The Newvision* (Kampala, 8th December 2008).
[163] See EALA (2005), op. cit. n. 158, at pgs. 6-7.

An important point to note, however, is that the persistent ensuing conflicts between the Council and the Assembly partially arise from the Treaty provision that requires State quotas to the Assembly to be reflective of the major political parties represented in the national legislatures, thus placing national party politics at the centre of the legislative processes. A long serving member of the EALA had this to say:

> "Some colleagues extend national multi-party politics to Arusha [Seat of the EALA], making it difficult for us to have a unified voice when it comes to matters that affect us as an independent institution…they sometimes play the loyalty card to their parties in government while labelling some of us as being anti-government…But, my friend, this is a regional assembly and not a national parliament. Where should we stand?"[164]

It is worth noting here that because of the ambiguity in the processes involved, the nominations and elections of members to the Assembly have been a source of conflict and as a result, one case has at least been filed before the EACJ, where the underlying issue basically concerns state level power struggles.[165]

Although the EALA has been active in various activities, such challenges have contributed to its inability to initiate and or pass laws. Aside from the budget and procedural laws, the Assembly, in over eight years of existence, passed not more than ten substantive Acts,[166] and most of these relate to trade and taxation

[164] Interview with a Member of the 2nd East African Legislative Assembly ((East African Community Secretariat, Arusha, Tanzania, 25 July 2006).
[165] See *Peter Anyang' Nyong'o & 10 Others v. Attorney General & Another*, (Reference No. 1 of 2006, East African Court of Justice).
[166] After four years in existence only three substantive Bills had, as of end of 2005, been laid before the Assembly. See EALA (2005), op. cit., n. 158, at p. 4.

matters.[167] Despite the wide expectations accruing from explicit Treaty provisions, the Assembly has been able, to date, to handle only two environmentally related Bills - the Lake Victoria Basin Commission Bill, which was in waiting for close to three years and the recently passed Wildlife Management Bill 2008.

In summary, we see that, though the EALA is an autonomous organ with broad mandate, its effective functioning has to be founded on a harmonious working relationship with the other stakeholders. As seen from the events that led to the *Calist Mutwala v. EAC* case, conflicts of interest appear to stand at the centre of the strained relations between the Council and Assembly, which inevitably impacts on Community business. While conflicts of interest are likely to arise in such institutions as the EAC, which are built on the principle of separation of powers, the option of averting or limiting conflicts is more plausible than conflict resolution. In this case, for instance, it is clearly necessary to indicate the circumstances under which the EALA or Council may legislate, but also to do so in a manner that does not undermine the principle objectives, powers and functions of either organ, or the Community goal in general. On the other hand, it is also necessary for the EALA to assert its position, and work towards implementing and enhancing its mandate. The Assembly itself ought to be a front runner in tackling impediments to the attainment of its objectives and extended roles in the integration process. Ulf observes that:

> "While RAs [Regional Assemblies] cannot steer the path of regional integration, they can support it by acting as accelerating catalysts, provided they are willing to pick up the challenge and assert that role. Much depends on how effectively and constructively the assemblies exploit opportunities,

[167] These are, The East African Community Customs Management Act, 2004; and The Standardisation, Quality Assurance, Metrology and Testing Act, 2006; and the East African Community Competition Act, 2006: Other laws passed are; Laws of the Community (interpretation) Act 2004; The Community Emblems Act, 2004; The Acts of the East African Community Act 2004; The East African Legislative Assembly (Powers and Privileges) Act 2004; and The East African Community Appropriation Acts for the Financial Years 2002 to 2006.

and demand more influence, particularly as the competencies of regional organisations are growing steadily."[168]

In citing this quotation, it is not intended to insinuate that the Assembly has not exerted itself as a key player in the integration process, but rather to emphasize that the apparent challenges should not turn the Assembly away from other avenues, through which it can positively contribute to the Community's objectives.

Decision Making Process of the EAC

Decision making processes are equally important in the proper functioning of an institution. Given the distinctiveness of environmental problems, environmental management requires swift decision-making processes that, at times, necessitate taking hard decisions. As was observed by the Committee instituted to seek views on the fast tracking of the East African Federation, the slow and complex decision-making process is among the major malignant problems affecting the effectiveness and efficiency of the Community in pursuance of its mandate.[169] It was, for instance, found by the Committee that many of the Community's decisions that require the amendment of national laws have remained outstanding and, for those cleared, the process was unnecessarily long.[170] Basically, the problem of slow decision-making mainly arises out of two factors. The first is the requirement to refer agreed positions back to the Partner States for sanctioning, a process that has, for several reasons, proved to be slow. It is, for example, observed by the Community that Partner States are slow at holding feedback meetings and in monitoring the implementation of Community activities and in the process delaying several Community matters for unnecessarily long periods.[171] Unfortunately, there is no effective mechanism through which Partner States can be compelled to act within reasonable time.

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[168] Terlinden (2004) op. cit., n.106, at p. 16.
[169] See East African Community, *Report of Committee on Fast Tracking East African Federation* (EAC Secretariat, Arusha 2006).
[170] ibid.
[171] See East African Community (2005) op. cit., n. 180 at p.11.

A second issue concerns the manner in which decisions are arrived at, especially at the high levels. It is a requirement of the Treaty that decisions of the Summit and the Council be by consensus.[172] A major reason of this stance is that the architects and promoters of the new EAC appear to have been cognisant of the events that led to collapse of the old EAC. They probably did not wish to find themselves in similar situations, especially in the 'early' days of the integration process. Despite its advantages, the attainment of consensus in dispute resolution is often difficult and time consuming. The repercussions may be severe in matters concerning the environment, since they necessitate, at times, taking swift and painful decisions and sacrifices. Indeed, Bondasky observes that:

> "...the consensus requirement puts international environmental law under a serious handicap."[173]

He goes further to quote Cromwell who contends that:

> "...the unanimity rule is recognised as incompatible with effective government."[174]

The long delay in adopting the Protocol on the environment was, for example, a result of one of the Partner States taking so long to agree with the others on the contents of the Protocol.[175] Having gone through that process, the Protocol has in the past three years been stuck at the ratification level. Getting all the Partner states on one side may not only be time consuming and difficult but sometimes impossible. It

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[172] EAC Treaty 1999, Arts. 12 (3) and 15 (4).
[173] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 American Journal of International Law 596, 607.
[174] Riches Cromwell (1940), 'Majority Rule in International Organisations: A study of the Trend from Unanimity to Majority Decision.' quoted in Bodansky (1999) at p. 607.
[175] Interview with an official of the East African Community (Name withheld on request) (East African Community Secretariat, Arusha, Tanzania, 17 July 2006).

is actually feared that decision making by consensus is likely to be further complicated by the recent enlargement of the Community. [176]

The Funding Challenge

As is the case with most institutions, the Community does not only require a steady but also a sufficient income base to fund its operations. Aside from contributions from development partners and any source that may be determined by the Council,[177] the Community's major source of income accrues from the mandatory annual contributions from Partner States. Notwithstanding such a broad income base, however, the Community is faced with the problem of mobilising sufficient resources.[178] This problem has been exacerbated by the gradual increment in the implementation of its Treaty provisions, particularly at a time of its enlargement. The shortfall in funding has drastically impacted on the implementation of several programmes of the Community, and certainly that concerning the environment.[179]

To ameliorate the funding problems the EAC is inclined to enhancing its internal revenue sources that it believes to be more dependable than donor funds.[180] Despite their significance in supporting the Community's goals, donor funds have proved to be inflexible in meeting short term requirements. Often, these funds take too long to process and access and also come with conditions, which are at times stringent or may not be in the interest of the Community.[181] In general, the Community is seeking to replace the requirement of equal member contributions with a direct funding mechanism that obliges Partner States to automatically and unconditionally

[176] Bossa Barungi op. cit., n. 117.
[177] See EAC Treaty 1999, Art. 132 (4).
[178] East African Community (2003) op. cit. n. 104, at p. 43.
[179] See East African Community, *Policy Brief on Environment and Natural Resources* (EAC Secretariat, Arusha 2005) p. 11.
[180] East African Community (2003) op. cit. n. 104, at p. 44.
[181] ibid.

contribute a commonly agreed percentage from their customs' revenue. Negotiations to that effect are underway.[182]

Particularly for environmental management financing, in addition to donor funding, the Community is based on two sources. The first is the introduction and enforcement of retention schemes by Partner States, where a levy is imposed on particular businesses or activities considered to have reasonable impact on the environment and natural resources. The Secretariat is already lobbying for the introduction of such schemes, where fish export trade, which is believed to be a lucrative business, is being particularly targeted.[183] Second, the EAC hopes to raise funds by charging user fees mainly on large resource users and through the application of the 'user pays' principle.[184] Partner States are being urged to jointly or individually, put in place measures to recover environment costs from, for instance, large-scale water users. Partner States are also being encouraged to ensure that polluters pay, as near as possible, the cost of pollution resulting from their activities. It is intended that costs recovered from both of these sources should be ploughed back to service environmental management in terms of operational and restoration costs.[185] Although the usage of retention schemes and user fees can be said to be relatively old in environmental management, their application in the East African region is a new phenomenon.[186] While the introduction of these instruments is largely still on the drawing board, their full scale application is likely to be faced with various challenges as have been experienced in many other developing economies.[187]

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[182] East African Community (2005) op. cit., n. 180, at p. 11.
[183] ibid.
[184] See Protocol on the Sustainable Development of Lake Victoria Basin 2003, Arts. 17 (1) and 18 (1).
[185] ibid., Arts. 17 (2) and 18 (2).
[186] Retention and user fees have widely been used in the region as a means of generating revenue. Income raised from these sources is normally credited on the general funds and, therefore, not necessarily ploughed back to the respective revenue generating sectors.
[187] See David O'Connor, 'Applying Economic Instruments in Developing Countries: from Theory to Implementation' (1998) 4 Environment and Development Economics 91.

The introduction and implementation of a direct funding mechanism may also be faced with various challenges. Nostalgic for the funding mechanisms of the old EAC where funding directly accrued from various Community services and institutions, the new EAC Secretariat argues that the current system of Partner States' contributions lacks similar automatism.[188] The system of automatic and unconditional funding being advocated was actually the basic mode through which the defunct EAC largely raised its funds. Unlike in the case of the defunct EAC, however, the new Community does not run or own business oriented common services, which were crucial in enhancing the base and rationale for direct financing from national revenues and joint business interests of the defunct Community. An important point to note, though, is that the health of those businesses largely accrued from the fact that they were monopolies, often supported by public financing. Given the commonly shared view of economic liberalisation in the region, it is quite unlikely that the EAC can think of setting up business ventures. Actually, the EAC Treaty explicitly states that;

> "The principles that shall govern the practical achievement of the objectives of the Community shall include: (a) people-centred and market-driven co-operation..."[189]

Considering the Treaty's objective and the principle of fair competition it is almost certain that involvement of the Community in business ventures is farfetched if not principally impossible.

Automatic and unconditional tax revenue contributions from Partner States would certainly be a more assured and stable source of income for the Community. Success of such an arrangement will, however, depend on two issues: first, the question of unanimous acceptability by the Partner States; and second, the percentage national

[188] East African Community (2003) op. cit. n. 104, at p. 44.
[189] EAC Treaty 1999, Art. 7 (1) (a).

governments would be willing to release. It may be recalled at this point that some of the issues said to have triggered the collapse of the defunct EAC centred on feelings of incommensurate gains from the Community.[190] It is probably for that reason that, irrespective of distinct demographic and economic variations, Partner States are required to contribute equally to the funding of the Community.[191] Aside the challenges of an insufficient resource-base, the current financing arrangement has also proved to be a major challenge in that Partner States have, in the recent past, not only met their financial contributions in small bits, but have also always done it belatedly. The Community observes that:

> "Despite the strong political will and hard bargaining in the budgetary process, Partner States find the EAC budget a burden on their national budgets."[192],

As can be seen the funding challenges discussed tend to imply that the Community is still being perceived by the Partner States as a distinctive and not complementary level of government whose funding should be sufficiently catered for in the national budgets. While it is argued that Partner States have financial constraints,[193] the mere fact that the Community is neither a business entity nor tax collection centre obliges its members to bear the mantle for its funding requirements, lest they cede powers that would enable it build its own financing base.

[190] See discussion in Chapter Seven on the collapse of the now defunct East African Community (1967).
[191] See EAC Treaty 1999, Art. 132 (4).
[192] East African Community (2003) op. cit. n. 104, at p. 44.
[193] ibid., at p. 43.

Conclusion

Undoubtedly, the EAC has gone a long way in establishing itself as a regional cooperation platform of broad competence. However, while its pivotal organs are in place and already functioning, there remain several institutional problems that require to be addressed if the institutions are to function in an ideal manner. Recognising that these organs are established to variously support the regional integration process across the several areas of cooperation, their inability to function normally shall certainly continue to impact on the ENRM in the region, most especially in relation to the shared resources such as the Lake Victoria region. Indeed, among the core reasons for the existence of the EAC is the need to address issues of common interest of which ENRM is certainly one.

We see in the preceding discussion that many of the institutional challenges being faced by the EAC are founded in a lack of empowerment, which appears to be underpinned by conflicts of interest between regional and state level priorities. As such, the integration spirit demonstrated in the EAC Treaty has tended to fade in practice, as the Partner States seem to be withholding their earlier obligations and commitment in the regional integration process. The distinction between the Community's major decision-making organs and the governments of the Partner States is blurred, implying that decision making powers have not been effectively transferred to the regional level.

The strengthening of regional cooperation can greatly benefit from the fact that the Community in place and functioning. It is of crucial importance, therefore, to address the missing links even if this may involve painful decisions. First, the placing of responsibilities at the regional level should be accompanied with ceding of the requisite powers and functions from Partner States to the Community in a committed and rational manner that entails intervention and not interference. Secondly, wherever required, the institutions and organs of the Community should be allowed

to perform and exercise their functions and duties with the due autonomy and independence that they deserve. Thirdly, the widening of the mandate and jurisdiction of various Community organs and institutions should enable them fully exploit their potential. Fourthly, some aspects concerning the general functioning of the Community may require revision of the relevant Treaty provisions. Important among these is the issue of distribution of powers and functions among the Community organs and institutions. Such problems have to be addressed if the good intentions spelt out in the Treaty are to be realised. Generally, political will remains a key deciding factor for any positive changes and their impact towards the successful implementation and protection of the Lake region's natural resources.

CHAPTER ELEVEN

The East African Community and Natural Resource Management in the Lake Victoria Region

The previous Chapter considered the importance of and challenges of facing the core organs of the East African Community (EAC) in Environment and Natural Resources Management (ENRM). We saw that many of the challenges inhibiting proper functioning of these organs can be attributed to the reluctance of the Partner State to cede authority to the Community. The purpose of this Chapter is to ascertain whether a similar challenge arises within the regional framework for ENRM and most particularly that which concern the management of the Lake Victoria region. We shall, in other words, be examining the responsiveness of the regional ENRM regime to the concept of multi-level government whose absence since colonial times, as was seen in Part III, has proved a contributing factor to environmental degradation.

While this thesis' interest is on the EAC, this Chapter will first outline the various recent regional-wide interventions in the environmental management of the Lake Victoria region. It will then explore the EAC legal and institutional framework as it relates to the management of the Lake region. We will explore the EAC jurisprudence and consider that which concerns ENRM and the management of the Lake Victoria region in particular.

The Regional-wide Interventions in the Management of the Lake Victoria Region

As mentioned in Chapter One, our argument for highlighting various levels of government in ENRM is premised on the fact that, aside from the issue of legitimacy, they may add to capacity. At the regional level, therefore, the EAC is expected to play a leading role in establishing an ENRM regime, through which all the interventions pertaining to the management of the Lake region can be guided, regulated and coordinated. It is not yet clear, however, that there is in place a clearly defined regional ENRM regime for the Lake region. As we shall see, the management of the Lake region has, despite the emergence of regional environmental law jurisprudence, continued to be largely based on national laws and as such is fragmented. Although the EAC Treaty calls for the harmonisation of various aspects of the national ERNM regimes this is not well reflected in the domestic environmental policies and laws which have seldom addressed the issue of trans-boundary ENRM. While the recently adopted Protocol for the Sustainable Development of Lake Victoria attempts to establish an over-arching legal, policy and institutional framework aimed at instituting a holistic and coordinated approach in the restoration, sustainable utilisation and management of the Lake region, the success of this development may substantially depend on the extent to which the Partner States are willing to embrace the concept of supra-nationalism in natural resources management.

The rejuvenation of the spirit for the revival of the East African Community, since the 1990s, has been a precursor for various regional-wide interventions intended to improve the environmental management of the Lake Victoria region. While most of those interventions have been made under auspices of inter-state regional cooperation, however, others have been initiated and implemented outside this framework. The major interventions have been implemented through legal instruments, and administrative measures as well as projects and programmes. Since our focus is on the interventions inherent within the mainstream EAC institutional structure, which are later discussed in greater detail, this section briefly highlights the

frameworks under which the interventions are being implemented with other stakeholders.

Pursuant to Articles 130 (3) of the Treaty and 44 (1) of the Lake Victoria Protocol, both of which urge the EAC to cooperate with other development partners, the Community has partnered with several stakeholders in the management of Lake Victoria region. The EAC signed an agreement with the Governments of Sweden, France and Norway, the World Bank and the East African Development Bank for a twenty year Partnership Agreement on the Promotion of Sustainable Development of the Lake Victoria Basin, effective April 2001. This agreement, which establishes a Partnership Consultative Committee and Fund, seeks to offer: technical support; a broader linkage between EAC and donor agencies; and assistance to mobilise resources for the implementation of identified programmes.[1] In July 2006, the EAC signed a Memorandum of Understanding with the Nile Basin Initiative (NBI) [2] that also has a major interest in the environmental management of the Lake Victoria region. Established in 1999 as an intergovernmental organisation, the NBI brings together the nine countries that share the Nile basin,[3] of which the Lake Victoria region is a part.[4]

Other than the long term agreements, the EAC has also entered into short term partnerships or sought external funding, most particularly in the form of projects and programmes. Notable among them are: The Global Environment Facility funded Lake Victoria Environmental Management Project (LVEMP) Phase I (1997 to 2002) and

[1] See Partnership Agreement on the Promotion of Sustainable Development of the Lake Victoria Basin 2001.
[2] The Nile Basin Initiative (NBI) is focused on the achievement socio-economic development and regional stability, through joint strategic planning and implementation of programmes. It largely transacts its business through integrated basin-wide and sub-basin projects. Lake Victoria Basin Project is one of the sub-basin projects under the Nile Equatorial Lakes Subsidiary Action Program (NELSAP) NESLAP.
[3] The Countries are: Burundi, the Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda. Eritrea participates as an observer.
[4] Being the source of River Nile, Lake Victoria is an important component of the Nile Basin.

Phase II (2005 to 2010);[5] the European Union funded Lake Victoria Fisheries Research Project (LVFRP), 1997-2002; Lake Victoria Basin Aquaculture Research and Development; [6] Production and Marketing of Value-Added Fishery project, 2002-2007;[7] Lake Victoria Fisheries Research Project (LVFRP) and; [8] Nile Perch for Lake Victoria Project.[9]

The cooperative spirit towards the management of the Lake Victoria region has also seen the establishment of the Lake Victoria Region Local Authorities Cooperation (LVRLAC), which brings together over seventy local governments. Although constituted of local governments, LVRLAC is registered as an NGO.[10] Its mission is to facilitate members' participation in the sustainable management of Lake Victoria and its environs through building of strategic partnerships, harmonization of policies and promotion of knowledge on best practice. In the same spirit as LVRLAC, the East African Communities Organization for Management of Lake Victoria's Resources (ECOVIC) was also established, in 1998, with the purpose of to bringing together the various Civil Society Organisations (CSOs) involved in the environmental management of the Lake region. Its mission is to restore and develop the environmental resources of the Victoria region through support of local community initiatives. While these other institutions appear to be on the path of closely working with the EAC, their

[5] The five year Lake Victoria Environmental Programme I (LVEMP) was signed in 1994 between the Governments of Uganda, Kenya and Tanzania, and the International Development Association/Global Environmental Facility. Implemented under a Tripartite Agreement, the project was aimed at the rehabilitation of the Lake ecosystem, through an integrated approach. Preparation for the second phase of the project (LVEMP-II) was launched in January 2005.

[6] See The Joint Communiqué of the Council of Ministers of the Lake Victoria Fisheries Organization (LVFO), Issued in Nairobi, Kenya, on 28th June 2002.

[7] The project was implementing by LVFO and funded by the Common Fund for Commodities (CFC) – through FAO and the Common Market for East and Southern African (COMESA).

[8] This project was instrumental in the development of the Fisheries Management Plan that has, to-date, provided the core framework for fisheries management in the Lake Victoria region.

[9] Phase I (1996-1999) and Phase II (2001-2005) of this project were implemented by Kenya marine and Fisheries Research institute (KMFRI) and the LVFO, respectively.

[10] Formed in 1997, LVRLAC is a regional coordination institution that brings together local authorities with the aim of promoting environmental management and socio-economic development in the Lake Victoria region. Prior to the inclusion of small towns and rural local governments, effective 2006, LVRLAC membership was limited to city and municipal councils.

structures and mandate are not institutionalised and legitimised within the EAC fraternity.[11]

For purposes of networking the various regional bodies with an interest in management of the Lake region, the Lead Partners Interagency Network Forum (LPIANF) was recently formed as a platform for dialogue and joint action. It is currently constituted of LVRLAC, LVBC, NBI, UNHABITAT and UCSD as the primary stakeholders, while the secondary ones include national ministries responsible for the sectoral interventions and programmes of the individual lead partners such as the Ministries of Water Development, Environment, Local Government, and Regional Cooperation respectively. Others are regional intergovernmental and inter-institutional programmes such as LVEMP, LVFO and ViCRES as well as regional civil society networks such as ECOVIC. As it can be seen, there are various actors participating in the ENRM of the Lake region. Despite their influx in recent times, however, the impact of these interventions is likely to remain low mainly because they are being implemented in a fragmented manner.

[11] This point was raised by some of the interviewees as an issue of major concern. See Appendix 2.

The East African Community Jurisprudence

As seen in Chapter One, one of the major causes for the infectiveness of international institutions lies in their inability to rely on their own legal and institutional mechanisms in the enforcement of their objectives. Existence of the EAC jurisprudence is expected to be a major driving force in propagating the regional cooperation agenda within the EAC. While EAC's jurisprudence is growing by the day, however, its major draw-back lies in the fact that is not clearly demarcated, in terms of both scope and legal supremacy.[12] This limitation has hindered the effective implementation of the EAC Treaty, especially in light of the enormous tasks delegated to the Community. Limitations in the nature and application of EAC law accrue from weaknesses inherent in the institutional arrangement for regional cooperation. The push for supra-nationalism in matters that could best be handled through regional intervention is constrained as state governments continue to place more interest in their functioning as sovereign entities. In other words, there is an established regional level government whose effectiveness is reined in by limitations inherent in both its legal regime and also in practice.

The Issues of Clarity and Legal Supremacy

While the EAC Treaty establishes the EACJ as a judicial body of broad competence over Community matters, it does not specifically state which law this Court should adhere to. Although the Treaty's provisions on the fundamental and operational principles of the Community may be good pointers to the standards to be applied,[13] such provisions are usually surrounded by limitations that often impact on their effectiveness.[14] Also, while the EAC Treaty requires the EALA to liaise with National

[12] East African Community, *East African Community; Treaty and the Challenges of the Community* (EAC Occasional Papers No.3, EAC Secretariat, Arusha 2003) p. 37. See also, Maria Nasali, 'The East Africa Community and the Struggle for Constitutionalism: Challenges and Prospects' Kituo cha Katiba Resource Centre, Makerere University, Kampala <<http://www.kituochakatiba.co.ug/EAC2000.htm>> accessed 6th January 2007.

[13] See EAC Treaty 1999, Arts. 6, 7 and 8.

[14] Solomy Bossa Barungi, 'A Critique of the East African Court of Justice as a Human Rights Court' (Conference on Human Rights Institutions in East Africa, Arusha, Tanzania, 26 October 2006)p. 13

Assemblies of Partner States on matters relating to the Community, [15] it does not explicitly define roles of National Assemblies in the development or upholding of Community Law. Partner States, as required by Article 8 (2) of the Treaty, have enacted laws that give effect to the Treaty within their respective jurisprudences, but there remain several gaps as to the holistic relationship between Community and domestic law. It may be presumed, nonetheless, that EALA law is generally binding on Partner States.[16] Such ambiguity has raised concerns as to whether Partner States might be encouraged to act contrary to the objectives of the Community.[17]

The Kenyan case of *Peter Anyang' Nyong'o & 10 Others v. Attorney General & Another*,[18] presents us with a recent example on some of the perceptions on the relationship between national and Community law. In this case the applicants intended to use domestic law provisions to challenge amendments that had been made to the Treaty, which according to them breached several provisions of the Kenyan Constitution.[19] It was argued by the applicants that as the EAC Treaty is annexed to Kenya's East African Community Act 2000, which gave domestic validity to certain provisions of the Treaty, the Treaty itself had become part of the Kenya

[15] EAC Treaty 1999, Art. 49 (2) (a).

[16] John Eudes Ruhangisa, *The State of Constitutional Development in East Africa: The Role of the EAC - 2003* (Annual Evaluation of Constitutional Development in East Africa, Kituo Cha Katiba 2003) p. 18.

[17] Kamanga Khoti *Some Constitutional Dimensions of East African Cooperation* (State of Constitutional Development in East Africa Project, Kituo Cha Katiba, Undated) p. 24.

[18] *Peter Anyang' Nyong'o & 10 Others v. Attorney General & Another*, Reference No. 1 of 2006 judgment delivered 19 March 2007. Available at eKLR, <http:// www.kenyalaw.org> accessed 11 January 2008.

[19] *Inter alia*, the orders sought that the High Court be pleased to (a) interpret the true meaning of the purport of section 9 of EAC Act as read with Article 150 of the schedule thereto and declare that the said section as read with the Article set out therein was inconsistent with section 30 as read with section 46 of the Constitution of Kenya and therefore void to the extent of the inconsistency. (b) declare that under Section 30 of the Constitution of Kenya, the legislative power is an exclusive preserve of the National Assembly of the Republic of Kenya exercisable only as prescribed in Section 46 of the Constitution (c) declare that the action of the Minister of Foreign Affairs of ratifying the amendments to the EAC Treaty without recourse to Section 46 of the Constitution of Kenya is unconstitutional null, and void. They further contended that the Petitioner's fundamental right to fair hearing was likely to be contravened if the 1st respondent were to proceed to publish the amendments to the EAC Treaty. (Kosgei Timon, 'Does the High Court of Kenya have Jurisdiction to Determine Issues Arising out of Amendment of the East African Community Treaty?' <http://www.kenyalaw.org/Articles/show_article.php?view=263&cat=7&lmenu=2-1> accessed 19 December 2008).

law.[20] They in other words argued that annexing the Treaty on its transposing Act made it subsidiary legislation in Kenya.[21] Court, however, stated that as the Domestic law was enacted to give effect to certain provisions of the Treaty, the former is therefore confined to only such provisions and not the entire Treaty. It further contended that the Treaty is an international law agreement, whose validity is governed by international law and most particularly, the Vienna Convention. This interpretation clearly suggests that in the absence of explicit provisions on relationship between national and Community law, the national and Community legal systems may in some instances operate in parallel, indicating a lack of clearly defined hierarchy.

Along with the issue of EACJ's limited jurisdiction, discussed in the previous Chapter, addressing the issues of lack of clarity and legal supremacy calls for the direct intervention of Partner States. This activity would require the redefinition of the Community's legal regime, something that would involve the ceding of more powers to the Community.

Variances in the Legal Systems

Although the legal systems of the three Partner States are all based on Common Law, there are extensive disparities among them, and this has contributed to the slow progress in the policy and law harmonisation efforts.[22] While under British rule,[23] the EAC Partners States operated similar legal systems at the epoch of whose Court

[20] See ruling in *Peter Anyang' Nyong'o & 10 others v. Attorney General & Another*[2007], Reference No. 1 of 2006, and judgment delivered 19 March 2007.
[21] See Kosgei Timon, 'Does the High Court of Kenya have Jurisdiction to Determine Issues Arising out of Amendment of the East African Community Treaty?' available at <http://www.kenyalaw.org/Articles/show_article.php?view=263&cat=7&lmenu=2-1> accessed 19 December 2008.
[22] East African Community, *East African Community: Treaty and the Challenges of the Community* (EAC Occasional Papers No.3, EAC Secretariat, Arusha 2003) p. 39.
[23] Tanzania gained its political independence from British rule in 1961, Uganda 1962 and 1963 for Kenya. Apart from Tanzania which became a British Territory after the Second World War, Uganda and Kenya were since the early 1900s under British Administration, as a protectorate and colony, respectively.

structure was a regional appellate authority – The East African Court of Appeal. The willingness of these states to carry-on the spirit of regional cooperation into the post-independence era did not prevent the proliferation of state-centrism that eventually led to the disparities in their legal systems. This exacerbated the emergence of differences not only in the legal systems, but also in other aspects such as policy directions and institutional structures, which have a direct bearing on the national and regional jurisprudences. So long as the paradigm of state-centrism remains strong, therefore, the issue of streamlining the legal systems across the Partner States remains a major challenge.

Domestication and Transposition of Community Laws

In accordance with the Treaty, domestication and transposition are major requirements in giving force to EAC law among the Partner States. The Treaty provides that Community organs, institutions and laws are to take precedence over similar national laws.[24] To effect this provision, however, Partner States have to undertake to pass the necessary legal instruments.[25] Other than the Treaty, however, in the main, EAC law has yet to be domesticated by the Partner States.[26] Similarly, Partner States have been slow and at times inconsistent in the transposition of EAC law. As is the case with the Protocol on Sustainable Development of Lake Victoria, this has resulted from the failure of the laws themselves to provide for clear guidance on issues such as timescale and enforcement mechanisms for transposition. Given the silence on such provisions, a Partner State may choose to tactfully delay transposition or do so in a non-compliant way or even completely fail to transpose an instrument. Yet, in effect, transposition of EAC law is supposed to reinforce the harmonisation of Partner State laws, as required by the Treaty.

[24] EAC Treaty 1999, Article 8 (4) (1).
[25] Ibid., Art. 8 (4-5).
[26] Interview with Registrar of the East African Court of Justice ((East African Community Secretariat, Arusha, Tanzania, 10 July 2006).

Harmonisation of Laws

Law and policy harmonisation among Partner states is among the measures that are extensively enshrined in the Treaty.[27] Under regional cooperation or integration, law and policy harmonisation is usually intended to set the minimum standards and thus reduce on the disparities in the legal and institutional regimes of the cooperating states by making them more uniform and coherent. This may, however, involve making major decisions, and may be resource intensive in terms of funds, manpower and time. This probably explains why there has been slow progress in the harmonisation of the domestic laws and policies among the EAC partner states. In the EAC's ten years of existence, the greatest achievement in harmonisation has been in the field of commercial law,[28] as the Partner states pursue their mission of establishing a Monetary Union, whose foundation was laid with the signing, in November 2009, of the Common Market Protocol that entered force on 1st July 2010.[29]

Save for fisheries management, similar enthusiasm has generally not been extended to the ENRM sector. The drive for the harmonisation of fisheries policies and laws was a direct response to the escalating commercial value of fish juxtaposed with the dwindling stocks of Lake Victoria fisheries. The East African governments seem to have realised that it was prudent for them to concertedly establish a common management regime that would safeguard their economic interests on the Lake and this inevitably had to involve the institution of environmental management measures. The need and commitment to harmonise fisheries management, especially over shared resources such as Lake Victoria, is clearly highlighted in the recently adopted national fisheries policies. That notwithstanding, however, there remain

[27] The EAC Treaty variously calls for the harmonisation of policies and laws in virtually all the areas of cooperation.

[28] See East African Community, 'Press Release: Meeting on Approximation of National Laws in the EAC Context held in Nairobi' *EAC Press Release* (Arusha, 18 February 2010).

[29] See Council of Ministers (EAC), *Budget Speech for the Financial Year 2010/2011 Presented on 27 May 2010 at the Municipal Council Chamber, Mombasa, Kenya* (EAC Secretariat 2010).

significant differences among the Partner States' fisheries management regimes.[30] As also evidenced from recently adopted Regional Environment Impact Assessment Guidelines for Shared Ecosystems,[31] the efforts towards law and policy harmonisation are often held back by the problem of implementation at state level. With the exception of those with direct effect, regional instruments are often frameworks intended to initiate and guide the harmonisation process. They are not the end point but are part of the harmonisation process that entails response from the cooperating parties.

The Enforcement and Rule of Law

Notwithstanding the limitations inherent in the law itself, EAC is in practice also faced with the problem of enforcement. As can be adduced from the form and level of environmental degradation discussed in Chapter Three, law enforcement remains a major challenge in the Lake region. The enforcement problem can either arise as a result of capacity gaps or because the law in question may, for various reasons, not be enforceable. In other words, non-enforceability can be deliberate. Despite its being the Executive arm of the Community, EAC Secretariat ironically has weak executive authority to enforce Community decisions.[32] The EAC Secretariat enforcement mechanisms, such as sanctions, seem to be farfetched as even the Treaty provisions on suspension and expulsion of a Partner States appear to be apparently redundant, even assuming one could overcome the technical complications.[33] For example, the Treaty provides that:

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[30] See East African Community, *Mid-Term Review for EAC Development Strategy (2006 - 2010)* (EAC Secretariat, Arusha, Tanzania 2009), sec. 7.2.2.3 at p. 101.

[31] The guidelines were adopted by the EAC Council of Ministers in its 9th meeting held in November 2004.

[32] See Table 7.2 entitled, Summary of Challenges and Priority Interventions, in East African Community, *Mid-Term Review for EAC Development Strategy (2006 - 2010)* (EAC Secretariat, Arusha, Tanzania 2009) p. 77.

[33] Articles 146 and 147 of the EAC Treaty summarily entrust the Summit with powers to expel and suspend a Partner State. The procedure of arriving at such decisions is not given and the only recourse to fair treatment appears to be the engagement of the EACJ.

> "The Summit may suspend a Partner State from taking part in the activities of the Community if that State fails to observe and fulfill the fundamental principles and objectives of the Treaty ..."[34]

Chapter Three suggested that the nature and level of environmental degradation in the Lake region is a clear manifestation of failure on the part of the Partner States to fulfil various objectives of the Community, but there is no evidence to attest that the suspension provision has ever been considered. As discussed in the previous Chapter, it is likely that EAC Partner States will be inclined to prefer diplomatic settlements for the sake of maintaining the Community.[35]

Certainly, such variances in law and practice expose EAC law to unilateral abuse by the nation states and this can be true also for Court decisions. The EACJ, in its strategic plan, lists the 'lack of respect for Court decisions' among the threats that it anticipates.[36] EAC law is not only faced with the problem of being ill defined, but its enforcement is also a major challenge. To address this challenge will require total commitment, cohesion and coordination among various institutions, both at the regional and Partner state level. National governments should champion this cause with the same spirit and vigour demonstrated in the negotiation and eventual signing of the Treaty.

The EAC Environmental Law Jurisprudence: Its Sources and Evolution

Prior to the more detailed discussion on EAC environmental laws, this section looks at the sources and evolution of environmental law in East Africa. As the EAC is an international institution it is appropriate that we consider its environmental laws to

[34] See EAC Treaty 1999 Art. 146. See also, Art. 143, concerning sanctions.
[35] Interview with a senior official of the EAC Secretariat (Name withheld on request) ((East African Community Secretariat, Arusha, Tanzania, 10 July 2006).
[36] East African Court of Justice, *The East African Court Of Justice, Strategic Plan 2010 - 2015* (EAC Secretariat, Arusha, Tanzania 2010) Sec. 4. 4.

be within the confines of the term 'international environment law'. According to Sands international environmental law;

> "…includes those substantive, procedural and institutional rules of international law which have as their objective, the protection of the environment."[37]

Sands further observes that international environmental law basically provides the principle framework that guides the contracting parties in the achievement of the intended legislative, administrative and adjudicative functions.[38] It is against this definitional background that the following discussion considers both the environmental laws and the general legal framework under which they are established and implemented.

Sources of EAC Environmental Law

The EAC Treaty gave birth to East African Community law as a distinctive body of law. Aside from providing the general framework for EAC legislation, the Treaty enhances its position as the focal principal authority for EAC law by giving retrospective cognisance of the agreements earlier signed among the Partner States. Other than being a pivotal source of EAC environmental law, the Treaty also broadly provides for the institutional framework which is critical in the development and management of the environment and natural resources in the Community.

According to Article 41 of the EAC Protocol on ENRM, sources of Community environmental law include: relevant provisions of the Treaty; applicable protocols; regulations and directives made by the Council; applicable decisions made by the Court; Acts of the Community enacted by the Legislative Assembly; and relevant

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[37] Phillipe Sands, *Principles of International Environmental Law* (Second edn, University Press, Cambridge 2003) p. 15.
[38] ibid., at pgs. 12 -13.

principles of international environmental law. Several laws have been passed,[39] while others are in the making.[40] The Council has issued various directives and regulations concerning environmental management, especially in the field of Lake Victoria Fisheries.[41] Although the EACJ has not made specific decision concerning the environment, several of its decisions are indeed applicable to various environmental matters. For example, Courts pronouncement in *Callist v. EAC* that the Treaty is supreme in any matter that concerns the Community,[42] presents an important precedent that is likely to be useful in environmental litigation arising from conflicts between domestic and Community law.

Save for the principles of international environmental law and the general commitment of the Treaty that obliges Partner States to adhere to international law, there is no explicit reference to any MEA in the Treaty. Arguably, though, reference by the Treaty to other international legal instruments, circumstantially makes them binding on the EAC and as such part of Community law. For instance, Article 6 (d) of Treaty refers to the African Charter on Human and Peoples Rights as being among the focal references in the recognition, promotion and protection of human and people's rights, several of which are arguably relevant in the sphere of environmental rights.

While plans are under way, as allowed for by Article 130(3) of the Treaty,[43] the Community is currently not a direct party to any MEAs.[44] However, since the Treaty

[39] These include: the Convention for the establishment of the Lake Victoria Fisheries Organisation 1994; the Protocol for the Sustainable Development of Lake Victoria Basin 2003; the Protocol on Environment and Natural Resources Management 2006, which replaced the Memorandum of Understanding on Co-operation on Environment Management 1998; and the Regional Environment Impact Assessment Guidelines for Shared Ecosystems.

[40] In the queue are the long awaited Lake Victoria Basin Commission Act 2005, which is under debate and the recently passed Tourism and Wildlife Management Bill 2008 that awaits accent of the Summit.

[41] Examples include the Council directives on the establishment of BMUs and fishing standards on Lake Victoria.

[42] See judgement in *Calist Mwatela et al v. EAC,* Application No. 1 of 2005, EACJ.

[43] Article 130 (3) states that:

obliges its Partner States to honour the commitments in respect to the other multinational and international organisations to which they are members, [45] the environment-related agreements entered into under such arrangements may presumably also be considered to be sources of EAC environmental law. Indeed, all EAC Partner States in their individual capacities are committed to a number of Multi-National Environmental Agreements (MEAs).[46] They are also members of other regional cooperation bodies, amongst whose objective is the proper management of the environment and natural resources.[47]

Notwithstanding the numerous sources, EAC's environmental law has largely been constructed by the Council of Ministers particularly in the form of Protocols, Regulations and ministerial directives. As will be seen, this trend has in some cases been seen as a deliberate ploy, by the Partner States, intended to elevate state-centrism in the management of Community matters.

Evolution of the EAC Environmental Law Jurisprudence

Since revival of the spirit for its re-establishment, in the early 1990s, the EAC has often been seen as vital for regional cooperation in ENRM. Under the auspices of the Permanent Tripartite Commission (PTC), the three East African states of Uganda, Kenya and Tanzania signed a Memorandum of Understanding (MoU) on Co-operation on Environment Management, in 1998.[48] The MoU was *inter alia* signed with a vision

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> "With a view to contributing towards the achievement of the objectives of the Community, the Community shall foster co-operative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community"

[44] Interview with Wilbert Kaahwa, Counsel to the Community, East African Community (East African Community Secretariat, Arusha, Tanzania, 17 July 2006). The same position remains to date.

[45] EAC Treaty 1999, Art. 130 (1).

[46] These Include: The Convention of International Trade in Endangered Species (CITES); Ramsar Convention; Convention on Biological Diversity (CBD); and the Agreements signed under the 1992 United Nations Conference on Environment and Development (UNCED) 1992.

[47] Uganda and Kenya are members of the Inter-Governmental Authority for Development (IGAD), which because one of its core objectives is sustainable development, has concluded various instruments concerning environmental management. Tanzania belongs to the Southern Africa Development Cooperation (SADC) which, aside from it constitutive Treaty's provisions on the environment, has Protocols on fisheries, wildlife and shared water systems.

[48] The PTC was established in 1993 as an inter-governmental platform for the revival of the EAC.

of moving towards the establishment of a relatively harmonised ENRM regime for the Contracting Parties. There were, however, hardly two years between the coming into force of this MoU and the signing of the 1999 EAC Treaty that legally took precedence over all pre-Community agreements. Along with other pre-EAC agreements, however, the continued existence of the MoU was provided for under the Treaty's savings provision.[49] In pursuance of Article 3 of the MoU, the Council of Ministers, in 2001, directed that the MoU to be upgraded to a Protocol.[50] The Protocol for Environment and Natural Resource Management was adopted, as a result, though it is not yet ratified by all the Partner States.

Particularly for the Lake Victoria region, the 1993 LVFO Convention was the first ENRM instrument to be signed under auspices of the PTC. The coming into force of the EAC Treaty not only sanctioned the continued existence of the LVFO,[51] but also went on to provide for the establishment of a regional body responsible for the management of Lake Victoria.[52] In pursuit of the latter, the Community enacted the Protocol on Sustainable Development of Lake Victoria Basin, which establishes the Lake Victoria Basin Commission (LVBC). Unlike LVFO which is sectoral focused – on fisheries - LVBC has a wider and cross-sectoral jurisdiction over a range of issues that pertain to sustainable development in the Lake region.[53]

Having explored the sources and evolution of the EAC environmental law, we now examine its major constituents, from both the general perspective and also with specific reference to the management of the Lake Victoria region. As this thesis is concerned with multi-government, however, the discussion is focussed on those aspects that define the extent to which EAC's environmental law contributes to the rationalisation of environmental management powers and functions between the

[49] See EAC Treaty, Art. 142.
[50] See Minutes of the 3rd Council of Ministers, November 2001.
[51] EAC Treaty 1999, Art. 9 (3).
[52] ibid., Arts. 114 (2) (b) (vi).
[53] The Lake Victoria Basin Commission Bill, intended to fully operationalise the LVBC was in February 2010 laid before the East African Legislative Assembly for the second and third reading.

Partner states and the Community, especially as in regard to the management of the Lake Victoria region.

The 1998 Memorandum of Understanding for Cooperation on the Environment

Although the Memorandum of Understanding for Cooperation on the Environment (MoU) was recently abrogated,[54] exploring its key features helps highlight the major events in the evolution of cooperation on environmental matters among the three East African countries. Signed in 1998, the MoU was the first broad-based environmental agreement to be signed between Uganda Kenya and Tanzania. This was, however, done as an interim measure, pending conclusion of the EAC Treaty that was to provide the framework for the enactment of a legally binding instrument on ENRM.[55] The objects of the MoU included: to undertake joint programmes and activities; provide a basis for cooperation with other institutions; and promote the development and implementation of the necessary instruments and strategies.[56] It called for the development, review, reform, harmonisation and enforcement of environmental laws and policies among the contracting parties. To achieve its objects, the MoU provided for the establishment of an interim institutional structure that established a Sectoral Committee on ENRM comprising the chief executives responsible for the environment in each country. It also designated each country's department responsible for environment management as its national focal point.[57] While the MoU was a regional-wide instrument, there was special interest on the Lake Victoria region as an ecosystem that required concerted management efforts.[58]

Irrespective of its broad scope, the MoU fell short of providing details on how the intended measures were to be jointly implemented. The responsibilities were largely

[54] This MoU, which was signed in 1998 under auspices of the Permanent Tripartite Commission was abrogated under Article 51of the Protocol on the Environment and Natural Resources Management 2006.
[55] See para. 5 of the Preamble to the Memorandum of Understanding for Cooperation on Environment Management 1998. (*Hereinafter* abbreviated in these footnotes as MoU on ENR 1998).
[56] MoU on ENR 1998, Art. 2,
[57] ibid., Art. 4.
[58] ibid, Arts. 6-16.

left to the Contracting Parties and no strong commitment was made towards the development and implementation of common measures and standards. Being a non-legally binding agreement, compliance with its provisions was based on the good will and selflessness of the Parties. To some, the MoU was simply an ambitious piece of agreement thought to have been pushed by 'external' forces.[59] It ought to be recalled, however, that this MoU was signed before the Contracting States committed themselves to the EAC Treaty that was to provide for the enactment or adoption of legally binding instruments. Recognising that the major underlying weakness of the MoU may be attributed to the fact that it was entered into under a relatively loose form of cooperation, it is imperative to ascertain whether the coming into force of EAC Treaty has significantly contributed to the strengthening of Partner State commitment towards regional cooperation in ENRM.

The East African Community Treaty

The coming into force of the Treaty establishing the EAC ushered in a broad-based foundation for a new order in regional cooperation. The Treaty presents itself as the supreme and focal coordination framework for the Community's legislation, institutions and operations. With regard to ENRM, the Treaty dedicates its entire Chapter Nineteen to issues concerning regional cooperation in ENRM. The outlined areas of cooperation include the management of forest, lakes, land, wetlands and other aquatic and terrestrial ecosystems. Others areas include: the prevention and control of illegal trade in and movement of toxic chemicals, substances and hazardous wastes; noxious emissions and toxic and hazardous chemicals; pollution arising from developmental activities; natural and man-made disasters.[60] The dedicated Chapter Nineteen sits alongside the other provisions on ENRM found in other Chapters such as that on agriculture and food security and also on tourism and

[59] See Laurence Juma, 'Environmental Protection in Kenya: Will the Environmental Management and Coordination Act (1999) Make a Difference? ' (2002) 9 South Carolina Environmental Law Journal 181

[60] See EAC Treaty 1999, Arts. 111-113.

wildlife management.[61] Generally, the Treaty calls for the protection and conservation of the environment and natural resources against degradation and pollution that may arise from developmental activities.[62]

As a means of achieving this goal, the Treaty obliges the Partner States to commit themselves to the sustainable utilisation of natural resources through the adoption of cooperation mechanisms, joint management regimes, common policies and common environment control regulations, incentives and standards. It calls for: the integration of environmental management and conservation measures in all developmental activities; enforcement of environmental impact assessment of all development project activities and programmes; encouragement of public awareness and education; and the promotion and strengthening of facilities and research institutions and capacity building programmes.[63] Being a framework law, however, most of these provisions are broadly presented.

The Protocol on Environment and Natural Resources

After protracted negotiations that spanned over five years, the Community, in pursuance of Article 151 (1) of the Treaty, adopted the Protocol on Environment and Natural Resources Management, in 2006. Article 50 of the Protocol abrogated the 1998 Memorandum of Understanding on the environment,[64] whose existence had continued under the provisions of Article 142 (1) (i) of the Treaty. The comprehensiveness of the Protocol brings together a wide range of matters that concern ENRM within the Community.

[61] See Chapters 18 and 20 of the EAC Treaty 1999: See also, the Preamble and Articles 5(3) (a), 81(2), 94 (k), 100(1) (e), 101(f), 105(1), 109(d), 116.
[62] EAC Treaty 1999, Art. 111.
[63] See, generally, Chapter Nineteen of the EAC Treaty 1999.
[64] Prior to signing the Treaty that established the East African Community in 1998, Uganda, Kenya and Tanzania had earlier, on 22th October 2003, signed the Memorandum of Understanding for Co-operation on Environmental Management, which has been briefly discussed in this Chapter.

Foremost, it enters the sphere of fundamental environmental rights by obliging Partner States to guarantee their nationals the right to a clean and healthy environment.[65] This is reinforced with the requirement for the Partner States to cooperate in the delivery of the procedural rights on public participation and access to justice and information.[66] Second, it commits the Partners, while upholding the principles of sustainable development, to individually and through cooperation ensure sound management of the environment and natural resource within the Community.[67] Third, in addition to re-echoing the commonly applied environment management principles,[68] the Protocol firmly entrenches the mainstreaming of socio-economic principles such poverty eradication, food security and gender in environmental management. Fourth, it sets forth a long list of areas of cooperation in ENRM, including those that are potentially harmful to the environment, such as tourism development, military activities and other hostilities. For coordination and enforceability, the Protocol establishes National Focal Points at Partner State level[69] and also attempts to clarify on its relationship with the Treaty, other Community laws, international treaties and other parties.[70]

Undoubtedly, the adoption of the Protocol and also its broad scope is a commendable demonstration of the EAC commitment towards improving the region's ENRM regimes. As a framework instrument, implementation of the Protocol should invigorate the effectiveness of the Community's environmental management regime, both at regional and national level. As shall be seen in the following sections, however, the Protocol has several provisions that tend to inhibit its potential to reinforce the concept of multi-level government.

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[65] Protocol on Environment and Natural Resources Management 2006, Arts. 4 (2) (a) and 34 (c).
[66] The EAC Protocol on Environment (2006), Ch.3, Arts. 9-35.
[67] ibid. Ch. 2, Arts. 6-8.
[68] Such principles include those that concern: precaution, prevention of harm and equitable utilisation in the use of natural resources, prior notification and information sharing. See The EAC Protocol on Environment (2006), Arts. 4 (2).
[69] The EAC Protocol on Environment (2006), Art. 38.
[70] See Protocol on Environment 2006, Arts. 39 and 41-44.

The Development-Environment Protection Nexus

As was seen in Chapter Four, there are close links between economic development and environmental degradation that cannot be disregarded in the study of ENRM regimes. This fact was clearly demonstrated in Chapter Three, where it is seen that several of the immediate causes of environmental degradation in the Lake Victoria region accrue from development activities.

Saliently, the Protocol endeavours, from the outset - in the Preamble - to recognise the inseparable relationships among the issues of trade, development and the environment. It thus draws attention to its interest in the relationship with the Protocol on the Establishment of the East African Customs Union concluded in 2004.[71] In other words, it attempts to bring forth the requirement of a need to balance the Community's economic objectives and its commitment to protecting the environment and natural resources. Although the Protocol explicitly states its commitment towards addressing the economic development-environmental protection nexus,[72] it is important to review such commitment in light of both the law and practice. For that reason we isolate some of the provisions in the Protocol that offer an insight as to what may actually happen in practice. Article 42 states that;

> "The Partner States shall consult and co-operate on other Protocols with a view to ensuring the achievement of the objectives of this Protocol and avoiding any interference with the achievement of the objectives and principles of those instruments or any inconsistency between the implementation of those instruments and this Protocol."

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[71] See para. 2 (c) of the Preamble to The Protocol on Environment and Natural Resources.

[72] For example Article 32 (2) of the Protocol on Environment 2006, states that:

> "The Partner States shall develop common methods for determination of environmental standards reflecting the need for socio-economic development and protection of the environment and natural resources for the benefit of the peoples of the Community."

While this Article ought to serve the purpose of clarifying on the relationship between the Protocol and other Community instruments, it appears to instead choose a vague position that seems to leave the final decision to be taken on a case to case basis, as may be decided by the Partner States. It also states that;

> "The Partner States shall, individually or collectively, adopt appropriate measures, compatible with international law, to dissuade third parties from undertaking activities which undermine the effectiveness of this Protocol."[73] (Emphasis added)

The Protocol chooses to use 'soft' language and in the process waters down the obligations it confers unto the Partner States while dealing with third parties. It should be noted, however, that the third parties may include industrialists, natural resource exploiters and other investors whose activities are economically beneficial to the Partners though disastrous to the environment. The provision serves the purpose of allowing for the relaxation of the push for the environmental interests where this may discourage the much needed investment opportunities in the region. Notwithstanding its objectives, implementation of the Protocol, as a matter of priority, may instead conform to the Community's core objective of economic development.

The Compliance Procedures

While the mandate to oversee implementation of the Protocol can be derived from other instruments of the Community, such as the Treaty, the Protocol's provisions on Partner State compliance offer more detail and clarity on who is responsible for overseeing its implementation. Falling short of establishing or specifically mandating any existing institution of the Community to oversee its implementation, the Protocol tends to highly place the oversight responsibility of State compliance with the

[73] Protocol on Environment 2006, Art. 44 (1).

Partner States themselves and not the Community. The Partner States are required, after undertaking various measures, to ensure their compliance with the Protocol, inform others about such measures and also draw their attention to any activity that may inhibit such compliance.[74] Furthermore, where there is no predetermined procedure for enforcing compliance, the Parties are required to either individually or collectively arrange for the inspections.[75] In what appears to be the trickiest part, however, there is a requirement that;

> "Each Partner State shall take appropriate measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Protocol."[76] *(Emphasis added)*

Certainly, usage of the word 'competence' takes into account the fact that there are various inherent capacity problems among the Partner States. It nonetheless, also poses two likely problems. First, it tends to authenticate variability among the resource management regimes of the states, yet its core gospel is towards unanimity through common policies and harmonisation of laws. The second problem lies with the word 'competence' itself, whose contextual definition and scope may be difficult to ascertain. It is difficult to ascertain or prove whether non-compliance of a Partner State is due to incompetence or simply deliberate. Given these examples, we see that the Protocol tends to impose a self regulatory system that is largely dependent on the assumed honesty and enthusiasm of the Partner States. This situation seems to arise from the Protocol's tendency of shying away from the most logical option of engaging the Community organs in playing a leading role in overseeing the compliance measures.

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[74] ibid., Arts. 39 (2) and (3).
[75] ibid., 39 (4).
[76] ibid., 39 (1).

Commitment of the Partner States

Notwithstanding these broad commitments by the parties, it is interesting to note that, in some cases, the Protocol tends be evasive on their form and extent of engagement. This is particularly disturbing for the issues that are explicitly provided for under the Treaty. For example, the Treaty provides that;

> "Partner States undertake to adopt common environmental standards …"[77] *(Emphasis added)*

On the other hand the Protocol provides that;

> "The Partner States shall develop and harmonise common environmental standards…"[78]

The Treaty provision is clearly empathic on a straightforward and perhaps less laborious and time consuming approach, and on the other hand the Protocol tends to indicate that national standards should take priority with harmonisation efforts pursued later. While both provisions may end up with the similar results, it is not necessary true that the desired degree of commonality may be achieved. In another example the Treaty states that;

> "Partner States undertake to adopt common environment control regulations, incentives and standards;"[79]

On the other hand the Protocol states that;

[77] EAC Treaty 1999, Art. 112 (2) (h).
[78] Protocol on Environment 2006, Article 32 (a).
[79] EAC Treaty, Art. 112 (2) (a).

> "The Partner States shall develop common methods for determination of environmental standards reflecting the need for socio-economic development and protection of the environment and natural resources for the benefit of the peoples of the Community."[80]

Noting the substitution of the word 'adopt' with 'develop', this second example emphasizes the Protocol's position that the determination of environmental standards should offset both development and environmental concerns. As discussed in the preceding sections, however, the likelihood that socio-economic considerations will always prevail cannot be ruled out. The Protocol chooses a long route even though, as earlier mentioned, the EAC has in its ten years of existence failed to come out with a single set of reasonably harmonised laws in any sector.

Dispute Settlement

The Treaty is clear on its position on the settlement of disputes that arise among the Partner States. As is common practice in international law, the Treaty encourages inter-Party disputes to be settled peacefully.[81] In the same spirit the Protocol encourages disputes arising from its interpretation or application to be settled through negotiations or other alternate dispute resolution mechanisms.[82] Nonetheless, it also provides for reference of dispute to the EACJ in case the concerned parties cannot reach a settlement.[83] By limiting such reference to only the Partner States and Secretary General to the Community, however, the Protocol tends to undermine the Treaty, which additionally confers any legal or natural person with the right to directly refer a matter to the EACJ.[84] Moreover, as was seen in the

[80] Protocol on Environment 2006, Art. 32 (b).
[81] See EAC Treaty 1999, Arts. 6 (c) and 143 (4) (d).
[82] Protocol on Environment 2006, Article 40 (1).
[83] ibid., Art. 40 (2).
[84] Article 30 of the Treaty provides that:

> "Subject to the provisions of Article 27 [of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that

previous Chapter, reference by the Secretary-General to the EACJ has to be approved by the Summit. Considering that the Protocol is part of the Treaty[85] and that EACJ's initial jurisdiction is over the interpretation and application of the Treaty, a dispute between two or more Partner States concerning the interpretation or application of the Protocol, may well be a concern of any other legal or natural person.

As can be seen, the EAC Treaty and its establishment of a more defined and cohesive framework for regional cooperation has yet to significantly influence Partner State commitment towards regional cooperation in ENRM. As can also be seen, the Environment Protocol tends to renege on several of the commitments enshrined in the Treaty. Against this finding, the following sections discuss the Community instruments that are specifically focussed on the management of the Lake Victoria region, our area of interest. As the EAC has since recognised the Lake region as an area of special socio-economic and ecological importance,[86] we are interested in ascertaining whether the region has been accorded special attention in as far as the management of its environment and natural resources are concerned.

Convention for the Establishment of Lake Victoria Fisheries Organisation

The Convention for the Establishment of Lake Victoria Fisheries Organisation 1994 was negotiated and signed under the coordination and augmentation of the Food and Agriculture Organisation (FAO).[87] It was the first international agreement, in recent times, to bring together the original three East African Community states on

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such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

[85] Under the Interpretation Article of the Treaty, it is stated that:

"'"Treaty" means this Treaty establishing the East African Community and any annexes and protocols thereto; and "Protocol" means any agreement that supplements, amends or qualifies this Treaty;"

[86] See discussion in Chapter Three on the Socio-economic importance of the Lake region.

[87] The Committee for Inland Fisheries of Africa (CIFA), a sub-committee of FAO's Committee on Fisheries (COFI), had been coordinating and facilitating development of Lake Victoria fisheries since 1980. CIFA came in to bridge the gap after the collapse of the old EAC in 1997. Inevitably the collapse of the EAC also ceased the operation of its institutions, amongst which was the East African Freshwater Fisheries Research Organization (EAFFRO). CIFA, wound up its management role on the Lake upon establishment of the Lake Victoria Fisheries Organisation.

matters that concern environmental management in the Lake Victoria region. In pursuit of the core objective of establishing a regional institutional structure for inter-state collaboration in the management of Lake Victoria fisheries, the Convention establishes the Lake Victoria fisheries Organisation (LVFO), to which we shall return later.

While the Convention has been instrumental in the achievement of several positive interventions, in a similar manner to the Protocol on ENRM, it also contains provisions that potentially limit the powers and mandate of the inter-state organisation – LVFO - which it establishes. Most particularly, its extensive subjection to national laws and structures tends to veer it from the path of establishing a supra-national legal framework and institutional structure capable of ensuring the propagation of regional interests above national interests.[88] Despite the wide disparity in the applicable national laws, it explicitly provides that:

> "The Contracting Parties hereby agree to take all necessary measures including legislative measures when appropriate, in accordance with their respective constitutional procedures and national laws to implement the decisions of the Organization's Governing bodies."[89]

To seal its state centric perspective, Article XIII provides that any national measure taken pursuant to provisions of the Convention shall be applicable to nationals of the country where the measures originate and only enforceable within its territory. While the same Article obliges the Contracting Parties to adopt several common positions, it ironically goes further to stress that:

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[88] Although it is arguable that the Convention was entered into under auspices of a weaker form of cooperation, the Tripartite Permanent Commission, the LVFO Convention has, since the adoption the EAC Treaty – over ten years, never been revisited to the re-align it with the Treaty, which as has been seen, principally provides deeper regional integration in natural resources management.

[89] The Convention for the Establishment of the Lake Victoria Fisheries Organisation 1996, Article XIII (1)

> "Subject to paragraph 1 of this Article,[90] nothing in this Convention shall be interpreted as preventing a Contracting Party from exercising fully its sovereign powers in respect of any of the subject matters of this Convention."

It also emphasizes that:

> "Nothing in this Convention shall be interpreted as affecting the existing territorial limits of the Contracting Parties, or of their sovereignty in respect of the portions of Lake Victoria falling within their respective boundaries."

Inevitably, these provisions potentially impede the successful negotiation and implementation of joint resource management measures, even though they are called for in the same instrument. For instance, among the functions of the LVFO Council, it must adopt management and conservation measures over Lake Victoria fisheries,[91] but the same Council is under no obligation to ensure that the Contracting Parties comply with such measures. That notwithstanding, however, it is noted that the LVFO Council is constituted of Ministers from the Contracting States, who presumably represent their country's interests in the negotiation of common positions. It is interesting, therefore, that the common positions of the Council are not of direct effect and instead are subject to national endorsement. Generally, the Convention finds itself harbouring such inconclusive provisions, which certainly hinders the attainment of its objectives. Envisaging the adoption of a common standard and having a joint management framework while maintaining full sovereign rights is practically impossible since the process of establishing joint inter-state management frameworks demands some ceding of sovereign rights.

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[90] Paragraph XIII (1) of the Convention States that:

> "The Contracting Parties hereby agree to take all necessary measures including legislative measures when appropriate, in accordance with their respective constitutional procedures and national laws to implement the decisions of the Organization's Governing bodies."

This provision, however, also recognises the priority position of the national Constitutions and laws.

[91] The Convention for the Establishment of the Lake Victoria Fisheries Organisation 1996, Art. VI (1) (j).

Although the Convention commits Parties to work towards a harmonised management regime of Lake Victoria's living resources, it largely upholds a defragmented management approach. Given this observation, however, there are two issues worth noting. First, this Convention was made before the Contracting Parties were further bound together by the EAC Treaty. This may explain why less power and responsibility was transferred to a joint institution. This assumption will be further collaborated in the discussion in the following section, which reviews a similar agreement signed under the EAC arrangement. Second, now that the LVFO is an institution of the EAC and, of late, part of the LVBC, it is worth reconsidering how these later developments have or are likely to impact on the Convention, and in particular LVFO's powers and functions. Notwithstanding these developments, however, the Convention continues to be implemented in its original form and, as is discussed later, this presents various challenges, some of which may impact on the smooth implementation of its objects.

Protocol on the Sustainable Development of Lake Victoria Basin

The Protocol on the Sustainable Development of the Lake Victoria Basin, hereinafter referred to as the Lake Victoria Protocol (LVP), was signed by the EAC Partner States in November, 2003 and it entered into force in December, 2004. The Protocol is among the first laws to be adopted under the EAC Treaty.[92] The adoption of this Protocol within a relatively 'short time' is certainly an indicator of EAC's level of interest in the Lake Victoria region. Though focussed on a sub-region, the Protocol was as a matter of priority, concluded before the overall framework instrument on ENRM – the Protocol on the Management of the Environment and Natural Resources, which remained pending for over four years.[93]

[92] The EACT provides for a number of subsidiary instruments to be enacted especially in the form of Protocols, Regulations and Standards.

[93] Development of both the East African Protocol on Environment and Natural Resources and the Protocol on the Sustainable Development of Lake Victoria started in 2001. While the later was concluded and entered into force in 2003, the former is not yet ratified by all Partner States. Ordinarily

Aside from emphasizing a number of ENRM issues outlined in the EAC Treaty, the Protocol establishes a legal and institutional framework for the sustainable development of Lake Victoria Basin. Generally, the Protocol is cross-sectoral and multi-disciplinary in both nature and approach.[94] In relation to environment and natural resources, it commits the Partner State to cooperate in the sustainable development and management of water and wetlands resources, fisheries, agriculture and land-use practices including: irrigation, forestry, wildlife and the environment in general.[95] In light of the EAC Treaty objectives, fundamental and operational principles, the Protocol's guiding principles are based on contemporary environmental principles of equitable and reasonable utilisation; sustainable development; prevention; prior notification; environmental impact assessment; the precautionary principle; polluters pays; public participation; minimisation and control of pollution; gender-equality in development; and subsidiarity.[96] It as such provides for a mixture of regulatory, public awareness and incentive-based compliance measures as a means of achieving its objectives. Accepting the dire need for uniform application and enforcement of measures, it calls for the harmonisation of Partner State laws, regulations and standards.[97]

For purposes of ensuring compliance measures, the Protocol encourages Partners States to complement their traditional resources management measures with new incentives. For example, Article 19 (1) (b) requires Partner States to:

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the ENR Protocol, which should ideally be wider in coverage (Region-wide) and scope, is expected to provide an over-arching framework for sub-regional or sectoral ENR instruments of the EAC. This is not to say that the Lake Victoria Protocol is supposed to be or is a subsidiary instrument of the ENR Protocol, but it is rather to emphasise that having the later first saves the bother of working backwards in search of consistence.

[94] See Protocol on the Sustainable Development of Lake Victoria Basin 2003, Article 3(a-m). (This Protocol is *hereinafter* referred to in these footnotes as the Protocol on Lake Victoria 2003)

[95] Protocol on Lake Victoria 2003, Art. 3. Other sectors covered by the Protocol are also considered from the sustainable development point of view include: tourism, trade and industry, maritime matters, mineral exploration and energy.

[96] ibid, Art. 4.

[97] ibid., Arts. 6 (2), 14 (3), 25 (1) and 32 (a).

> "Put in place measures that conduce operators of existing facilities to avoid, reduce, minimize and control pollution from such facilities."[98]

Although not much emphasis is placed on it, this measure is an indication that the Community recognises the need to diversify and venture into new resource management approaches other than solely basing ENRM measures on the traditional command and control methods.[99] As commonly argued, such augmentation is premised on belief that strict command and control regimes are more likely to scare investment opportunities than incentive based systems. Incentive based regulations and economic instruments are, however, rather new strategies whose performance and enforceability in the region is yet to be appraised.

Not only is the Protocol wide in scope, but it also attempts to promote a holistic approach to the management of the Lake Basin's natural resources. Irrespective of such strides intended to re-engineer the Lake region' ENRM regime, its structure in relation to state-regional power relations appears not to be much different from those established by the instruments of the Community, which were considered earlier.[100] With regard to the dispersal of powers and functions to national and regional interests, the following sections discuss the LVP and issues of the development–environment nexus, the polluter-pays principle and the state-region power relationship.

The Development–Environment Nexus

As mentioned earlier, a major challenge in environmental management concerns the balancing of development needs and environmental interests. This nexus is of

[98] ibid., Art. 19 (1) (b).
[99] See Articles 17 and 18 of the Protocol, on application of the 'polluter pays' and 18 on 'user-pays' principles.
[100] That is; the Protocol on the Management of the Environment and Natural resources and the convention for the Establishment of Lake Victoria Fisheries Organisation.

particular interest to our discussion because it touches on economic matters, which are central in determining how the states relate to themselves and within the Community in general.

The Protocol, according to its title, is focussed on the concept of sustainable development, and while debate continues on whether there is supremacy hierarchy among the common principles of environmental law, [101] to some the principle of sustainable development is thought supreme.[102] Nothing conclusive is likely to come out of such a debate because ranking of these principles has to vary as in accordance to prevailing circumstances and the thinking of the major actors in the decision-making process. When looked at critically, however, the principle of sustainable development tends to be over-arching as it seeks to achieve a state of affairs while the other principles are oriented more towards specific actions. In any discussion of the principle of sustainable development, therefore, a major debate will always concern the extent to which other aspects of development can override environmental interests or vice-versa.

Going by its title, the Protocol is focused on sustainable development, which unlike the conservationist approaches, reasonably allows for the undertaking of development activities in so far as they do not inflict adverse impacts on the environment. Indeed, the Protocol incorporates several issues that are reflective of the sustainable development principle. Paragraph 3 of the preamble states that:

> "...Partner States recognise in the Treaty that development activities may have negative impacts on the environment leading to degradation of the

[101] See Maurice Sunkin, D. Ong and R. Wight, *Source Book on Environmental Law* (Second edn, Cavendish, London 2002) p. 45.
[102] David Hughes, *Environmental Law* (Fourth Edition edn, Butterworths Lexis Nexis Bath, UK 2002) pgs. 23-24.

> environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development;"[103]

It is further stated in Paragraph 4 of the preamble that:

> "Water is a finite and vulnerable resource essential to sustain life, development and the environment and must be managed in an integrated and holistic manner, linking social and economic development with protection and conservation of natural ecosystems;" [104]

In the main text, however, some provisions appear to suggest that environmental interests should only be safeguarded in so far as socio-economic conditions permit. In the prevention of pollution at source, for example, Partner States are required to adopt measures in consideration of the economic realities of the Basin, including the ability of the owners of the regulated entities to afford remedial measures provided that those realities are compatible with the long-term need of sustainable development.[105] Although the provision appears to be clear that sustainable development is a key consideration, the phrases "economic realities" and "long term need" subject this provision to interpretational vulnerability. It may be interpreted to mean that a regulated entity may not be liable for pollution arising from its activities in so long as it can prove its inability to undertake the required remedial measures. It can on the other hand, imply that pollution can continue unabated if it is arguably compatible with the long term need of sustainable development, something that is not necessarily synonymous with the concept of environment protection.

[103] See Preamble of the Protocol on Lake Victoria 2006.
[104] ibid.
[105] Protocol on Lake Victoria 2006, Art. 19 (2).

Social and economic considerations are part and parcel of sustainable development, and that should not in itself be a problem. Concern usually surrounds how the social and economic factors blend with environmental considerations without distorting the core principles in the concept of sustainable development. While it is difficult to have a standard formula, the law can be used to drive competing values. The Protocol goes to length to emphasize circumstances where economic factors may override the environmental objectives and not vice-versa. To take the development-environment nexus further, the following section discusses the polluter-pays principle, one of the new dimensions that Protocol introduces in the region's ENRM regime.

The Polluter-pays Principle

As earlier outlined, the Protocol promotes various management measures, some of which have hardly been applied within the Community. Of much interest to our discussion are those measures that are likely to influence Partner States' decisions on the manner and level of ceding ENRM powers and functions to the regional level. An example of where this might be necessary lies in the polluter-pays principle.[106]

Aside from being neither absolute nor obligatory to States,[107] there are doubts as to whether the polluter-pays principle has reached the status of being recognised in customary international law as an applicable rule.[108] That notwithstanding, this

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[106] The 'polluter pays' principle, which was initially endorsed by the Organisation for Economic Cooperation and Development, entails that the polluter economically bears expenses of maintaining the environment in an acceptable state. It aims at internalisation of environmental costs. For further discussion on this principle, see Patricia Birnie and Alan Boyle, *International Law and the Environment* (Second edn., Oxford University Press, Oxford, UK 2002) 92-95: This principle has gradually been included in several international agreements including UNCED's Rio Declaration 1992. Principle 16 of the Declaration States:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

[107] Birnie *et al* (2002) op. cit. n. 106 at 92-93.

[108] Sands (2003) op. cit., n. 37, at p. 280.

principle is provided for in numerous international agreements concerning the environment. Some treaties directly commit their parties to apply the principle[109] while others use soft language as a matter of guidance.[110] Aside from the remedial or liability perspective, the polluter-pays principle can be implemented in a precautionary manner, through imposition of a tax and charges system, where potential polluters or resource users are required to pay in lieu of their potentially harmful activities to the environment, thus internalising environmental costs in the cost of production.[111] Other than raising funds that can be used in the restoration of the environment, such an approach also acts as an incentive for more environmentally friendly production processes.[112] This principle can, therefore, be implemented at both specific and general levels.[113] Notwithstanding such options, however, the Protocol tends to approach it from only the liability perspective, where the polluter is required to pay for the damage already done. It, therefore, introduces it as a remedial measure and also as a potential source of revenue.[114]

The polluter pays principle is complex and as Sunkin *et al* observe, it is easy to state it in abstract terms but difficult to apply in practice.[115] Considering the complexities associated with the application of this principle,[116] its effectiveness requires extensive guidelines on what it actually entails. This would particularly be critical in the management of a shared resource, such as the Lake Victoria region, since the

[109] For instance, the Convention on the Protection of the Marine and Environment of the Baltic Sea Area 1992 (Helsinki Convention), Art. 3 (4).
[110] For example, the Convention on the Protection and Use of Transboundary Water Courses and International Lakes 1992, Art. 2 (5).
[111] According to Sunkin *et al* internalisation of environmental costs entails "that all human economic activity which impinges upon the environment should be fully accounted for in the economic pricing system of the goods and services produced by such an activity", See Sunkin *et al* op. cit., n. 101 at pgs. 52-53.
[112] See Birnie *et al* (2002) op. cit. n. 106 at p.92-95 and Clare Coffey and Jodi Newcombe, *The Polluter Pays Principle and Fisheries: The Role of Taxes and Charges* (English Nature Institute for European Environmental Policy, London 2001).
[113] Sunkin *et al* (2002) op. cit., n. 101 at p. 52; and Coffey (2001)op. cit., n. 112.
[114] See Protocol on Lake Victoria 2006, Arts. 4 (2) (g), 17 and 18.
[115] Maurice Sunkin *et al* (2002) op. cit., n. 101, at p. 53.
[116] See Sands (2003) op. cit. n. 37, at p. 279-280. See also, Birnie et al (2002) op. cit., n. 106, at pgs. 92-93.

objective may be easily lost through diverse application among the sharing parties. In its enforcement, however, the Protocol places the responsibility at the discretion of the Partner States without mentioning the direct role of the Community. It thus requires Partner States to ensure that the polluters pay, as near as possible, the cost of the pollution resulting from their activities. It also provides that the costs recovered from such an undertaking be used by the Partner States to cleanup and restore the affected environment.[117]

The most significant drawback of this principle concerns its potential impact on economic activities. Considering that its application continues to be highly contentious even at national level, it is certainly worse in the scenario of trans-boundary shared resources. It is perhaps for this reason that the Protocol, as we shall shortly see, confines its application to the state level. This stance, however, is likely to give rise to widely varying if not conflicting regimes that may substantially defeat the purpose of inter-state cooperation over the shared resources. Judging from the manner in which the Partner States have retained discretionary powers in the Community's ENRM regime, it is highly likely that such powers are preserved to address state-centric interests. Moreover, as has been mentioned earlier, states may not be that prepared to extensively compromise their much desired socio-economic interests for the sake of upholding the tenets of the polluter-pays principle. Interestingly, this represents a situation where Partner States are required to set their own rules and at the same time appraise their compliance, and this is in the context of matters such as national economic development, where they certainly have a direct interest.

[117] Protocol on Lake Victoria, Art.17 (1) and (2).

Roles and Power of the Partner States and the Community

A major goal of the Protocol is to bring together the Partner States, as a regional Community, in addressing matters concerning the sustainable development of the Lake basin, which is a shared resource. To achieve this goal the Protocol attempts to apportion various powers and functions among the Partner States in their right both as sovereign entities and also as members of the Community. Since the State remains a fully sovereign entity under the EAC arrangement, recognition of state sovereign rights is certainly expected. In the event that the states, in the interest of regional cooperation, have agreed to cooperate in various areas, however, they are expected to cede some powers and functions to the Community to enable it effectively exercise its mandate. The ceding of powers and functions is expected to be more widely extended when it comes to entrusting the management of shared resources with a supra-national entity. Surprisingly, however, this seems not to be the case with the institutional and legal framework ushered in by the LVP.

Although it establishes the LVBC, whose challenges are later discussed, the Protocol appears to place far less powers and functions at the EAC than at Partner State level. We see instead the Council taking central stage in virtually the entire decision making process. While it is arguable that the power-laden Council is an organ of the Community, it is on the other hand worth appreciating that its members, as a matter of first priority, are likely to serve the basic purpose of representing the interests of their respective states. And if such interests are not compatible with the common good, this would then be at the expense of the Community's interests. Despite being a central point in the coordination of Community affairs, the EAC Secretariat is minimally involved in the implementation of the Protocol. It has no specific role in the major aspects of the Protocol such as its compliance monitoring and enforcement mechanisms. Although the Protocol requires the Secretariat to conduct public consultations while developing national and Community guidelines and

regulations on Environmental Impact Assessment and Audit,[118] it falls short of putting in place an effective mechanism to enforce this measure.

The Protocol appears to forget that it is intended, among others, to address issues of a transboundary nature. It tends to address pollution matters as though they were entirely a state level matter. For instance, it provides for the enforcement of the polluter pay principle from basically the state level point of view.[119] Further, the issuance and enforcement of restoration orders is also left to the discretion of the Partner States.[120] Although the cause and source of pollution can be confined within state boundaries, the likelihood that its impact will be trans-boundary remains high, yet the mechanism for handling such cases is not clearly provided for under the Protocol. The emphasis is on the Partner States to put in place their own national pollution control measures,[121] which measures may, because of the differences in the national laws, be difficult to apply in case of transboundary pollution. It may be more difficult to find a common solution if such pollution arises from an activity sanctioned by a Partner State. The only provision where States are required to jointly put in place commonly applicable measures concerns the application of the 'user pays' principle.[122] Moreover, under that provision, the States are at liberty to act individually.[123] While the EAC has developed several guidelines including those on the EIA for shared ecosystems,[124] most of them have not been adopted largely because of a lack of a compelling force at the regional level.

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[118] ibid,, Arts. 12 (2) and 14 (2).

[119] Article 14 of the Protocol States that:

> "(1) The Partner States shall take necessary legal, social and economic measures to ensure that a polluter pays as near as possible the cost of the pollution resulting from their activities. (2).The costs recovered from the polluter shall be used for cleanup operations and restoration by that Partner State."

[120] Protocol on Lake Victoria, Arts. 17 and 18.

[121] ibid., Arts. 17, 19 and 20.

[122] According to the Protocol the 'user pay' principle entails recovery of costs from large-scale uses of the water resources.

[123] See Protocol on Lake Victoria, Art. 18.

[124] These guidelines were adopted by the Permanent Tripartite Commission during its 14th meeting held in 1994. For details of the recommendations see, East African Community, *Policy Brief on Environment and Natural Resources* (EAC Secretariat, Arusha 2005).

By placing most powers and roles at state level, the Protocol tends to stretch the assumption that its existence is likely to positively influence states' behaviour. In general, it entrusts various duties to the states but falls short of providing a mechanism that checks on their compliance. For example, Article 12 requires that when a Partner State determines that a project in its territory is likely to have significant transboundary effects, it should inform other Partner States and the Secretariat providing the relevant environmental impact statement for comment. There are two issues here. The first is whether States would find it appropriate, in practice, to inform others. Secondly, there may be instances where a State may argue that a project in question does not have or was thought not to have been capable of causing 'significant' transboundary effects.

Generally, notwithstanding its contribution to the sustainable management of the Lake region, the Protocol appears to undermine two issues that ought to be among its guiding principles. First, it tends to give prominence to a state centric approach even though its jurisdiction is over a transboundary resource. Secondly, the Protocol should be seen to be part of a wider regional cooperation effort bound together by the EAC Treaty. By entering into such an arrangement, the Partner States are presumed to have ceded various aspects of their sovereignty, as per the stated areas of cooperation, amongst which is ENRM. It is expected that, unlike agreements that bring together entirely sovereign states, the Protocol's provisions should reinforce the spirit of regional cooperation by promoting measures that rationalise the allocation of powers and functions between the state and regional governments, so as to enable the latter play a more versatile role in matters of common interest. The swift success in the Community led joint effort against the invasive water hyacinth weed on Lake Victoria serves as a good example of the benefits of cooperation.[125]

[125] Following a Council directive two major documents, the *Regional Strategy for Control of Water Hyacinth and Other Evasive Aquatic Weeds* and the *Harmonised Regional Action Plan for*

The EAC Institutions Concerned with the Management of the Lake Victoria Region

There are basically two major EAC institutions whose mandate explicitly concerns ENRM in the Lake Victoria region - The Lake Victoria Fisheries Organisation (LVFO) and the Lake Victoria Basin Commission (LVBC). As our interest is on the concept of multi-level government, these institutions are discussed with a view to ascertaining the extent to which their establishment and functioning manifests Partner State commitment towards strengthening regional cooperation in the management of the Lake region.

Lake Victoria Fisheries Organisation

The Lake Victoria Fisheries Organisation (LVFO) is established by the Convention for the Establishment of Lake Victoria Fisheries Organisation that was signed in 1994 and entered into force on 24th May 1996.[126] The LVFO Convention, as is commonly referred to, was originally entered into by the three riparian States of Uganda, Kenya and Tanzania. This was under auspices of the Permanent Tripartite Commission (PTC) that had been established in 1993 as a platform for the revival of the East African Community. While the initial idea was to establish a powerful supra-national Lake Victoria Fisheries Commission, such an arrangement failed to gain the acceptance of all the Contracting Parties, who instead agreed to establish a regional body whose mandate was to be limited to coordination and advisory roles and, thus, establishment of the LVFO.[127]

Implementation were drawn and approved by the Ministerial Committee on Water Hyacinth. See Council of Ministers directive of November 1998 and Minutes of the East African Ministerial Committee on Water Hyacinth of November 1999. Although the weed continues to recur, efforts to subdue the water hyacinth have been applauded as one of the most successful regional undertakings in the lake region.

[126] The LVFO was launched on 19th December 1996 and started operations on 1st January 1997, with its head office at Jinja, Uganda.

[127] Interview with a senior fisheries officer (name withheld on request) (Uganda Fisheries Research Institute, Jinja, Uganda, 14 July 2006). This information can, in fact, be collaborated with Micheni J. Ntiba's foreword to the LVFO Convention, November 2001 version, published by the Lake Victoria Fisheries Organization (LVFO) Secretariat in conjunction with the International Union for Conservation of Nature (IUCN).

The objectives of the LVFO are to: foster cooperation among the Contracting Parties; harmonize national measures for the sustainable utilization of the living resources of the Lake; and develop and adopt conservation and management measures.[128] The Organisation has an elaborate structure that distributes functions and powers among decision-making, management, administrative and technical organs. Its organs include the Council of Minister (CoM), which is the supreme body of the Organisation;[129] the Policy Steering Committee (PSC), [130] which is the policy organ and senior executive arm of the CoM;[131] the Executive Committee,[132] which is constituted of technocrats; the Management and Scientific Committees; [133] and a Permanent Secretariat headed by Executive Secretary, who is the chief executive and legal representative of the Organization.[134] At the national level, the Convention provides for the establishment of National Committees for Lake Victoria Fisheries and National Working Groups, [135] both of which are required to operate within the existing national frameworks for fisheries management.[136]

The Convention attempts to balance power among its key organs by providing for more involvement of the technical and executive organs in the decision-making

[128] To achieve these objectives, the Organisation is required to promote proper environmental management measures; undertake capacity building and training; conduct research; gather and disseminate information; and act as an inter-party forum for discussion on matters that concern the Lake. See LVFO Convention, Art. II (2) and (3).

[129] As required by Article V(1) of the LVFO Convention, the LVFO Council of ministers is consisted of the Ministers responsible for fisheries from each contracting state; See LVFO Convention

[130] Provision for this Committee is a result of an amendment adopted during the Second Session of the Council of Ministers of the LVFO held in Nairobi, Kenya on 12th November 1998. The Committee is constituted of the Chief Executive Officers, who are the Permanent Secretaries, of the Ministries dealing with fishery matters or their representatives from each of the Contracting Parties. See LVFO Convention (Final Act), Art. 7 (1).

[131] In accordance to Article VII (1) of the Convention, the PSC is consisted of the Chief Executive Officers of the Ministries concerned with fisheries, from each Contracting State.

[132] The Executive Committee is constituted of Heads of Departments responsible Fisheries Management and those for Fisheries Research in each of the Contracting Parties. See LVFO Convention (Final Act), Art. 8 (1).

[133] LVFO Convention (Final Act) Arts. 9 (1) and 9 (2).

[134] ibid., Article X (1) and (2).

[135] Ibid., Article XI (1).

[136] These national level organs are, however, largely not fully functional. See LVFO institutional structure, at <http://www.lvfo.org/downloads/INSTITUTIONAL%20STRUCTURE%20OF%20LVFO.pdf>, accessed 23 August 2009.

process. The later establishment of the Policy Steering Committee has been particularly important, as it embeds senior national technocrats within the decision-making structures of the Organisation. The LVFO has been since its inception a key player in the management of the Lake Victoria and most particularly in its fisheries.[137] Currently, its operations are basically guided by two framework documents, the *Strategic Vision for Lake Victoria (1999-2015)* and the *Fisheries Management Plan*.[138] Among its central themes are the issues of co-management and the engagement of a holistic ecosystem approach to resource management.[139]

As earlier mentioned, however, the LVFO was largely established as a monitoring and advisory than a regulatory or management body. Prior to the adoption of the EAC Treaty, which recognises it among the institutions of the Community,[140] its decisions had no force of the law. That notwithstanding, as seen to be the case with other organs and institutions of the Community, enforcement of LVFO decisions has often remained at the discretion of the Partner States. As discussed earlier, the Convention, that establishes it, is yet to be amended to bring it in line with the EAC Treaty that explicitly provides for Partner State commitment towards a stronger regional ENRM for the Lake region. As seen when examining the responsiveness of the Convention to the concept of multi-level government, placing greater leverage with the Partner States in its implementation not only lead to slow implementation or implementation gaps but also result in significant variations in the management regimes at state level, thus undermining the Treaty's call for law and policy harmonisation in managing the Lake region. This most likely explains why the

[137] LVFO is focused on several new measures including extensive involvement of the riparian communities in resource management; review and harmonisation of fisheries legislation; replacement of the prevalent *de facto* open-access fishing with a rights based system; and the establishment of a sustainable fund for fisheries management; See Lake Victoria Fisheries Organisation (LVFO), *Strategic Vision for Lake Victoria (1999 2015)* (LVFO Secretariat, Jinja 1999) p. 19.
[138] This plan, which was adopted by the Community in 2002, is being implemented through the five-year Implementation of a Fisheries Management Plan (IFMP) project.
[139] See, generally, Lake Victoria Fisheries Organisation, *Strategic Vision for Lake Victoria (1999 2015)* (LVFO Secretariat, Jinja 1999).
[140] EAC Treaty 1999, Art. 9 (3).

harmonisation effort in fisheries management has largely remained ineffective or inappropriately implemented.

The Lake Victoria Development Project

Following the establishment of the EAC, amongst whose objects was to have a holistic approach in the management of the Lake region, an effort was made to fast-track implementation of the Treaty provision that required the establishment of a broader mandate management body for the Lake region. Prior to the putting in place of the necessary instrument, however, the Lake Victoria Development Programme was commissioned as an interim measure.

Although the Lake Victoria Development Project (LVDP) was later transformed into the Lake Victoria Basin Commission (LVBC), it is important to briefly highlight its operations, as this will assist us to better understand EAC's commitment and chronology in reconstructing the regional institutional framework for ENRM in the Lake region. The LVDP was among the first specialist interventions to be established by the EAC.[141] With the basic aim of coordinating the various activities in the Lake region and their management, the LVDP was administratively established as a unit within the EAC Secretariat. It was, however, not entirely an environmental management intervention, as its three core themes were focussed on economic development, poverty reduction and environmental protection.[142] The Programme served as a stakeholders' centre for promotion of investments and information sharing and it was instrumental in the initiation of various foundational instruments for ENRM in the Lake basin, including the Protocol on Sustainable Development of Lake Victoria Basin and the *Vision and Framework Strategy for the Management and*

[141] The LVDP was established by a directive of the 3rd Council of Ministers, in 2001. It became operational after two studies were conducted on the institutional and legal arrangements for the sustainable development and management of Lake Victoria Basin.

[142] More information about LVDP can be found in 'Overview of the Lake Victoria Development Programme' available at <http://www.eac.int/lvdp/about.htm> accessed on 8th December 2006.

Development of Lake Victoria Basin, 2003.[143] LVDP was also a driving force behind the process that led to a focus on the Lake basin as a regional economic growth zone.[144]

Lake Victoria Basin Commission

The Lake Victoria Basin Commission (LVBC), which has a broader and more defined mandate than its predecessor - the LVDP[145] - is established by Article 33 of the Protocol on Sustainable Development of Lake Victoria Basin.[146] It is established as a specialized institution of the EAC that is responsible for coordinating the sustainable development of the Lake Basin. While the LVBC was inaugurated in 2006, its full operation still awaits the enactment of the long overdue Lake Victoria Basin Commission Bill 2007.[147] The objectives of the Commission are to promote: equitable economic growth; measures aimed at eradicating poverty; sustainable utilisation and management of resources; environmental protection; and compliance on safety of navigation.[148] To achieve these objectives, the Commission is basically required to carry out its functions through facilitation, promotion, guidance, advocacy, monitoring and reporting on activities of different actors towards sustainable development and poverty eradication in the Lake Basin. It is also required to link with other organs and institutions of the EAC on matters that pertain to the Lake basin. The Commission's structure is comprised of: a Sectoral Council as the overall policy organ; a Coordination Committee as an intermediary and implementing organ of the Council; the Sectoral Committees, which basically form the technical layer; and the

[143] This framework was adopted by the 8th Council of Ministers, as a Planning Tool to be used by all stakeholders in the Basin.
[144] See 'Overview of the Lake Victoria Development Programme', op. cit., n. 142.
[145] It was not possible to access the instrument that established the LVDP. This information was, however, confirmed in an interview with confirmed with former head of the LVDP and currently the Executive Director of the Lake Victoria Basin Commission (EAC Secretariat, Arusha, Tanzania, 3Juky 2006).
[146] Article 33 of the Protocol for the Sustainable Development of Lake Victoria 2003, operationalises Article 114 (2)(b)(vi) of the East African Community Treaty 1999, which provides for the establishment of a region-wide institution to manage Lake Victoria Basin.
[147] The passing of this Bill has been delayed by the lengthy consultative process, since consensus remains a major precursor for EAC legislation. See Tom O. Okurut, 'The Governance Mechanisms of Lake Victoria Basin' (The 2010 World Water Week, Stockholm, 21-27 August 2010). – This author is the Executive Director of the Lake Victoria Basin Commission.
[148] See Protocol on Lake Victoria, Art. 3.

Secretariat as the executive organ of the Commission. The Secretariat which employs several technical staff is headed by the Executive Secretary, appointed by the EAC Council.[149]

As the Commission's organisational structure and its functioning closely imitate that of the Community, which was discussed in the previous Chapter, we shall not discuss this in detail. Contrary to various Treaty provisions, the Protocol that establishes the LVBC falls short of creating an institutional arrangement that effectively gives rise to supra-nationalism in the management of the Lake Basin. It instead places most important decision-making powers in the Sectoral Council, whose decisions, as seen under similar arrangements in the previous Chapter, are likely to be influenced more by national than regional interests. This arises from the fact that the Councils are populated by members of the Partner State executive arms of government. Also, because it does not provide for any of the other key organs to play an oversight role, the Protocol entrenches ultimate supremacy of Council interests and decisions. Interestingly, the Council is under no obligation to consult other Community organs, even over important tasks, such as the approval of budget estimates and management plans,[150] which are normally done by or with the involvement of more representative bodies such as the Assembly.

The following sections discuss in more detail some of the major institutional challenges being faced by the LVBC.

Limited Mandate of the LVBC

Aside from other benefits associated with joint resource management regimes, the establishment of a joint management body for the shared Lake Victoria region is expected to act as a check on state excesses and hegemony that may arise in the absence of such a body. However, while it is explicitly stated in the Preamble of the

[149] ibid., Arts. 35-42.
[150] ibid., Arts. 27 (2) and 35.

LVBC Protocol that Partner States agree to establish a body for the management of Lake Victoria Basin,[151] the Commission, which the Protocol accordingly establishes, is not commensurately empowered to effectively and appropriately function as a joint management body. This can be adduced from Article 33 (c), which provides for its functions; the Commission appears to be more of a coordinating and advisory than a management body. Indeed, the preceding phrase to the Commission's broad functions explicitly states that;

> "The broad functions of the Commission shall be to promote, facilitate and coordinate activities of different actors towards sustainable development and poverty eradication of the Lake Victoria Basin..."[152] *(emphasis added)*

If the intention was to establish a body responsible for management functions, enforcing words such 'implement', 'ensure' and 'enforce' would be expected as common prefixes to several of the Commission's functions. Generally, the kind of 'management' body established by the Protocol tends to subdue the spirit of joint management enshrined in the Treaty.

The Treaty's call for the establishment of a management body for Lake Victoria may be viewed from another provision which states that:

> "Partner States agree to take concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States;"[153] *(Emphasis added)*

[151] See Preamble to the Protocol and EAC Treaty 1999, Art. 114 (2) (b) (vi).
[152] Protocol on Lake Victoria, Art. 33 (c).
[153] EAC Treaty, Art. 114 (1).

That notwithstanding, however, the Protocol appears to place less emphasis on the consolidation of a regional ENRM regime for the Lake Basin. It tends to reinforce a defragmented resources management regime where Partners States are expected to establish own management regimes, enforce them singlehandedly and at the same time be their own overseers. That way, the Commission's mandate is basically reduced to monitoring and offering advice to the Partner States but not intervening in terms of enforcement or reprimand. The Protocol positions the Council at the centre of the management decision making processes. If not deliberate, then the placing of most of the powers in the Council overtly relies on the assumption that the Council and not the Commission represents the interests of the Community as a whole. As seen in the preceding Chapter, however, this may not necessarily be the case.

Parallel Structures and unclearly defined institutional relationships

As mentioned earlier, there are two major institutions of the Community whose mandate primarily concerns the management of the Lake Victoria region and its resources. The need to synchronise the operational relationship between these institutions cannot be overemphasized and an effort has been made to that effect. On the sustainable development and utilisation of fisheries resources, for instance, the LVB Protocol commits the Partner States to comply with the LVFO Convention.[154] While such effort is welcome, there appears to be outstanding disjuncture, which if not appropriately addressed can potentially lead to conflict among the two institutions. In considering the institutional relationship between LVFO and LVBC, it is important though, to recall at this point, that these institutions were established at different times and indeed under different regional cooperation arrangements.

Furthermore, unlike the former that is focussed on fisheries the latter cuts across several sectors that stretch beyond environmental management. But organisational

[154] Protocol on Lake Victoria, Art. 8.

re-alignment and restructuring is part and partial of the institutional building process and, therefore, necessary and expected to continue within the EAC. The purpose here is to emphasize that it is not only due but also has to be done in line with the Treaty provision that requires a well coordinated institutional structure. The following discussion notes that provisions on the institutional relationship between LVFO and LVBC fall short of addressing such pertinent issues, and this poses a threat of institutional conflict that may eventually impact on the effectiveness of these institutions.

Recognising the prior existence and continuity of other agreements on the management of Lake Victoria, the LVB Protocol provides that with the exception of the EAC Treaty, it takes precedence over other regional agreements whose focus is within LVBC's scope of mandate.[155] It goes further to provide that:

> "Institutions and programmes of co-operation existing prior to this Protocol shall be accommodated under the institutional framework of this Protocol"[156]

However, the EAC Treaty, which is indeed recognised by the LVB Protocol as being superior,[157] recognises the continued existence of the LVFO and also requires it to operate according to its instrument of establishment.[158] There are three major concerns here. First, although the LVBC is supposed to be the overall Community institution on Lake Basin matters, LVFO is now a well established and a reasonably financed institution, which may desire to remain autonomous. Secondly, the institutional arrangements relating to the existence and functioning of these two institutions is not adequately harmonised. For instance, now that both the LVFO Convention and the LVP establish Sectoral Councils, it remains unclear as to their

[155] ibid., Art. 48.
[156] ibid, Art. 52.
[157] ibid, Art. 47.
[158] EAC Treaty 1999, Art. 9 (3).

relationship, especially with regard to the issue of superiority since the decisions of both of them are expected to have direct effect. Thirdly, there are several areas where the mandates of these two institutions criss-cross. Now that both bodies are operational, it may be only a matter of time before problems associated with such parallelism and unclearly defined institutional relationships come to light. While the long awaited Lake Victoria Basin Commission Bill may seek to address these issues, it may as well require a revision of other instruments already in force to allow the effective co-existence of both institutions.

Undoubtedly, the establishment of specialised institutions responsible for various aspects in the ENRM of the Lake region exhibits a high level of commitment and interest of the EAC in the Lake region. It is clear, however, that there exist gaps that are likely to impact on the effectiveness of this effort. While the Partner States must retain their traditional obligation of ensuring compliance to the ENRM regimes within their respective jurisdictions, they should also cede reasonable authority to regional institutions to enable them to autonomously participate in the management of the Lake region. Owing to its transboundary nature, the Lake region needs to be uniformly managed and this can best be attained with the genuine participation and oversight of the regional institutions.

Conclusion

The fact that the EAC has been progressively developing various instruments that specifically concern the ENRM of the Lake region is without doubt an expression of the interest that the Community has in the Region. These instruments are, however, embodied in the wider regional jurisprudence, whose effectiveness or failure certainly affects the Region's regime. We see that the regional jurisprudence is faced with numerous problems, the most crucial being the lack of clarity on its own boundaries. Since the regional laws are basically framework instruments, much of

their effectiveness is owed to the Partner States. However, the Partner States have not responded well in transposing, harmonising and enforcing the laws in a timely and cohesive manner.

The major findings of this discussion are not much different from those in the previous Chapter. EAC's institutional and legal arrangements for the ENRM tend to unilaterally elevate the power and roles of the Partner States, something that may not be consistent with the interests of regional cooperation. Interestingly, the management of Lake Victoria, which is a shared resource, is no exception to this arrangement despite the explicit Treaty provisions that particularly call for its management to be concertedly pursued under auspices of a joint management body. Although the joint management body – the Lake Victoria Basin Commission - is already in place and operational, the instrument that establishes it[159] and the Community's framework law on environmental management[160] fall short of asserting the Commission's mandate as envisaged in the Treaty. It is argued that unless Community laws are revisited in consonance with the various Treaty provisions concerning the environmental management, their existence in the current form is ill positioned to address the problems and challenges associated with state-centrism in environmental management. This is particularly important in the case of shared resources such as Lake Victoria, whose environmental well-being has continued to suffer due to the absence of effective and feasible joint management efforts.

[159] The Protocol for Sustainable Development of Lake Victoria Basin 2003.

[160] The Protocol on Environment and Natural Resources Management 2006. It should, however, be noted that although this Protocol was, as of 20th November 2009, signed by all the five EAC states, it has not been ratified by all of them.

CHAPTER TWELVE

Conclusion

Owing to the escalating level of environmental degradation in many parts of the world, attempts have been made to redefine the manner in which man should interact with his environment. This rethinking follows a widely accepted view that the degradation largely results from unsustainable human activity, which if not regulated is likely to lead to severe socio-economic and ecological consequences. For this reason, the recent past has seen the emergence of several environment management principles, many of which are now being widely applied within Environment and Natural Resource Management (ENRM). As these principles are not self executing, efforts have been directed at not only the review of policies and laws but also the establishment and strengthening of the institutional frameworks under which they are supposed to be implemented. Transcending the traditional thinking that solely entrusted environmental protection with nation-states as sovereign entities, environmental management is increasingly being perceived as a task that requires a concerted effort both within and among the nation-states and this has, among others, led to the emergence and promotion of the environmental law principles of subsidiarity and regional cooperation. These principles underlie the concepts of local and regional government, respectively, whose joint application denotes the concept of multi-level government. The concerted application of these principles thus the concept of multi-level government, is particularly important in the management of trans-boundary resources such as the Lake Victoria region of East Africa, which is shared by the three states of Uganda, Kenya and Tanzania, and on the other hand, amongst several of their sub-national entities, the local governments. Against this background this thesis, with its focus on the Lake Victoria region, has attempted to evaluate the extent to which the concepts of local and regional government have been incorporated into the ENRM regimes at the local, national and regional levels in East Africa.

Part I explored the ecological and socio-economic endowment of the Lake region and its exposure to various forms environmental degradation, most of which were found to be associated with unsustainable human activity. The major underlying causes attributed to the degradation were discussed in Part II, where it was argued that state-centrism and a lack of a multi-level government arrangement stood out among these causes. Based on the argument that since the Lake region's natural resources are of shared interest both within and among the three lacustrine states, Part III and IV discussed local and regional government, as crucial actors in the environmental management of the Lake region. In these two Parts, the legal and institutional frameworks for the management of the Lake region were discussed. It was shown that their potential contribution, despite having been recently enhanced, remains thwarted by the continued elevation of state-centrism in ENRM. The following sections look in more detailed at this conclusion.

It was demonstrated in Chapters Two and Three that the Lake Victoria region is richly endowed with natural resources that are of invaluable ecological and socio-economic importance not only to the lacustrine community but beyond. As was seen in Chapter Three, however, these resources continue to be utilised in an unsustainable manner leading to various forms of actual and potential environmental problems. In addition to the effects already being felt, it was seen that continued degradation of the environment is likely to lead to far-reaching ecological and socio-economic consequences with an impact beyond the Lake region. Regardless of the natural causes, it was argued that the unsustainable human activity, which is a result of the ineffective ENRM regime, remains a significant catalyst for environmental degradation in the Lake Victoria region.

As discussed in Chapter Four, however, the immediate causes of environmental degradation are underpinned by several factors including: a high poverty incidence;

increasing population pressures; ill defined property and resource management rights; and prioritisation of economic interests. That notwithstanding, it was argued that the prominence of these underlying causes is generally precipitated by the lack of a strong institutional structure, capable of supporting participation and coordination at the local, national and regional levels. The effective engagement of key stakeholders at various levels is crucial in the improving the ENRM regime of the Lake region. While this would involve state and non-state actors, this thesis argues that because of capacity and legitimacy issues, such a multi-level institutional setup ought to place government tiers at the core; hence the concept of multi-level government and not governance, was pursued in this thesis. This conceptualises a multi-level continuum with central government positioned between, and accountable to, at the one end, local government and at the other, regional, cooperative government structures.

This conceptualisation draws us back to the discussion in Chapter One, where it was seen that despite its changing role, the state remains a major actor in the enforcement of ENRM. It was argued that the concept of multi-level government in ENRM implies neither homogeneity in roles nor an even distribution of authority across the levels of government. It involves the rationalisation of powers and functions. Although this thesis has argued that the strengthening of multi-level government is likely to mitigate the problem of state-centrism in ENRM, it also recognises that it is not an end in itself or a panacea to the environmental problems in the Lake region. It basically constitutes a framework intended to enable or facilitate the participation and coordination of various interests across levels of government on the region.

Chapters Six and Seven suggested that the colonial and post-independence ENRM regimes did not embrace the concept of multi-level government and this limited their effectiveness. These regimes were generally state-centric as the ownership and

management of most natural resources were vested in the central government and even concentrated in the executive arms of government. As had been seen in Chapter Five, the practising of ENRM by the pre-colonial communities was spear-headed by local institutions and which generally assumed a communal responsibility. While the debate remains open on whether the Africa pre-colonial communities had effective ENRM regimes, it has been argued that most parts of East Africa were prior to colonialism were abundantly endowed with natural resources and that the rate of their utilisation was within containable limits.

Although it has been argued that factors such as low population and technological development significantly contributed to the containment of environmental degradation among the pre-colonial communities, evidence suggests many of these communities also employed effective ENRM regimes. The strength of these regimes mainly lay in the fact that they were instituted and managed by the communities themselves and in accordance to their needs and norms, meeting the cardinal tenets of the principles of sustainability and subsidiarity. As was also seen, the incursion of colonialism dismantled not only the Traditional Natural Resource Management (TNRM) but generally, the native way of life. This had two major impacts on ENRM. On the one hand, it replaced TNRM with strange and unpopular systems, and on the other, it significantly changed the form and rate in the utilisation of the environment and natural resources. This state of affairs was exacerbated, in the Lake Victoria region, by other socio-economic factors such as increases in and greater concentration of the population and the commercialisation of the natural resource base. Together these factors increased the rate of environmental degradation.

Colonial Regimes and Natural Resources

As the change in the way of life continued to impact on the natural resources, the foreign systems attracted resistance from the natives. This led to the institution of force and coercion that were to later prove to be a major underlying philosophy in

the colonial ENRM regimes. While the use of force proved successful in some instances its effectiveness was generally held back by the fact that its application was limited to the natives while the colonial administrations and the settler communities continued to plunder the natural resources. As was pointed out in Chapter Five among the major intentions behind the colonisation of Africa was the exploitation of her resources. There was certainly no exception to the Lake Victoria region which, as seen in Chapter Three, has always been abundantly endowed with various natural resources and a favourable environment for agricultural production.

As seen in Chapter Five and Six, environmental degradation during the colonial era was typified by persistent conflicts between the native and the colonial administrations over the utilisation and management of the natural resources. Largely, these conflicts often arose from the fact that, since the natives were estranged from the management of their resources, they no longer felt any duty to care for these resources. The native administrations that should have been instrumental in advancing native interests instead served colonial interests. Although representative local governments later replaced the native administrations, it was not until the last decade of colonialism that their participation in ENRM started to take root, albeit under the firm control of central government. At that stage we begin to see the emergence of the concept of multi-level government in ENRM but one whose effectiveness was held-back by state-centrism.

Attempts at regional cooperation under colonialism failed to break the paradigm of state centrism. Although such attempts were as old as colonialism itself, the fact that the three lacustrine states shared much in common, including a colonial master and ecological regions such as the Lake Victoria region, did not lead to the ceding of state power in the interest of regional integration. The institutional framework for cooperation was basically presided over by state governments or their interests. Cooperation was limited to selected common services that hardly concerned ENRM

matters. The single effort towards regional cooperation in the management of the Lake – Lake Victoria Fisheries Services- was too short lived to yield tangible results.

This thesis argues that the concept of multi-level government was unattainable in colonial ENRM regimes, as the central governments, for political and economic reasons, were reluctant to effectively disperse resource management powers and functions to local and regional levels. Although this state of affairs was vehemently contested during agitation for self-rule, the post-independence governments found themselves treading the same path. In any case, they were to later dismantle the emerging multi-level government institutional framework that had been inherited at independence and improved shortly after.

Post-Independence Government

As Chapter Seven shows, it was not long before the post-independence governments reneged on their initial constitutions which had, among others, instituted stronger local government systems. Although regional cooperation was, on the other hand, strengthened and broadened it still failed to capture issues of ENRM, even where there were shared natural resources. Interestingly, the regional cooperation services such as agricultural production, trade and ferry services which did flourish tended to be based on the natural resources' potential of the Lake Victoria region.

Although, unlike its predecessors, the post-independent regional cooperation framework - the East African Community - had been, built on a stronger legal and institutional base, this strength was eventually compromised by the unrelenting force of state-centrism heightened due to the drifting political and socio-economic ideologies among the Partner States. Certainly, the collapse of the East African Community, in 1977, detrimentally affected the management of the Lake Victoria region that, because of its trans-boundary nature, required the joint and coordinated

effort of the lacustrine states. Significantly, the late 1970s through the 1980s saw a remarkable increase in the rate of environmental degradation in the Lake region.

The collapse of the East African Community and the erosion of the legitimacy of local government clearly demonstrate that the post-independence governments attached little importance to the concept of multi-level government, despite their earlier enthusiasm. They seem not to have learnt much from the underlying failures of the colonial ENRM regimes.

Environment and Natural Resources Management in the Lake Victoria

Although environmental degradation in the Lake region has always been a result of a combination of several underlying causes, as was seen in Chapter Four, the lack of a multi-level government framework or a platform for the effective participation of the local and regional governments unquestionably played a part. It was against this background that Parts III and IV discussed the concepts of local and regional government, respectively, with a view of ascertaining the extent to which they are represented in the current ENRM regimes. While the focus of this thesis is on ENRM in the Lake Victoria region, it was necessary to consider the general frameworks supporting ENRM at the level of local and regional government for two reasons. In the absence of a specific framework, the Lake Victoria region is left to be managed under general national ENRM regimes. Secondly, ENRM is not solely about environmental law, but the also the general framework supports its implementation.

The Lake region has, despite the existence of an ENRM regime in each state, continues to be faced with various forms of environmental degradation as they are essentially faced with the problem of implementation. Most of the environmentally harmful activities such as deforestation, overfishing and pollution are explicitly regulated and, as necessary, prohibited in each of the countries. However, a major problem arises as most of these activities are centrally controlled and managed. As

was discussed in Chapter One and demonstrated in other Chapters, state-centrism has proved a major cause of the persistent failures in public service delivery. Often, central governments lack capacity and at times the legitimacy to oversee the vast and dispersed natural resources within their jurisdictions.

The Role of Local Government

While central governments may be reluctant to cede the requisite powers and functions, the importance of local government has increasingly become clear, especially in relation to ENRM whose success inevitably calls for effective local participation. Democratisation and poverty reduction continue to be major catchwords in the revival of decentralisation and are embedded within the push for local participation.

As seen in Chapter Seven and Eight, since the early 1990s, all the three countries have made great strides towards the revival of local government, extent move that coincided with the review of environmental legislation. Despite the tremendous opportunities provided neither of these developments can be said to have clearly mitigated the historical problem of state-centrism in ENRM. While attempts have been made to decentralise some aspects of ENRM, this effort has not been firmly founded in the local government system, denying the system legitimacy and local accountability. Much as several 'autonomous' national and sub-national bodies have been established, the preference for their local partners appears to be stand-alone Community Based Organisations. Even where local institutions are involved in ENRM, it was seen that central governments maintain recognisable representation or influence over them. Not only does this slow down the decision-making process but it is also likely to compromise the autonomy of the local institutions. While there are undoubtedly various benefits in involving CBOs, the effectiveness of such direct centre-community co-management partnerships is likely to be limited by the fact that many of them tend to supplant instead of complement the local government

functions and powers. By-passing the local government system denies the co-managing parties the opportunity to benefit from the services and facilities that could be more readily available from the local than the central governments, which in most cases operate from great distances. Generally, decentralised ENRM manifests a mixture of deconcentration, delegation and devolution, but the latter that is largely coterminous with the concept of local government, appears to be the least visible in ENRM.

That notwithstanding, some ENRM powers and functions have been devolved to the local government. Their implementation is, however, faced with certain difficulties. In addition to many of them reneging from the policy positions that call for increased local government participation in ENRM, most laws are not clear as to the holistic picture of the devolved local government powers and roles. Moreover, the devolution is not sufficiently well coordinated among the local government and environmental laws, creating conflicts of interest but also confusion as regarding the issue of legal supremacy. As seen, basing the allocation of the management rights over natural resources on lopsided classification systems has also constricted the participation of local government, especially in the management of the high-end categories of certain natural resources. Where the management of a given resource is shared across several levels of government, the classification system is in many cases not clear as to the manner in which powers and functions are distributed among the participants.

It was also seen that the participation of local in the implementation of decentralised ENRM is faced with problems that are inherent within its broad institutional setting. The local environment offices, where they exist, are poorly staffed and funded. Similar challenges are faced by the local environment committees. The functioning of the local environment offices and committees is in some cases poorly defined in law. Challenges to decentralised ENRM include the weak framework for local

government. This framework is generally infested with claw-back provisions and practices that seek to maintain state-centralism in ENRM. The local government legislative mandate, which should be crucial in the development and enforcement of ENRM, is significantly under central government influence. Also, aside from being insufficient, local government financing and its prioritisation is also greatly dependant on central government interests. Further, although local governments largely enjoy the right to employ their own staff, we saw central government's increasing interest in the appointment of the senior local government personnel. Generally, however, local governments staffing remains challenged with the problem of adequacy, quality and dual allegiance.

It must be emphasised here, however, that, as seen throughout the discussion, local government challenges differ both among the resource management regimes and the countries. Kenya's apparent limited scope of local government may not necessarily give an accurate indication as to whether the other two countries have a better record on the integration of local government ENRM. It is, nonetheless, clear that the recent legal and institutional reforms in the environment and local government sectors have insignificantly impacted on the historical problem of state-centrism. In some cases, the paradigm of state-centrism has not only continued to reign across sectors, but has also been strengthened.

The policy models for intergovernmental relations, discussed in Chapter One, suggest that local government participation in ENRM is subject to a mixed policy model, though the coercive aspects seem to be more pronounced than the cooperative ones. On a case by case basis, though, the cooperative aspects are most pronounced among the resources whose management is fully devolved. These resources, however, constitute a much smaller portion of the entire natural resources base.

In sum, despite the recent efforts, the frameworks for decentralised ENRM significantly fall short of dispersing the powers, functions responsibilities and capacity that would be crucial in ensuring the advancement and protection of local interests. This situation is particularly exacerbated by the failure to adequately make use of the local government systems, which unlike the other preferred partnerships, enjoy a wider range of economies of scale that could be instrumental in championing the push towards the reduction of state-centrism in ENRM. Keeping local government in the background reduces opportunities for the ENRM regimes to benefit from the potential of local governments in spear-heading the coordination and integration of environmental management matters across sectors. Insufficient integration has not only caused conflicts in roles and interests among the various actors, but has also exacerbated wasteful duplication of services. It has also made it difficult for the cross-cutting issues to be appropriately addressed, as each sector tends to pursue own goals that may not necessarily be coincide.

Regional Government and Dominance of State Centrism

Drawing on this thesis' conceptualisation of the term 'multi-level government' we also explored the context of regionalism in the management of the Lake region. In that regard Chapters Ten and Eleven focussed on the role and potential of the East African Community (EAC), as a regional level government that brings together the three lacustrine states over several issues, inclusive ENRM. As earlier mentioned, this direction in our discussion was premised on the fact that the Lake Victoria region is physically shared among these three states and, thus the call for a joint and coordinated effort. As is the case with local government, a regional level ENRM is not only about environmental laws, but also the general framework under which they operate.

As may be recalled from the discussion in Chapter One, the role or regionalism in ENRM cannot be overstated, especially in the management of transboundary

resources. Such roles have to be enforced through international instruments that are, however often faced with severe challenges, especially as in regard to implementation. This drawback mainly arises from the issues of a lack of legitimacy and legal enforceability, which are often prevalent in international regimes. Often, this is exacerbated by the traditional approaches that emphasize the principles of state-sovereignty and territorial integrity in international matters. We, however, saw that these principles are supposed to be less pronounced given the competence of the EAC, which is established by a Treaty that envisages deeper integration among the Partner States.

As seen, the EAC is built upon the principle of separation of powers. It has an Executive arm consisting of the Summit and Council of Ministers; a legislature – EALA; and a judicial arm – EACJ. Together, these arms of government, which are supported and coordinated by a permanent Secretariat, provide the underlying institutional framework that is critical in the development and enforcement of a regional ENRM framework. Interestingly, while the principle of separation of powers is signified by the existence of these organs, it is less apparent when one examines their functioning.

As well as the shortcomings found in the instruments that establishing the institutions of the EAC, the proper functioning of these organs has often been subject to state-centrism that certainly denies them the supranational status crucial to the development and enforcement of ENRM at a regional level. As such, the Treaty's call for the adaptation of common policies and laws or their harmonisation among the Partner States has been minimally addressed. While the EAC has made an effort to establish a regional framework specifically for the ENRM of the Lake region, the instruments that drive it generally lack a regional outlook, as they tend to place most powers with the Partner States.

We saw in Chapter One that, despite its changing roles, the state has remained an instrumental partner in the enforcement of international environmental law. As was seen in the same Chapter, however, the success of regional cooperation not only concerns the existence of regional laws and institutions but also their effectiveness in championing region-wide interests. It was shown, for instance, that, although the Lake Victoria Basin Commission and the Protocol that provides for its creation are established under a framework based on deeper integration, they nonetheless significantly lack a supranational outlook. Although the regional institutions are not expected to directly manage environmental resources, they are expected to have over-arching roles to ensure environmental compliance. Retaining most of the powers at Partner State level defeats the core purpose of having regional level interventions. The thesis emphasizes that unless the Community is entrusted with the necessary powers, any rational common interest over shared resources may be denied. It has also been argued, however, that much as the Community institutions need to be empowered, the structural relationship between them also requires to be revised.

In sum, it is evidently clear that the strengthening of multi-level government is crucially important in salvaging the escalating level of environmental degradation in the Lake Victoria region of East Africa. It is equally clear that this effort has continued to be held back by the continued dominance of state-centrism in ERNM. The attainment of an effective ENRM regime for the Lake region remains highly dependent on the political will of the central governments of the three lacustrine states of Uganda, Kenya and Tanzania.

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APPENDIX 1

Field Interview Summary

Method	Semi-structured Interview (Face-to-face)		
Number of Interviewees Targeted			50
Number Interviewed			29
Reasons for Shortage in Targeted Number	No response		13
	Failed Appointments	Officer Busy	3
		Declined	5
Respondents on their Privacy	Requested for full anonymity		11
	Requested omission of only names		3
	Indifferent		15

The field interviews were first held, between 8th July -26th July 2006 and the 19 march – 21st April 2007. A total of 28 persons were interviewed out of the targeted population of fifty. Because I had more time in Uganda, which is actually my home country, the highest response rate was by far from Uganda. That aside several of the interviewees are known to me and were, as such, not faced with the concerns of being interviewed by a stranger, as was the case in Tanzania and Kenya.

All interviews were semi-structured and conducted on a face-to-face basis. The semi-structured questioning was chosen because, as can be derived from the details in appendix 1, the interviewees were drawn from various sectors and are of different socio-status. It would, therefore, have been difficult to administer a structured questionnaire or ask the same questions for each interviewee.

As opposed to other research methods, preference for face-to-face interview method was mainly premised on the understanding that many of the targeted interviewees:-

- Have busy schedules, thus expected to have high preference for time saving or instant response methods
- Hold offices with highly regulated procedures and codes of conduct that can easily impact on their ability to comment on issues considered 'sensitive' or in the 'no go' areas for them
- Are not easily accessible through the usual communication channels like telephones, postal mail or e-mail, or would rather not like to commit themselves through such methods

That aside, face-to-face interviews provided me with the opportunity of assuring the respondents with anonymity whenever requested or in instances where signs of holding back information were sensed. Through this method, it was also possible to

probe for more information. The method, however, had several short comings. Several interviewees did not keep time or their commitment and this usually a cascading effect on the other appointments in line. Fixing new appointments was difficult and in other instances impossible. The task of conducting interviewees across three countries within a specific period, proved costly especially as a result of the unanticipated changes in schedules.

List of Persons Interviewed

	Organisation	**Title**	**Code**
1	Uganda Parliament	Senior Legislative Counsel	C1
2	Uganda Parliament	Member of Parliament	C5
3	Government of Uganda	Commissioner Fisheries	C2
4	Bugiri District, Uganda	Fisheries Officer	D1
5	Bugiri District, Uganda	Environment Officer	D5
6	Lake Victoria Basin Commission	Executive Secretary	E1
7	East African Community	Clerk to Council	E4
8	East African Community	Legal Counsel	E5
9	East African Community	Court Registrar	E2
10	East African Community	Director, Productive and Social Sectors	E3
11	East African Community	Principal Clerk Assistant	E6
12	East African Community	Member, Legislative Assembly	E7
13	East African Community	Chief Editor, Hansard	E8
14	Government of Uganda	Minister of State for Fisheries	C4
15	Uganda Local Authorities Assoc.	Economist	N2
16	Bugiri District, Uganda	District Planner	D3
17	Bugiri District, Uganda	Senior Planner	D3
18	Kisumu Municipality, Kenya	Environment Officer	D6
19	Mwanza City Council, Tanzania	Council Economist	D2
20	National Environment Management Authority, Kenya	Environment Officer	C6
21	National Environment Management Authority, Uganda	Legal Officer	C3
22	Jinja Municipal Council, Uganda	Principal Planner	D4
23	United Nations Environment Prog.	Senior Legal Officer	N3
24	ECOVIC (NGO), Tanzania	Director	N7
25	ACODE (NGO), Uganda	Executive Director	N1
26	Osienalla (NGO), Kenya	Title and Name not given	N6
27	GreenWatch(U) NGO, Uganda	Executive Director	N5
28	Uganda Local Authorities Association	Secretary General	N4

Notes: Since many of the interviewees requested for anonymity, however, it was imperative to withhold all the names and use codes instead. **C**= Central government Official; **D**= Local Government Official; **E**= EAC Official; **N**= NGO and other Non-State Actors.

APPENDIX 2

Much as similar questions were asked, some of the questions were asked in specific relation to the interviewee's job or place of work. The interviewees from the East African Community were for instance asked more questions in line regional cooperation matters. Nonetheless, an effort was made towards ensuring that the questioning was targeted at getting responses on the six topical areas concerning:

- The major environmental problems being faced in the Lake Victoria region
- The major players in the management of the resources
- The challenges faced in the management of the natural resources of the Lake Victoria region.
- The preferred management approach and institutional arrangement for the Lake region's ENRM regime
- The recent opportunities and achievements in the management of the resources
- The compliance tools and mechanisms

Basically, these topical areas form the basis against which the general response categories have been derived.

The Major Issues Derived from the Interviews

	Responses	Interviewees (Code)	Remarks
Challenges in Environment and Natural Resources Management (ENRM)			
➢ Regional	• Enlargement of Community	C1, N5	Argued than since it has been difficult for 3 states, harmonising laws for 5 states more challenging
	• Sovereignty interests/ Political will	D3, D4, C1, N1, E7, D4, N5	This includes political will
	• Limited EACJ jurisdiction	C1, E5, E7, N3, N5	Reasoned that EACJ has no direct and clear jurisdiction in environmental matters
	• EACJ judges not very conversant with Environmental law	C1, E7, N8	
	• Budgetary limitations	C1, C2, E2, E5	
	• Power struggles between EAC organs	C1, E6, E7, N5	Power conflicts between the Assembly and Council of Ministers
	• Major differences in Partner State laws	E5, D1, E7, E8, D3, D6	

	• Regional integration a political stunt • Weak enforcement mechanisms in EAC law/Legal supremacy	C1, E7, N5 E4, D4, C1, N1, N2, N3, C5, E7, D6	Problem on under which circumstance should EAC law prevail over domestic law and vice Versa; EAC environmental law mainly in form of Protocols; Lack compliance enforcement on Partner states
	• EAC law and weak	N2, D3, N1	
	• Slow decision making processes	D4, C5, E6, E7, E8, N5	
➢ National	• Lack of enforcement	N4, D3, D4, C1, C4, D5, C6, C8	All argued that the laws are in place, with some of them being good but enforcement levels still low. Reasons given cover political technical and financial resources limitations
	• Political Interference • Budgetary limitations	D4, C1, D5, E7, N2, D4, N1, N4 C1, C2, E2, D5, C6, C8	Political patronage to law breakers through intimidation and directives
	• Obsolete laws	C2, E2, D2, C5, D4	Some laws have never been revised since the 1960s
	• Command and control legal regime/ Cruel enforcement	C2, E7, N2, D3, D4, N1, N4	One interviewee argue that better to use persuasive methods that seek to arrest because it yields no results; Some provisions are oppressive and can not be implemented
	• Insufficient staff	E2, D5, E5, D1, D6, C8	Major issue here is that central government staff is too thin to oversee management all the resources that are centralised managed
	• Over-centralisation of ENRM	D3, D4, N2, E2, D5, D1, E7, N2, D3, D4, N1, N4	Decisions made at central level; central government owns most resources; some management structures exclude local institutions
	• Lack of capacity and adequate knowledge on ENRM among key players	C2, E1, N2, C4, D3, D4	Many resource managers lack sufficient knowledge in their areas; Parliament not sufficiently aware to offer good oversight role
	• National development agenda and economies dependent on natural resources	N4, D4, E1, N2	One interviewee argued that governments can not interfere with economic development programmes for the sake of the environment
	• Lack of coordination among sectors/Too many players at centre	D3, E1, N2, D1, D2, C4, E5, E3, D6, D4	Each resource in managed by at least one body and other resources are found within others yet

			coordination mechanisms are minimal e.g Fish is found in water and yet the two resources are managed separately
	• Conflict in sector laws	E1, D3, D6, N5	
	• Bureaucracy	D4, E2, E8	
	• Corruption and lack of nationalism	E2, D4, N5	Take brides to abate degradation or fail litigation
➢ Local	• Political Interference	C5, D1, E7, N2, N7, NI, N5, C8	Local leaders especially MPs interfering with law enforcement for the sake of protecting their local support
	• Budgetary limitations	D3, N4, C2, E2, N2, N4, D1, D3, D4	
	• Local governments prefer revenue at expense of ENRM	C2, C6, N7, C8	Tendency of local government to use licensing regimes as a source of revenue, by licensing applicant far above quota; Funds collected from natural resource use not ploughed back into sector
	• Shortage of personnel to oversee ENRM	D3, D5, D6, D7	Example given – Each district in Uganda has one environment officer
	• Less emphasis on Urban authorities in ENRM	E2, D6, D4	ENRM programmes are usually rural based, forgetting that urban centres are major sources of pollution and mass consumers of natural resource products
	• Rivalry among resource users	E2, D1, D6, C8	Resource users competing among themselves. Example given of fishermen rushing and using crude methods in order to be competitive
	• Lack of capacity at local level	C2, E1, D5, C6, C8	
	• Poverty	E2, D2, N3, N4, D1, E6, C6, N6	One interviewee, however argued that it is not poverty that leads to resource degradation but rather poor utilisation of resources leads to poverty
	• Lack of awareness	N4, D5,C3, N6	
	• Local community participation low	N1, N2, E6, N2, N6, N7	Communities not involved in decision making and having no representation in the management structures
	• Ambiguities in devolution of ENRM function	D4, N2, D5, D4	Laws do not come out clearly to indicate what resources or aspect of their management is devolved
	• Population pressure	N2, D1, E7, N2, C6, N3, C8	

➢ Others	• International Trade • Exploitation by foreign business interests	E2, E5	
Institutional Arrangement: What should be the role at each level			
The East African Community should take the lead	• The EAC be transformed into a political federation that unifies government structures	E7	
	• Establish single East African management Body responsible for ENRM	E7, N1	
	• Operate under directly binding legislation done by the EAC		
	• Clear separation of powers at regional level		
	• EAC Court established as the supreme tier but also with a level of first instance		
	• Trans-boundary natural resource Management to be a sole for the EAC		
Management to be enforced concertedly among various stakeholders	*East African Community*		
	• The EAC to offer framework guidance and oversight	E3, E8, N5	
	• The East African Court of Justice to be actively involved in ENRM	N3, N5, E3	
	• Adopt Common management approach	E8, D3, D6, C6, D4, N3	
	• management bodies	E3	
	• Set regional standards • Establish focal officers	N3, C8	
	• in each country • Restructure existing	D2, N3	

	• EAC resource management institutions to align with national local governance structures		
	Partner States		
	• Offer frontline political will	E8, E6, D4, N5, N4	
	• Harmonisation policies and laws among Partner States	E3, E8, D6, N5	
	• Ratify EAC framework law	E3, N3, N5	
	• Establish special Funds for resource management	C2, C6, C8	
	• Ensure Share benefits across stakeholders	D2, D4, N5, N4	
	• Support local authorities in ENRM	D2, N5, N4	
	• Offer judicial services • Support law enforcement • Enact laws and formulate policies • Coordinate sectors responsible for ENRM	C4	
	Local Government and Communities		
	• Co-management with local communities	D2, C2	
	• Make bye-laws	C2, C4, D2, N3	
	• Implement the laws	D3, N4	
	• Collect revenue accruing from resources	N4	
	• Invest in resource management	D6, N7	
National Governments to take leading role	• Recentralise staff concerned with ENRM at local levels	C4	

	• Create single national institution to manage all resources	D4	
	• Centre should be responsible for making laws and policies	C4	
	• Management plans should be centrally approved	C2, C4	
	• Resources should be centrally managed	C8	
	• Central government to set national standards	C2, C4	
Management to be left to the Local Governments and Communities	• Lake region to be managed under joint body for Local Governments		
	• Locals to decide own priorities in the management of their resources	N2, N6, N4	
	• Central government to monitor but not to direct local communities	N7	

Since many of the interviewees requested for anonymity, it has been imperative to withhold all the names and use codes instead. **C**= Central government Official; **D**= Local Government Official; **E**= EAC Official; **N**= NGO and other Non-State Actors: