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Gender Struggles in Homosocial Settings: Reconstructing Gender and Social Equity Sustainability in Post-Colonial Societies

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GENDER STRUGGLES IN HOMOSOCIAL SETTINGS: RECONSTRUCTING GENDER AND SOCIAL EQUITY FOR SUSTAINABILITY IN POST-COLONIAL SOCIETIES

BOSIRE MARAGIA *

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I. INTRODUCTION

The dual maxims of sustainable development—intra- and inter-generational equity—embed the idea of gender equity and provide both a conceptual lens for defining the parameters of sustainability and a roadmap for translating the rhetoric of sustainable development into actionable policy.¹ In post-colonial societies, promulgating and implementing sustainable development policies requires reconciling the undefined role of traditional norms and practices with the void left by the erratic and uneven spread of modernity. In these societies, pre-colonial marriage, inheritance, and property norms play a significant role in how livelihood resources, including land, are acquired, owned, used, distributed, and passed from generation to generation. In Kenya, for example, there is growing distance and tension between marriage, inheritance norms, and property law. This distance and tension has been exacerbated by homogenization and modernization of traditional tenure through registration, individualization, and vesting of the ultimate title in the post-colonial state, while leaving marriage and inheritance to be governed by a combination of multiple local norms and modern law. The impact of this continuing tension between property, marriage, and inheritance is reflected partly in growing landlessness and squatting in fragile agro-ecological zones in Kenya today.

Sustainability makes sense, and proposed sustainable development policies are likely to have a positive impact only if conceptualized and pursued within a particular social, political, and economic context. Sustainable development, both as a process and as a set of substantive commitments through which people seek to better their lives, cannot be divorced from the very social processes that shape human/nature relations. Sustainability efforts are shaped by, and they in turn shape, the social, economic, and political conditions of the local milieu. Hence, resolving pressing domestic and complex international environmental phenomena such as climate change, biodiversity, energy, and poverty eradication, necessitates taking action at the local level.

Sustainable development, as a process, entails pursuing economic policies that promote and maintain environmental quality and an equitable

1. I assume that it is possible to promulgate reforms that, at the very least, address some of the issues that the paradigm of sustainable development has raised, although the concept of sustainability remains contested. See LAMONT C. HEMPEL, ENVIRONMENTAL GOVERNANCE: THE GLOBAL CHALLENGE 40 (1996) (pointing out that because the concept of sustainability is based on the belief that human progress must conform to basic ecological precepts and human needs, one must ask whether sustainability is truly an end or merely a necessary means to some higher end); see also Bosire Maragia, *The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That is Needed?*, 18 GEO. INT'L ENVTL. L. REV. 197, 204-09 (2006) (arguing that an operational idea of sustainability can overcome initial definitional confusion).

social system.² That process requires dealing simultaneously with poverty, environmental degradation, and social equity. In other words, sustainable development encourages promulgation and implementation of policies that address poverty, and environmental and social issues; it is best understood when placed, in a specific local, political, social, economic, and ecological context.

This Article argues that efforts to translate sustainable development into actionable policy in a post-colonial setting like Kenya requires taking stock of how livelihood resources are accessed, acquired, and distributed across generations. This approach provides insight into how the dominant model of the patriarchal household mediates nature-society relations in the local political economy and how gender affects the intra- and inter-generational passage of property and wealth. Such perspective requires unpacking gender into its multiple homosocial and heterosocial spheres, not only to underscore the heterogeneity of women as a group, but also to emphasize the dynamism, malleability, and temporal nature of gender relations. Disaggregating gender into its multiple homosocial and heterosocial spheres also helps to shed light on why and how, in post-colonial societies, otherwise unwritten customary norms manage to override both constitutional and legal provisions that attempt to create gender equality.

This Article will use succession disputes in Kenya in which two or more women sue to inherit from the estate of an intestate husband or man. The efforts of such women demonstrate that gender relations are not only complex, but also suggest that understanding how gender relations structure property relations is indispensable to promulgating and implementing sound sustainable development policies in post-colonial societies. So far, such disputes have arisen in four situations. First, where a man contracts a customary law marriage while still married to another woman under statute.³ Second, where a man enters into a statutory marriage while a potentially polygamous African customary marriage

2. See Maragia, *supra* note 1, at 205-07 (arguing that sustainable development consists of economic sustainability, including policies that promote universal access to land in agricultural societies, ecological sustainability through regulation of human activity to align economic activity with land's carrying capacity, and social sustainability through redistributive justice). See generally NOLBERTO MUNIER, INTRODUCTION TO SUSTAINABILITY: ROAD TO A BETTER FUTURE (2005) (providing an overview of sustainable development through detailed case studies on the environmental impact of industry, tourism, and electrical generation, as well as case studies on measuring the impact of sustainable development).

3. See, e.g., *In re Ruenji's Estate*, (1977) K.L.R. 21 (H.C.K.) (Kenya), available in EUGENE COTRAN, CASEBOOK ON KENYA CUSTOMARY LAW 206-07 (2d ed. 1995) (holding void two customary law marriages contracted while the deceased was legally married under statute); *In re Ogola's Estate*, (1978) K.L.R. 18 (H.C.K.) (Kenya), available in COLTRAN, *supra*, at 209 (rejecting the contention that the deceased could contract valid customary law marriages while married under statute).

subsists.⁴ Third, where a woman attempts to marry another man under customary law without first dissolving a previous statutory marriage.⁵ Lastly, where a woman claims to be married to two men concurrently.⁶ At the very least, these varied situations illustrate the weakening of the role of marriage as an institution for securing and protecting property and wealth both within and across generations. More importantly, these cases show how local patriarchal norms mediate inherited colonial laws in gender-specific ways, and reaffirm the growing irrelevance of the traditional dualistic view of gender relations to understanding and solving economic and ecological deterioration in many post-colonial societies. Gender struggles are no longer about the oppression of weaker women by stronger men. Rather, they are contingent on a multitude of situational factors that determine how power and resources are allocated. Since such power and resources are bound to shift, ensuing gender struggles cannot be determined *a priori*, nor held constant.

By taking the foregoing approach or position, however, this Article neither challenges nor seeks to downplay the influence of the international political economy on chronic poverty and ecological decay in the Global South. Rather, this Article aims to demonstrate that one must penetrate deeper into the post-colonial society to understand how the local political economy helps contextualize and deepen the economic and environmental crises of development, assessing sustainable development's ability to deliver the promises modernity, thus far, has failed to deliver. Such analysis requires that we examine how the evolution and metamorphosis of property norms since the colonial period—particularly the modernization of pre-colonial “communal” tenure—has impacted livelihoods and the environment in gender-specific ways. More specifically, the vesting of the ultimate title to land in the post-colonial state and the traditional male-centric inheritance norms have led to skewed distribution of livelihood resources, including land, in the patriarchal order. This Article maintains that if sustainable development is to yield positive results, post-colonial Kenya must address the role of gendered traditions, practices, and legal norms that affect the acquisition, ownership, distribution, and use of

4. See, e.g., *K. (Otherwise B.) v. K.*, (1972) E.A.L.R. 554 (H.C.K.) (Kenya), available in COLTRAN, *supra* note 3, at 205 (finding a statutory marriage void when contracted while the respondent was also married under a customary law that allowed polygamous marriages).

5. See, e.g., *Anastasia Mutheu Benjamin v. Lakeli Benjamin*, (1979) __ K.L.R. __ (C.A.) (Kenya).

6. See, e.g., *In re Estate of Benjamin Muya Nganda*, (H. C. Misc. C. C. No. 121 of 1970 (Nairobi), Sept. 26, 1977), available in COLTRAN, *supra* note 3, at 215 (finding that the claimant's customary law marriage to the deceased did not in law or fact take place, and further she would have been incapable of entering into a customary law marriage with the deceased because her statutory marriage had not been dissolved).

essential livelihood resources, which both directly and indirectly influence poverty and environmental degradation.

Part II of this Article defines gender and gender equity, illustrating how an expanded view of gender can better inform our understanding of sustainable development in a specific social-cultural milieu. Part II also examines whether ecological problems are necessarily a function of gender oppression. Part III draws on the growing body of Kenyan intestacy case law to illustrate gender struggles in female homosocial spheres. These cases—which involve female litigants who interchangeably use tradition and modern law to prevent their opponents from inheriting a deceased man’s (husband’s) property on grounds of a pre-existing marriage—challenge the orthodox view of gender relations as encompassing only struggles between women and men in a patriarchal order. Struggles over power and resources in homosocial spheres are no less important than those in the heterosocial sphere. Part IV examines how disaggregating gender into its homosocial and heterosocial spheres could inform promulgation and implementation of sustainable development policies, particularly in post-colonial societies.

II. LINKING GENDER AND SUSTAINABLE DEVELOPMENT

A. Defining Gender and Gender Equity

Gender, like sustainable development, has multiple meanings and its construction has been subject to prolific debate. A working definition of gender provides a starting point: gender is the social organization of sexual difference based on the knowledge that establishes meanings for bodily differences varying across cultures, social groups, and time.⁷ Gender differences are neither natural nor fixed,⁸ but are socially constructed.⁹

7. A. M. Imam, *Engendering African Social Sciences: An Introductory Essay*, in *ENGENDERING AFRICAN SOCIAL SCIENCES* 3 (A.M. Imam, A. Mama & F. Sow. F. eds., 1997).

8. See Sandra Harding, *Just Add Women and Stir?*, in *MISSING LINKS: GENDER EQUITY IN SCIENCE AND TECHNOLOGY FOR DEVELOPMENT* 298-301 (1995) (proposing that gender relations are dynamic and historically changing ways of distributing social resources); Diedre L. Badejo, *African Feminism: Mythical and Social Power of Women of African Descent*, 29 *RES. AFR. LITERATURES* 94, 104-05 (1998) (arguing that, despite the similarities between American and African feminism, the European concept of “woman” is culturally deficient to the extent that the term “woman” became a label that sought to marginalize women in general and to make their historical accomplishments invisible).

9. See Harding, *supra* note 8, at 300 (arguing that gender is an oppositional relationship created through a society’s assignment of activities to men or women, and that gender differences are always hierarchical, interlocked with race, class, and other social relations); see also RITU VERMA, *GENDER, LAND, AND LIVELIHOODS IN EAST AFRICA: THROUGH FARMERS’ EYES* 3 (2001) (arguing that history, political economy, and gender play as large a role in soil degradation in rural Africa as land scarcity,

Harding¹⁰ argues that gender has little to do with biology or ontological differences and instead involves the complex interactions between men and women within dynamic hierarchical structures of power often mediated by race, class and ethnicity.¹¹ Gender relations can still be complementary even though they are hierarchical by nature.¹²

If gender relations are neither universal nor fixed, but rather context dependent, then a number of tentative conclusions must follow. First, gender relations are understood best when viewed in their social, economic, political, and cultural milieu. Second, we must caution against any notion of *a priori* fixed male power or female subjugation even in patriarchal orders. Gender relations by nature are malleable, always shifting, temporal, and mediated by other factors like race, class, ethnicity, religion, age, stage in lifecycle, and culture, with the ultimate distribution of power between and among women and men depending on the complex interplay of these factors.¹³ Third, understanding gender relations requires looking at gender both in homosocial and heterosocial settings. It requires probing

population pressure, and unsustainable farming practices). *See generally* ALICE HORVOKA, GENDER RESOURCES FOR URBAN AGRICULTURAL RESEARCH: METHODOLOGY, DIRECTORY AND ANNOTATED BIBLIOGRAPHY (1998) (outlining methods to encourage building gender capacity in urban agricultural development research).

10. *See* Harding, *supra* note 8, at 300 (arguing that gender, class, and other hierarchical social relations are mutually constructed and maintained, and that “[t]hey form a social matrix in which each of us has a determinate location (individual, structural and symbolic) at the juncture of gender or class social relations.”).

11. *See* Jane L. Collins, *Women and the Environment: Social Reproduction and Sustainable Development*, in THE WOMEN AND INTERNATIONAL DEVELOPMENT ANNUAL 33, (Rita S. Gallin & Anne Ferguson eds., 1991) (stating that gender is not a timeless natural category but one that is linked to particular social and historical contexts); *see also* VERMA, *supra* note 9, at 19 (stressing that gender must take into account roles and relationships among men and women that are differentiated by age, class, race, life-cycle positioning, and marital status). *See generally* Deane Curtin, *Women's Knowledge as Expert Knowledge: Indian Women and Ecodevelopment*, in ECOFEMINISM: WOMEN, CULTURE, NATURE (Karen J. Warren ed., 1997) (examining women's agricultural practices as a way of highlighting women's environmental expertise, and arguing that gender constructs in defining knowledge marginalizes women's knowledge as mere “wives tales”); Karen J. Warren, *Introduction to ECOFEMINISM: WOMEN, CULTURE, NATURE* xi (Karen J. Warren ed., 1997) (providing a critical examination of ecological feminism from a variety of cross-cultural and multidisciplinary perspectives).

12. *See* Badejo, *supra* note 8, at 94 (noting that although gender roles may be “complementary, parallel, asymmetrical, and autonomously linked in the continuity of human life” does not mean women and men, particularly in patriarchal societies, occupy the same plane). This is important in demystifying the claim that women's condition was better in pre-colonial Africa simply because women's roles were conceived as complementary to men's even though in general women were perceived as subordinate to men.

13. *See* VERMA, *supra* note 9, at 27 (noting that patriarchy is not “fixed, monolithic, timeless, and unchanging [but it] is rather both a dominant ideology that underpins ‘cultural’ norms, idioms and practices, and an inequitable social structure that shapes and permeates gender relations”).

not only relations between women and men but also among women and men as separate categories in multiple settings.

Gender equity from this perspective entails more than just attaining some measure of equitable treatment between women and men. It necessitates extending equality to homosocial arenas—that is treating women, and girls, and men, and boys, with fairness. It requires reconstructing gender relations to address extant inequalities amongst women and men as groups in addition to resolving inter-gender inequalities. Second, gender equity requires focusing on fairness rather than on seeking to impose ontological parity. That is, gender equity requires creating an equal playing field between women and men rather than pretending to eradicate biological differences.¹⁴ However constructed, biological differences, unlike gender differences, will always be there.¹⁵ Third, gender equity necessitates ensuring biological differences are not used to deny access to important livelihood resources like land or political power. In other words, gender equity anticipates removing the social, economic, cultural, and political barriers that disadvantage an individual's access to, control, ownership, and use of resources to sustain his or her livelihood or participate in governance.

B. Gender and Sustainability: Towards a Theoretical Framework

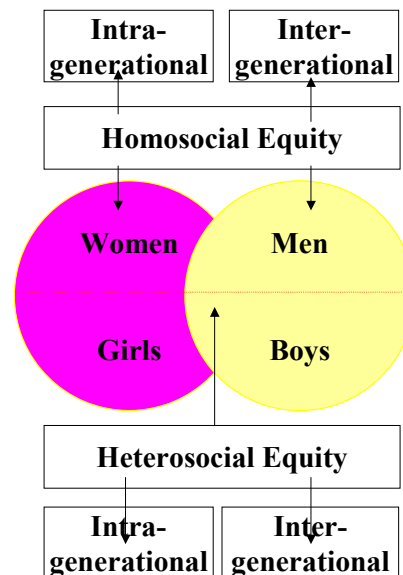
Intra- and inter-generational equity provides a conceptual framework for entrenching gender in sustainable development. Inter-generational equity is implausible without intra-generational equity. Similarly, equity cannot be achieved in the current generation if relations between women and men remain inequitable. In other words, the concepts of intra- and inter-generational equity embed, if not anticipate, gender equity. To better understand the relationship between gender and sustainability a disaggregated concept of gender—into homosocial and heterosocial spheres—is necessary. This relationship is captured in Figure 1 below.¹⁶

14. See JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 172 (1988) (proposing to recognize and use notions of sexual difference while making arguments for equality by rejecting the power relationship constructed by posing equality as the antithesis of difference); Jane Flax, *Beyond Equality: Gender, Justice and Difference*, in BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS, AND FEMALE SUBJECTIVITY 196 (Gisela Bock & Susan James eds., 1992) (questioning whether sameness or equality entails anything more than assimilating women into patriarchal structures); Chris Armstrong, *Complex Equality: Beyond Equality and Difference*, 3 FEMINIST THEORY 67, 67 (2002) (arguing that the concept of equality has played a controversial role in feminist thought).

15. The ontological incongruence masqueraded as sex difference is a social construct that has nothing to do with the superiority or inferiority of either gender. It would be superfluous, if not naïve, to talk of ontological parity between women and men as presumed gender inequality are constructed based on biased cultural practices and traditions rather than actual biological differences.

16. See Carolyn C. Bitzer, Multidimensional Gender Equity in Sustainable

Figure 1: Linking Gender and Sustainability: Theoretical Framework



This framework, illustrated in Figure 1 above, broadens our understanding on how sustainability can be promoted in situations where power and resources are inequitably distributed across and within gender lines. Specifically, intra- and inter-generational equity intersects with gender at two levels: homosocial, women/girls and men/boys as separate categories, and heterosocial, interactions between women/men and girls/boys. We can summarize this relationship between gender and sustainability as follows:

- (i) *Intra-generational homosocial equity*. Requiring equity between (a) women and girls of today, and (b) men and boys of today—or *intra-gender intra-generational equity*.
- (ii) *Intra-generational heterosocial equity*. Requiring equity between (a) women and men of today, and (b) girls and boys of today—or *inter-gender intra-generational equity*.
- (iii) *Inter-generational homosocial equity*. Requiring equity between (a) women and girls of today and tomorrow, and (b) men and boys of today and tomorrow—or *intra-gender inter-generational*

Development: a Concept and a Case (2003) (unpublished Ph.D. dissertation, University of Delaware) (on file with the University of Delaware Library).

equity.

- (iv) *Inter-generational heterosocial equity.* Requiring equity between (a) women and men of today and tomorrow, and (b) girls and boys of today and tomorrow—or *inter-gender inter-generational equity.*

C. Delimiting the Parameters of Gender in Sustainability

1. Gender as an Indispensable Variable

There is little disagreement among development experts that gender equity is essential to promoting or achieving sustainable development.¹⁷ According to some scholars, incorporating gender issues is essential to constructing a functionally relevant and responsive socio-economic system.¹⁸ Studies also have affirmed that incorporating gender issues

17. See U.N. Econ. Comm'n for Latin Am. and the Caribbean, *Gender, the Environment, and the Sustainability of Development*, 15, U.N. Doc. LC/L.1144 (Oct. 1998) (prepared by Maria Nieves Rico), available at <http://www.eclac.cl/publicaciones/UnidadMujer/4/lc11144/lc11144i.pdf> (last visited Mar. 21, 2008) [hereinafter U.N. Econ. Comm'n for Latin Am. and the Caribbean] (noting that previous international attempts to address environmental and development issues such as the United Nations Conference on the Human Environment in Stockholm in 1972 and World Conservation Strategy (IUCN/UNEP/WWF, 1980) did not address gender). Women's efforts to challenge exclusion from development policies and increased awareness of the problems of gender and the environment led to Principle 20 of the Rio Declaration, which declared that, because women play an indispensable role in environmental management and in development, it is imperative for them to participate fully if sustainable development is to be achieved. *Id.* at 17. See generally ESTER BOSERUP, WOMAN'S ROLE IN ECONOMIC DEVELOPMENT (1970) (analyzing gender roles in agriculture, and noting that some proponents of agriculture modernization complain when agricultural change is slow because men or women refuse to do work, which the prevailing custom dictates should be done by the opposite sex); ROSI BRAIDOTTI ET AL., WOMEN, THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: TOWARDS A THEORETICAL SYNTHESIS (1994) (evaluating the strengths and weaknesses of various theoretical models seeking to provide a framework for analyzing women's roles in the environment and sustainable development); PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT (Irene Tinker ed., 1990) (arguing that new scholarship on women and development has challenged the entire spectrum of development theorists and has also altered such fundamental concepts as household and work); VANDANA SHIVA, STAYING ALIVE: WOMEN, ECOLOGY AND DEVELOPMENT (1989) (linking traditional notions of development with western patriarchy and noting that while large numbers of both men and women were impoverished, women tended to lose more); Rosemary Berewa Jommo, *African Women's Indigenous Knowledge in the Management of Natural Resources*, in WOMEN AND CHILDREN FIRST: ENVIRONMENT, POVERTY AND SUSTAINABLE DEVELOPMENT 157 (Filomina C. Steady ed., 1993) (arguing that women's knowledge of local environments is key to sustainable development).

18. See Eci Nabalarua, *Gender is About Women and Men, Boys and Girls*, www.abc.net.au/ra/carvingout/issues/gender.htm (last visited Feb. 4, 2008) (arguing that despite the challenges of actual implementation and sustainability of gender based programs in island nations in the Pacific, that the continued support for gender-based programs show that they have the potential to ameliorate the root causes of the marginalization of women's roles in Pacific communities).

throughout project design, planning, and implementation phases generally enhance a project's success.¹⁹ Moreover, gender mediates property relations as well as affects the management of ecological resources in many societies around the world.²⁰ There is little doubt that gender relations may foster or inhibit sustainable development²¹ even though data on the relationship between specific property regimes and sustainability are lacking.²² It is unclear, however, whether achieving a measure of gender equity necessarily resolves economic and ecological crises of modernization.

The intricate relationship between gender and sustainability cautions us against ignoring gender issues when promulgating and executing sustainable development policies.²³ Gender and sustainability intersect in at least five areas. First, environmental deterioration can cause negative gender-specific outcomes, and efforts to ameliorate them often result in unintended and/or undesired gender-specific consequences.²⁴ Second, many scholars recognize women as dedicated natural resource managers and, therefore, important agents of sustainability.²⁵ Third, women's

19. Elizabeth Musoke-Odur, *Gender Issues in Sustainability of Watsan Systems*, in REPORT OF 21ST WEDC CONFERENCE 6-9 (1995) (arguing that social relationships between men and women impact the sustainability water and sanitation projects, and that projects will be more successful if gender roles are taken into account by planners).

20. See Ruth S. Meinzen-Dick et al., *Gender, Property Rights, and Natural Resources*, 25 WORLD DEV. 1303, 1315 (1997) (noting that gender relations affect "natural resources management policies and projects in terms of efficiency, environmental sustainability, equity, and empowerment of resource users").

21. See RUTH MEINZEN-DICK ET AL., FCND DISCUSSION PAPER NUMBER 29: GENDER, PROPERTY RIGHTS, AND NATURAL RESOURCES 1 (1997), available at <http://www.ifpri.org/divs/fcnd/dp/papers/dp29.pdf> (last visited Mar. 20, 2008) (arguing that understanding existing natural resource property regimes and how they are determined is essential in devising policies that are supportive of broad-based economic growth).

22. *Id.* at 6.

23. See BRAIDOTTI ET AL., *supra* note 17, at 6.

24. E.g., Mriama Awumbila & Henshall Momsen, *Gender and the Environment: Women's Time Use as a Measure of Environmental Change*, 5 GLOBAL ENVTL. CHANGE 337 (1995).

25. See, e.g., Filomina Chioma Steady, *Introduction—The Unsung Majority: Guardians of Our Common Future*, in WOMEN AND CHILDREN FIRST: ENVIRONMENT, POVERTY, AND SUSTAINABLE DEVELOPMENT 6 (Filomina Chioma Steady ed., 1993). See generally IRENE DANKELMAN & JEAN DAVISON, WOMEN AND THE ENVIRONMENT IN THE THIRD WORLD: ALLIANCE FOR THE FUTURE (1988) (documenting how women in the Southern hemisphere interact with and utilize natural resources); PATRICIA KAMERIMBOTE, AFRICAN WOMEN AS ENVIRONMENTAL MANAGERS 11 (1992); WOMEN, LAWS, CUSTOMS, AND PRACTICES IN EAST AFRICA: LAYING THE FOUNDATION (Janet Kabeberi-Macharia ed., 1995); R.B. Jommo, *African Women's Indigenous Knowledge in the Management of Natural Resources*, in WOMEN AND CHILDREN FIRST: ENVIRONMENT, POVERTY, AND SUSTAINABLE DEVELOPMENT (1993); Women and Desertification: A Dynamic Relationship, available at <http://www.unep.org/PDF/Women/ChapterFour.pdf> (last visited Mar. 20, 2008) (recognizing that "[w]omen serve on the front lines of dryland management").

reproductive roles impact and shape environmental outcomes and, by extension, sustainability.²⁶ Fourth, sustainability requires empowering women both as individuals as well as in group contexts.²⁷ Fifth, sustainability efforts will falter if women, who constitute the majority in many rural environments around the world, are excluded from participation.²⁸

2. Limits of Gender in Sustainability?

Gender is indispensable to promoting sustainable development because socio-ecological relationships are inextricably intertwined and interdependent: humans affect nature as much as nature affects humans.²⁹ Moreover, gender relations particularly affect how resources are accessed, distributed, controlled, and utilized—affecting livelihoods and the quality of the environment. Policy makers who desire to promote sustainable development risk failure if they neglect to address gender issues. Intuitively, the success or failure of sustainable development policies hinges on understanding not only how gender influences socio-ecological relations but also in recognizing instances where such influence might be limited or unnecessary.³⁰

In this respect, it is also difficult to impose limits where gender is inapplicable. Three factors complicate such delimitation. First, the dual status of women as victims of environmental degradation³¹ and as environmental managers requires a delicate balance between policies aimed

26. George Martine, *Gender and Sustainability: Reassessing Linkages and Issues* (1997), available at <http://www.fao.org/sd/Wpdirect/Wpan0020.htm> (arguing that better communication between spouses encourages effective use of contraceptives, a key ingredient in checking population growth). It has been argued, for example, that fertility rates, unwanted pregnancies, and infant morbidity and mortality are much lower in societies with higher levels of gender equality and higher levels of female literacy than in less gender-equitable societies or societies with relatively lower levels of female literacy. *Id.*

27. See Filomina Chioma Steady, *Gender Equality and Ecosystem Balance: Women and Sustainable Development*, in *DEVELOPING COUNTRIES, DIVERSITY FOLIO*, 6 WOMEN'S VIEWS FROM THE ETHNIC & MINORITY PRESS 13 (1998) (noting that women are among the most ardent activists for environmental sustainability). See generally Martine, *supra* note 26 (arguing that putting women in decision-making positions would naturally encourage preference for sustainable practices).

28. See generally GITA GOPAL & MARYAM SALIM EDS., *GENDER AND LAW: EASTERN AFRICA SPEAKS* (1998).

29. See, e.g., U.N. Econ. Comm'n for Latin Am. and the Caribbean, *supra* note 17.

30. In many societies, such as Kenya, women access land through marriage as wives, daughters, sisters, and mothers. They generally lose such access when the marriage ends, legal and constitutional provisions that prohibit discrimination on the basis of gender notwithstanding.

31. Martine, *supra* note 26 (demonstrating that global and local environmental destruction undermines the agency of women as environmental managers and renders them victims). See generally SHIVA, *supra* note 17 (exploring the impact of environmental degradation on the natural role of women in the environment in India).

at resolving environmental degradation while protecting the managerial role of women. For example, deforestation creates local shortages increasing the distance women must travel to obtain wood for domestic use. Reforestation efforts that prohibit exploitation of wood in a specified area could have a similar impact, requiring long travel to avoid exploiting protected forest reserves. Second, women's interests are never homogenous, given that women are not a homogenous group. Many factors, such as "class, caste, landowning/landless, tenant/owner, lifecycle stage, polygamy, marriage order, whether female-headed household/male-headed household composition, race, ethnicity,"³² age, and religion mediate women's relations in the homosocial sphere. Third, there is danger in attempting to view gender relations from the perspective of one gender while in reality gender relations involve interactions between women and men. Such an attempt can distort reality as it presupposes distinct female and male spheres.

Some scholars, however, hypothesize that gender only influences localized or secondary problems such as acid rain, air and water pollution, desertification, depletion of natural resources, floods, and nuclear accidents, but not the critical global environmental problems that are linked to industrialization such as depletion of the ozone layer, climate change, toxic chemical/radioactive waste accumulation, over appropriation of biomass, and loss of biodiversity.³³ However, this hypothesis is flawed even if we assume that the classification of environmental problems into localized/secondary and critical is valid. Attempting to separate gender oppression from critical problems of industrialization, such as ozone depletion and climate change, creates an erroneous perception that the process of industrialization is gender neutral.³⁴ Rather, industrial society is

32. MEINZEN-DICK ET AL., *supra* note 21.

33. *See generally* Martine, *supra* note 26 (noting that local environmental problems tend to originate with local policy decisions that are heavily influenced by gendered social roles).

34. *See generally* MEREDITH TAX, *THE RISING OF WOMEN: FEMINIST SOLIDARITY AND CLASS CONFLICT, 1880-1917* (1980) (explaining that industrialization in the United States depended on subordination and exploitation of women, immigrant, and minority labor). Tax thus observes that

[m]any of the most exploited . . . workers were new immigrants. Between 1901 and 1920 over 14.5 million immigrants came to the United States, and they and their children made up the majority of the industrial working class. In 1900 44 percent of U.S. miners were foreign-born and 61 percent had immigrant parents; 36 percent of iron and steel workers were immigrants and 63 percent had immigrant parents (footnote omitted). An 1887 government survey found that 75 percent of women factory workers in large cities were either immigrants or daughter of immigrants (footnote omitted). Immigrants—especially those who could not speak English—filled the lower rungs of the industrial ladder; they were segregated into the worst jobs, usually paid less than their native-born counterparts, and ghettoized in their own slums.

at least in part a product of gendered social relations of production.³⁵

The idea that environmental problems can be categorized dichotomously as local/global or secondary/critical overlooks the interconnectedness between different ecological phenomena. For example, the industrial processes behind critical/global environmental problems like ozone depletion and global climate change also account for secondary/local ecological problems like acid rain, water and air pollution, degradation of forests, and nuclear accidents. It is therefore difficult to disentangle critical/global environmental problems from secondary/local environmental menaces, given that both are caused either by related processes or affect each other.³⁶

The impossibility of clearly delineating not only the causes and effects of environmental degradation, but also the distance between local and global,³⁷ weakens the argument that gender is only an issue at the local level. Globalization almost has made the global/local dichotomy irrelevant. While not all environmental problems are a function of gender oppression, it is safe to say that ecological degradation is a result of the subjugation of women.³⁸ The fact that socio-ecological relations are inextricably interwoven and interdependent, however, does not mean that gender relations account for all environmental problems. There are instances when the nexus between gender and environmental outcomes might be immediate or direct; there are also cases where the relationship might be distant or indirect. The challenge is finding and making that distinction in promulgating and implementing sustainable development policy.

Id.

35. R. Eisler, *From Domination to Partnership: The Hidden Subtext for Sustainable Change*, 7 J. ORGANIZATIONAL CHANGE MGMT. 32, 35 (1994) (noting that the main obstacle to sustainability is not science and technology but the underlying ideology of "conquest and domination" which predates "Newtonian science and Cartesian rationalism" and which, in the West, can be located effectively in religious doctrine that dates back to Genesis and in the East to the Babylonians' *Enuma Elish*). According to Eisler, a fundamental ideological and social shift is believed to have occurred in the pre-history era. *Id.*

36. See generally Bosire Maragia, *Defining the Jurisdictional Reach of NEPA: An Analysis of the Extraterritorial Application of NEPA in Environmental Defense Fund, Inc. v. Massey*, 4 WIDENER J. PUB. L. 129 (1994).

37. See generally Bosire Maragia, *Almost There: Another Way of Conceptualizing and Explaining NGO's Quest for Legitimacy in Global Politics*, 2 NON-ST. ACTORS & INT'L L. 301, 320-21 (2002) (noting that "... while the impacts of global [environmental] problems are usually trans-nationally dispersed, in reality their origins are usually local. Similarly, global solutions to local problems that have been globalized would not be effective unless directed to the domestic/local domain where they originate.").

38. See generally Maragia, *supra* note 1.

III. HOMOSOCIAL STRUGGLES IN KENYA

Examining gender relations in the homosocial sphere is essential to debunking the simplistic and dualistic orthodox view that gender relations are binary, encompassing interactions between dominant men and subjugated women. Kenyan women, like their male counterparts, are heterogeneous and have the propensity to compete for power and resources. Like men, women frequently deploy multiple strategies, interchangeably taking advantage of both modern and traditional norms, when favorable to their property claims. A case in point is the rising property disputes in which female litigants attempt to prevent other women from inheriting the estate of a deceased husband or another man.

A. Kenyan Women Are a Heterogeneous Group

It is important to remember that, although some in Kenya view women generally as being subordinate to men in the patriarchal order, differences in class, age, stage in the life cycle, marital status, political power, and ethnicity often mediate their access to important livelihood resources and unevenly redistribute the impacts of patriarchal deprivations.³⁹ In many communities in Kenya, for example, women access land through marriage and lose such access when the marriage is dissolved or if a widow remarries.⁴⁰ However, women rarely experience dispossession or its consequences in the same way.

Married women rarely hold matrimonial land as joint owners with their spouses, even when they have contributed to its purchase, and despite an existing legal right to hold such property as joint owners. Typically women avoid insisting on joint ownership because of the entrenched belief that they do not have property rights.⁴¹ Furthermore, women are rarely seen as legitimate property contenders in the matrimonial and natal homes because of the entrenched patriarchal practices like exogamy and patrilocality, a position illustrated by Jomo Kenyatta's oft-quoted passage:

39. Please note the examples given in this Article are by no means exhaustive. As noted earlier, gender relations are complex, malleable, and always shifting—so are the variables that affect the allocation of power and resources that are both a cause and a consequence of gender struggles. Consequently, no two women will experience oppression in the same way regardless of how similarly they might be situated.

40. See The Law of Succession Act, (1981) Cap. 160 § 36 (Kenya) (providing that a widow has a life interest in the property of her deceased husband that terminates upon her re-marriage to any person).

41. See EUGENE COTRAN, CASE BOOK ON CUSTOMARY LAW 97 (1995) (observing that the “husband is seen as the manager of his wife’s property except perhaps for personal effects and household utensils which are generally perceived as belonging to the wife”).

But as female children do not take part in the ownership of land, we will leave them out, because, having no system of spinsterhood in the Gikuyu society, women do not inherit land on their father's side; they play their part in the family or clan in which they marry.⁴²

Women's property rights in the matrimonial home are pegged to the subsistence of the marriage,⁴³ while their access to land in the natal home is generally seen as temporary—needed only to guarantee short-term support before getting married or remarried.

It should be noted, however, that not all married women face similar circumstances. A woman's level of education, class, source of income outside the household, and other similar factors may mitigate the severity of dispossession in some cases. For example, educated women and those with incomes outside the household are better positioned to purchase and register property in their name than uneducated women or women whose sources of income are limited to the household. Even so, it is not uncommon for educated women to avoid acquiring separate property because they are not aware of their rights to own land or because they fear that doing so might send the wrong signal to the husband, who in turn, might decide to terminate the marriage.⁴⁴ Kenyan courts, however, have ruled that a wife's domestic contribution can be taken into account when dividing property during divorce proceedings.⁴⁵

Single women, like their married counterparts, are not homogenous and their rights to access land depend upon their status. Adult single women generally access land in the natal home through their father or brothers. For example, among the Kikuyus, unmarried women are traditionally eligible for allocations of temporary plots by their fathers for cultivation, although in practice these plots are generally smaller than the plots allocated to their brothers.⁴⁶ Young girls, on the other hand, generally do

42. JOMO KENYATTA, *FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU* 29 (Vintage Books 1965).

43. Subsistence of the marriage is dependent on a number of factors such as a woman's ability to bear male heirs, demonstrating that she is a hardworking and "good wife" to her husband and his extended family. Note that women's rights are protected more where property is registered jointly than where only the husband is the registered owner.

44. COTRAN, *supra* note 41, at 97.

45. *See, e.g.,* Tabitha Wangeçi Nderitu v. Simon Nderitu Kariuki, (1997) L.L.R. 203 (C.A.K.) (Kenya) (recognizing a wife's domestic contribution as entitling her to fifty percent of the matrimonial properties upon dissolution of marriage).

46. *See* Mary Wanja Gichuru v. Esther Watu Gachuhi, (1998) K.L.R. 76 (C.A.K.) (Kenya), available at <http://www.kenyalaw.org/CaseSearch/viewpreview.php?link=1021407771551979304110&words=gichuruandgachuhi&mode=2> (last visited Mar. 22, 2008) (noting that it is the custom of the Kikuya and Embus that land is inherited by sons, while unmarried daughters generally receive less than half of what sons receive and these property rights are held only during the women's lifetime); *see also* Jean Davidson, *Who Owns What? Land Registration and Tensions in Gender Relations of*

not have recognizable rights to property in many societies, even though they can legally claim entitlement under modern law. In general, young girls acquire a life interest to the use of land upon coming of age, but cannot transfer these property interests to their children.

Divorced women, for example, may have indirect access to land through their sons who become entitled to their father's land upon coming of age. Some communities allow parties to take property acquired before marriage and split the property acquired after marriage. In other communities, women can only take property inherited from their family and cannot take any matrimonial property, regardless of the wife's contribution to acquisition of the property.⁴⁷ Despite the community's traditional customs, however, courts increasingly are considering women's non-monetary contributions in apportioning matrimonial property upon divorce.⁴⁸

Widows have slightly different property rights than divorced women. Widows' property rights often depend on a number of factors such as the length of the marriage, presence or absence of male children, and the widow's relationship with deceased husband's relatives. A widow generally has a life interest in her deceased husband's land that expires upon her death or remarriage, but a widow rarely acquires full ownership and title to this land.⁴⁹ It is not uncommon for the deceased husband's relatives to use threats and other intimidation tactics to try to evict the widow. A number of ethnic communities also practice widow inheritance, where one of the decedent's brothers or relatives takes over the decedent's wife and she bears children for him. If a woman resists being inherited in these communities she may be denied her inheritance, especially where the widow does not have sons to inherit the decedent's land. The HIV/AIDS pandemic has put widows at further risk as demonstrated by a phenomenon in the Luo Nyanza province, in Kenya. Here widows of HIV positive men reportedly are being forced to have sex with men hired by family members to perform rituals traditionally restricted to close family members and meant to separate the decedent's spirit from the family to avoid getting

Production in Kenya, in AGRICULTURE, WOMEN, AND LAND: THE AFRICAN EXPERIENCE 157, 162, 169 (Jean Davidson ed., 1988) (noting that post-colonial courts have reaffirmed this tradition).

47. See COTRAN, *supra* note 41, at 97 (naming the Kikuya, Kamba, Meru, Kuria, Nandi and Kipsigis, Elgeyo, Marakwet, Tugen, and Pokot as communities that allow parties to retain property acquired before a marriage, upon dissolution of that marriage, and naming the Luhya and Kisii as communities that give women no marital property rights).

48. See *Nderitu v. Kariuki*, (1997) L.L.R. 203 (C.A.K.) (Kenya) (noting the decision of the Court of Appeal in *Karanja v. Karanja*, (1976) K.L.R. 307 (C.A.K.) (Kenya), where the court found that, in regards to property distribution upon divorce, "indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like a financial contribution").

49. See Law of Succession Act, (1981) Cap. 160 § 26, 35 (Kenya).

HIV/AIDS.⁵⁰

Furthermore, older women in general occupy a stronger position and sometimes control or exploit the relatively weaker, younger women's labor and sexuality. They teach younger girls and women about socially acceptable behavior and what is expected of them when they become women or wives. Tensions between younger and older women often arise when younger women do not adhere to traditional values, which is usually due to urbanization or Western education. It should be noted, however, that inequalities also exist among older women; for example, in polygamous households first wives generally enjoy certain privileges such as a larger share of the land. Giving birth to children is a sign of fertility and bearing sons especially increases a woman's stature in the community; the more sons a woman bears, the higher her social status.

Woman-to-woman marriage is another arena in which women struggle for power and resources. Typically, an elderly or widowed woman without children marries a younger woman to bear children for her. The elder woman then assumes the role of husband and controls the younger woman as a wife. The children of the marriage are the elder woman's, and the younger woman accesses land and other livelihood resources through her "husband," just as in heterogeneous marriage. This type of marriage continues to thrive today, even though courts have ruled them to be repugnant to justice and morality.⁵¹

B. Marriage as a Stepping Stone to Acquiring Property

Understanding the enduring historical relationship between marriage and property and how it has evolved through the pre-colonial, colonial, and post-colonial eras is important to comprehending the current struggles

50. See Mike Owuor, *Bizarre Widow Cleansing Ritual*, THE STANDARD, Feb. 12, 2007, available at <http://www.eastandard.net/archives/index.php?mnu=details&id=1143964745&catid=349> (last visited Mar. 22, 2008) (explaining that this ritual is a necessary evil for women who want to carry on a normal social life, as women who do not perform this rite often are viewed as cursed and ostracized by her community).

51. See, e.g., *Maria Gisese w/o Angoi v. Marcella Nyomenda*, (1982) E.A.L.R. 1 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 196-97 (quoting Justice Aganyanya:

Much as a people's customs should be respected, I am constrained to believe that a custom which allows this sort of arrangement, where a woman will have no right to choose which man should have sexual intercourse with her, is repugnant to justice and an abuse of individual freedom of choice, as must have happened in this case where the respondent must have started having strange men threatening to have sexual intercourse with her and so on and so forth. This is obviously against the rules of natural justice and I feel the custom does not fit with modern developments.

). But see *Mule Ndeti v. Ngonyo Sila*, (1997) K.L.R. 128 (C.A.K.) (Kenya) (avoiding to rule on whether or not a woman-to-woman marriage contracted under Kamba customary law was repugnant to justice and morality).

amongst women over property.⁵² Marriage historically has played an integral role in property relations. In pre-colonial Kenya, marriage, inheritance, and succession norms were inextricably intertwined—with marriage providing a legitimate, though not necessarily secure, way of accessing land. In many patriarchal societies today, women access land through their status as wives, mothers, and daughters, and their access to land often shifts as their respective statuses change. Marriage thereby serves as a framework for inter-generational passage of property and wealth.

The colonial and post-colonial attempt to sever this interdependence between marriage and property is partly to blame for the rising disputes between women who compete to inherit land from a deceased husband. Although traditional African polygamous marriages typically create uncertainty as to the ultimate number of potential heirs because a man can choose to marry additional wives at any time, traditional marriage norms clearly and predictably define property rights both in the short-run and long-run. Marriage in this sense provides stability because all eligible heirs are able to inherit land. It is doubtful, however, if polygamy as an institution would be sustainable today given the growing population and the corresponding scarcity of land. Moreover, individualization of land through colonial and post-colonial land registration laws and policies has limited the capacity for expansion of individual land holdings. In the pre-colonial period, ethnic groups could expand into virgin lands sometimes by forcible encroachment on lands held by rival ethnic communities, as method of mitigating land pressure resulting from marrying multiple wives and having many children. In addition, it is safe to say polygamy worked well in the pre-colonial period because, unlike the imposed Judeo-Christian, colonial, and post-colonial state-sanctioned monogamy, polygamy was a local institution with norms and expectations that were understood widely and internalized. In particular, the circumstances under which a man could enter into polygamous unions were clearly defined; so were the wives' access rights and children's inheritance rights. Similarly, land disputes as well as inheritance claims often were adjudicated by clan members in ways that minimized disinheritance.

The plural marriage norms reflect Kenya's ethnic, racial, and cultural mosaic. Kenya is home to Africans from over forty ethnic groups, Europeans, Indians, and Arabs, all of whom have diverse family customs and practices. The plural marriage laws therefore are a product of the

52. It is important to note that despite the increasing erosion of marriage as an institution that guarantees intra- and inter-generational access and transfer of land and property right, marriage still continues to be the most important means through which property is acquired and passed from one generation to another.

convergence of three main historical forces: historical migrations by different groups of Africans to the region, East Africa's commercial ties to the Arabian sub-continent dating back to several centuries ago, and the nineteenth- and twentieth-century British colonialism. This heterogeneity has survived historical upheavals as a result of a number of factors. First, the colonial racial segregation policy required each group to maintain its customs and to be subject to its own laws—save those that conflicted with official colonial economic policy—allowing Africans and other groups to continue with their local customs and practices. Second, and in part as a consequence of the foregoing, colonial administrators avoided unnecessary intrusions into Africans' social institutions, fearing that such interferences could derail their economic objectives. As long as Africans provided labor in European-owned plantations and urban centers, and paid taxes, the British had no interest in how many wives they married. Even missionaries did not disrupt some aspects of African culture found to be inconsistent with Christianity. Third, post-colonial governments and ruling elites failed to create an environment for harmonizing the plural norms into a coherent system. The post-colonial state, led predominantly by African male ruling elites from mostly patriarchal societies, has generally been insensitive to gender issues—particularly regarding land and inheritance.

The introduction and proliferation of pluralistic norms since colonization has contributed to the instability of marriage as an institution that clearly defines and predictably secures property rights, particularly for women. Parties in Kenya today can marry under any of the five major marriage systems: Civil,⁵³ African-Christian,⁵⁴ Hindu,⁵⁵ Islamic,⁵⁶ and African customary marriages. Marriage, however, still remains the single most important way through which women gain and lose access to land, one of the most important resources for a majority of Kenya's rural inhabitants.

The proliferation of marriage norms, however, has not kept pace with changes in land laws. The trend in Kenya since colonial times has been to homogenize land law through registration and conversion to individual tenure—an opposite trend when compared with the plural marriage and inheritance norms. This trend is reflective of colonial and post-colonial political economies. Land laws, which were essential to achieving British economic policy, underwent radical change. An array of laws and ordinances were passed, bequeathing all the land to the English Crown and

53. The Marriage Act, Cap. 150 (Kenya).

54. *See generally* African Christian Marriage and Divorce Act, (1955) Cap. 151 (Kenya).

55. Hindu Marriage, Divorce and Succession Ordinance, (1960) Cap. 43 (Kenya).

56. Mohammedan Marriage, Divorce and Succession Act, (1920) Cap. 156 (Kenya).

seeking to transform communal ownership into individual ownership. Alternatively, marriage and inheritance norms that did not have direct bearing to achieving key colonial economic objectives, were in many cases left intact. In fact the purpose of the introduction of separate civil marriage and African-Christian marriage norms was precisely to avoid forcing Africans to abandon their traditional lifestyles while leaving open the possibility of converting to modern or Christian values for those that became Christian and accepted monogamy. The result was the perpetuation of plural marriage norms while property laws were being homogenized—a trend that still is reflected in property and marriage laws today. For example, a party who contracts a customary law marriage⁵⁷ can

- (i) hold land under traditional tenure and dispose of it through local customs, which in most societies prohibit women from inheriting land;
- (ii) hold land under traditional tenure and dispose of it under the Law of Succession Act,⁵⁸ which, though gender neutral, is in most cases overridden by local customs;
- (iii) register land under the Registered Land Act,⁵⁹ but still dispose of it in accordance to local customs, which prevent women from inheriting land;
- (iv) register land under the Registered Land Act and dispose of it in accordance with the Law of Succession Act, which is gender neutral, but, in practice, is generally overridden by local customs; or
- (v) convert the marriage into a monogamous marriage under either the African Christian Marriage and Divorce Act⁶⁰ or the Marriage Act,⁶¹ but register and dispose of their land according to any of the aforementioned options.

There is nothing wrong with the plural marriage and inheritance norms given that Kenya's society is a culturally diverse one. The problem, however, is the deliberate attempt to separate property from marriage and inheritance norms as if they are unrelated and without seriously

57. Customary Marriages typically are unregistered and undocumented. Their proof depends on testimony of family members and witnesses to the marriage ceremony. African customary law permits polygamy, and there is no limit on the number of women a man can marry.

58. Law of Succession Act, (1981) Cap. 160. (Kenya) (harmonizing Kenya's diverse inheritance norms, but not affecting Islamic inheritance norms).

59. The Registered Land Act, (1963) Cap. 300 (Kenya).

60. See African Christian Marriage and Divorce Act, (1955) Cap. 151 (Kenya) (governing the monogamous marriages and divorces of African couples who had converted to Christianity, and prohibiting polygamy).

61. The Marriage Act, (1975) Cap. 150. (Kenya) (governing civil marriages and prohibiting polygamy).

contemplating the implications such as move augurs for the locals. This misguided separation of land from marriage and inheritance norms largely accounts for the declining relevance and stability of marriage as an institution that, among other things, mediates property relations. The tension between marriage and inheritance norms on the one hand, and property law on the other, is reflected in the rise in property contests that pit women against each other, in which legal “wives” sometimes become de facto and de jure “illegal widows.” These disputes have challenged the relevance of marriage as an institution through which property is accessed and protected. They also suggest that the uncertainty created by competing multiple inheritance norms, may indeed be eroding the traditional function of marriage as an institution that both guarantees and protects accesses to and passage of property rights.

C. The Plural Marriage and Inheritance Disputes

Kenya’s plural marriage systems allow for people to marry under a system of law consistent with their religious or cultural beliefs. Nonetheless, Kenya’s plural marriage systems also create opportunities for conflict.⁶² This is especially true if one takes into account that only a few people in Kenya know the law or have access to legal services and therefore understand the implications of contracting marriage under the various marriage laws. The first problem is the different requirements of marriage under the different systems, which presume or require extensive legal knowledge. For example, civil, African-Christian and Hindu marriages are strictly monogamous while Islamic and African customary marriages may be polygamous. Some of the disputes pitting women against each other arise in situations where a husband contracts a marriage under one of the monogamous marriage systems, but is already married to another woman under another marriage system. This occurs, for example, where an already married man leaves his first wife in the rural area and moves to the city to take up employment, but subsequently decides to marry a second wife at the marriage registry.

Second, the plural marriage systems allow for the co-existence of monogamy and polygamy. Except for those who are well-versed in the law or can enlist the services of a lawyer, the co-existence of monogamy and polygamy is confusing, especially where parties do not understand the circumstances under which polygamy is prohibited. The situation is exacerbated by the modern legal system based on *ignorantia juris non excusat*. Parties that are married, especially under potentially polygamous

62. See generally DR. PATRICIA KAMERI-MBOTE, THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY MANAGEMENT AND CONTROL (1995), available at <http://www.ielrc.org/content/b9501.pdf> (last visited Mar. 22, 2008).

Islamic and African customary law marriage systems, could inadvertently contract additional marriages in church or at the registry without realizing they are committing bigamy. For people unfamiliar with the law, their ignorant but innocent behavior could have serious legal consequences for their potential heirs, particularly if they die intestate.

The third problem with the plural marriage systems is that they allow parties to convert their marriage from potentially polygamous to monogamous marriages, thereby increasing the risk that those converting from polygamous marriages to monogamous marriages—without knowledge of the law—could in fact later on inadvertently take up additional wives without realizing they are committing bigamy. This is possible especially given that African customary law marriages are unregistered and determining the existence of these marriages depends on witnesses—in most cases friends or family members. In Kenya, parties can convert their marriage from customary to Islamic, Hindu, Christian, and civil marriage in that order and not the reverse. Historically, the convertibility of marriage was designed to allow Africans who became modern or Christian to convert their pre-existing customary marriage into a civil or African-Christian marriage. One of the requirements of becoming Christian, according to the missionaries, was to abandon polygamy in favor of monogamy. The assumption was that once an African became Christian, they became subject to the Judeo-Christian based marriage legal norms, a process that was deemed irreversible. However, Africans who were married already to several wives and could not abandon them, those who wished to marry more wives, or those who were unsatisfied with the European way of worshiping but still wanted to partake in Christianity, founded independent churches that combined some aspects of Christianity with African customs.

The rise of disputes between women, therefore, may be one of the pitfalls of the plural marriage systems and could be seen as symptomatic of the declining significance of marriage as an important institution that mediates property. As discussed below, it is unlikely that people would look at marriage today as a secure institution through which property or land is accessed and their rights to it securely protected given the uncertainty of inheritance laws.

1. The Nature of Inheritance Disputes and Judicial Responses

Inheritance disputes that pit women against other women often are seen as heterosocial rather than homosocial in nature. While there is some truth to this, it is important to note that women are just as embedded in such struggles as men. These types of disputes involve more than one woman claiming a right to inherit as the decedent's widow, and usually occur

where a wealthy man dies intestate leaving behind land and other property. There have been at least four such scenarios:

- (i) A man contracts a statutory monogamous marriage but subsequently contracts a second, potentially polygamous marriage under African customary law, with or without the knowledge of the first wife, and without dissolving the first marriage.⁶³
- (ii) A man enters a potentially polygamous marriage under African customary law but subsequently contracts a monogamous marriage under statute, with or without the knowledge of the first wife, and without dissolving the first marriage.⁶⁴
- (iii) A woman married under statutory law purportedly leaves her spouse and allegedly marries another man under customary law before the statutory marriage is dissolved.⁶⁵
- (iv) In rare situations, a woman claims to be concurrently married to two men.⁶⁶

Court battles arising from these different scenarios, whereby women struggle against other women for resources, indicate that women and men alike have attempted to use the plural marriage systems to their advantage. Women have interchangeably invoked favorable customary or statutory norms in an effort to assert their claim on the land or property at issue.

There have been two judicial approaches in dealing with inheritance disputes involving two female claimants. These approaches coincide with

63. See, e.g., *In re Ogola's Estate*, (1978) K.L.R. 18 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 209 (holding that provisions of the African Christian Marriage and Divorce Act override customary law, thereby granting all inheritance rights to the first wife married pursuant to the Marriage Act and preventing a woman, who claimed to be later married to the deceased under customary law, from inheriting any of the decedent's property); *In re Ruenji's Estate*, (1977) K.L.R. 21 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 207 (finding that the customary marriage of two women who claimed to have been married to the deceased, after the deceased was already married to his first wife under the African Christian Marriage and Divorce Act, was null and void and thereby precluding the two women from acquiring any property from the estate of the deceased).

64. See, e.g., *K. (Otherwise B.) v. K.*, (1972) E.A.L.R. 554 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 206.

65. See, e.g., *Anastacia Mutheu Benjamin v. Lakeli Benjamin*, (1979) L.L.R. 6 (C.A.K.) (Kenya) (holding that a woman claiming to be the second legal wife of the deceased could not contract a customary marriage with the deceased while she was still legally married to another man under the African Christian Marriage and Divorce Act, and therefore is not entitled to any portion of the decedent's estate).

66. See, e.g., *In re Estate of Benjamin Muya Nganda (Deceased)*, (1977) K.L.R. 121 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 211 (holding that a woman who was married to a man both under customary and African-Christian marital law, later was divorced under customary law, but was not granted an annulment of the Christian marriage by the church, was still legally married to her first husband, and was therefore not able to validly marry a second man and obtain inheritance from his estate).

shifts in legislation. First, before the enactment of the Law of Succession Act,⁶⁷ courts generally held that eligibility for inheritance depended on a finding of a valid marriage between the claimant and the deceased. Only if the claimant and the deceased were legally married could she and her children inherit the decedent's estate.⁶⁸ Employing a conflict of laws approach, courts generally considered the order in which the marriages were contracted in determining whether a party was entitled to inherit. Courts also looked at the convertibility of marriages within the hierarchy of marriage norms, whereby a marriage could be converted from either an African customary law marriage or Islamic law marriage—both of which are potentially polygamous—to a Hindu, African Christian, or civil monogamous marriage, but not vice versa.

Theoretically, the validity of marriage test seemed logical and legally consistent, and seemed to resolve issues regarding entitlement to the decedent's property in intestacy.⁶⁹ In practice, however, this approach was cumbersome and had a number of failings. First, pegging inheritance to the validity of marriage led to the disinheritance of children born of illegitimate unions but whose paternity was never at issue. Second, the conflict of laws approach clashed with the African concept and attitude toward marriage and family. This conflict occurred in situations where a party contracted a potentially polygamous marriage under African customary law and subsequently married under the statute. In short, the inadequacies of the existing legislation limited the courts' attempts to address the problem.

67. The Law of Succession Act, (1981) Cap. 160 (Kenya).

68. See, e.g., *In re Estate of Benjamin Muya Nganda (Deceased)*, (1977) K.L.R. 121 (H.C.K.) (Kenya), available in COTRAN, *supra* note 3, at 216-17 (rejecting a woman's bid to claim part of the decedent's estate because there was no valid customary law where a woman claimed to be legally married to two different men under both the customary law and the African Christian Marriage and Divorce Act); see also *Benjamin v. Benjamin*, (1979) K.L.R. 6 (C.A.K.) (Kenya) (rejecting the appellant's claim to the decedent's estate and declaring that the applicant's alleged marriage to the deceased was null and void since she lacked the capacity to marry by virtue of a pre-existing statutory marriage with another man); *In re Ogola's Estate*, (1978) K.L.R. 18 (Kenya), available in COTRAN, *supra* note 3, at 208-10 (applying the holding in *In re Ruenji's Estate* and rejecting a woman's claim that she was entitled to part of the decedent's estate as a second wife married under customary law subsequent to a pre-existing marriage under the African Christian Marriage and Divorce Act); *In re Ruenji's Estate*, (1977) K.L.R. 21 (Kenya), available in COTRAN, *supra* note 3, at 206-08 (denying an application by two women to a share of the decedent's property because of the existence of a customary law marriage contracted after a preexisting marriage under the African Christian Marriage and Divorce Act and finding that the children of the alleged marriage were illegitimate and could not inherit).

69. See, e.g., *K. (Otherwise B.)*, (1972) E.A.L.R. 554 (Kenya), available in COTRAN, *supra* note 3, at 205-06; *In re Ruenji's Estate*, (1977) K.L.R. 21 (Kenya), available in COTRAN, *supra* note 3, at 206-08 (ruling that one could not legally contract for a valid statutory marriage while there was a subsisting African customary marriage or a valid potentially polygamous marriage during the subsistence of a statutory marriage).

Parliament enacted the Law of Succession Act in 1981 in response to the foregoing problems, and to correct the injustice caused by the *In re Ruenji's Estate* and *In re Ogola's Estate*⁷⁰ decisions, which predicated eligibility to inherit on a finding of validity of marriage. The new Law of Succession Act aimed to unify the different inheritance laws and provided that legal nullity of marriage was no longer a bar to inheritance. Under the Law of Succession Act, all wives and children of the marriage were considered legitimate heirs, for purposes of succession, irrespective of the legality of the marriage.⁷¹

Consistent with the Act, courts held that nullity of marriage, such as where a customary marriage is contracted subsequent to a pre-existing statutory law marriage, does not vitiate the inheritance rights of those who are otherwise potentially eligible to inherit from the deceased.⁷² Interestingly, this holding has been applauded and followed by courts, notwithstanding the fact that some of the unions are potentially bigamous. In applying the new law, however, courts have been intent on enforcing married women's property rights⁷³ and unmarried women's customary rights of inheritance as well.⁷⁴ Despite changes in legislation and the judicial approach in deciding property rights cases, little has been done to end inheritance disputes, particularly those that pit women against other women. To be sure, the new changes will likely continue to fuel disputes of this kind to the extent that there is a continuing disjuncture between the plural marriage norms and the relatively homogenized succession law.

70. See *In re Ogola's Estate*, (1978) K.L.R. 18 (Kenya), available in COTRAN, *supra* note 3, at 208-10 (stating that

[i]f a man who was married under the [African Christian Marriage and Divorce or the Marriage] Act purports to marry another wife under customary law it is not a valid marriage under customary law, or otherwise. If it is not a valid marriage the woman does not become his wife and cannot therefore inherit in that capacity

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71. Law of Succession Act, (1981) Cap. 160, § 29(a) (Kenya) (defining a dependent as "a wife or wives and children of the deceased whether or not maintained by the deceased immediately prior to his death").

72. See *Mubea v. Mubea*, (1990) K.L.R. 76 (C.A.K.) (Kenya) (reversing the High Court's decision which held that appellant, the deceased's son, was not entitled to his deceased father's estate on the ground that the alleged marriage between appellant's mother and father was null and void because it was contracted subsequent to a pre-existing statutory marriage with the respondent).

73. See *Nderitu v. Kariuki*, (1997) L.L.R. 203 (C.A.K.) (Kenya) (recognizing a wife's domestic contribution as warranting her entitlement to fifty percent of the matrimonial property upon dissolution of marriage).

74. See *Gichuru v. Gachuhi*, (1998) K.L.R. 76 (C.A.K.) (Kenya) (upholding Kikuyu customary law, which provides that unmarried daughters are entitled to a life interest to part of the natal land, though generally less than what sons receive).

IV. IMPLICATIONS OF HOMOSOCIAL STRUGGLES FOR SUSTAINABILITY

There is a significant relationship between ecological problems, poverty, and gender oppression, although knowledge of complex linkages between gender, the ecosystem, and livelihood outcomes is still evolving.⁷⁵ Scholars point out that in some societies traditional notions and stereotypes associated with gender identity constrain women's ability to earn income outside the household and thereby serve to perpetuate poverty.⁷⁶ Some have estimated that approximately 650 million poor people in the developing world, many of whom are women, live in environmentally fragile and vulnerable ecosystems.⁷⁷

As noted earlier, in Kenya, many women gain access to land or properties rights to land through marriage and often lose that privilege when the marriage is dissolved. Gender, therefore, cannot be ignored when discussing sustainable development, considering traditional patriarchal norms are invoked and in many instances override modern legal and constitutional provisions that seek to guarantee women's right to property and equality before the law. That gender affects how land—the most important resource for livelihood in a predominantly rural and agriculturally dependent country—is accessed⁷⁸ is a clear signal to policymakers to promulgate policies that not only seek to promote the environment and development but also ensure social equity is achieved in

75. See generally Steady, *supra* note 25, at 1 (recognizing that poverty causes environmental degradation and that women are affected more intensely by this degradation because of their subordination and disfavored status in many poor countries).

76. See DEEPA NARAYAN ET AL., VOICES OF THE POOR: CAN ANYONE HEAR US? 181 (2000) ("stressing that traditional notions and stereotypes associated with gender, which are often characterized as one's gender identity, have perpetuated poverty in these communities. These stereotypes have, in some cultures, prevented women from working and led to increased difficulties for women.").

77. See Selim Jehan & Alvaro Umana, *The Environment-Poverty Nexus*, DEV. POL'Y J., Mar. 2003, at 53, 60, available at http://www.sarpn.org.za/documents/d0000349/UNDP_Report_5.pdf (last visited Mar. 22, 2008) (noting that women are major contributors to environmental degradation because of the nature of communal property communities where women are interested more in the efficient use of their time, than in preserving resources, thus contributing to a more wasteful society).

78. See generally GENDER AND LAW: EASTERN AFRICA SPEAKS (Gita Gopal & Maryam Salim eds., 1998); H.W.O. OKOTH-OGENDO, TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAWS AND INSTITUTIONS IN KENYA (1991); D. HUNT, THE IMPENDING LAND CRISIS IN KENYA: THE CASE FOR LAND REFORM (1984); CHRISTOPHER LEO, LAND AND CLASS IN KENYA (1984); Tim O.A. Mweseli, *The Centrality of Land in Kenya: Historical Background and Legal Perspective*, in ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA (Smokin C. Wanjala ed., 2000); STEPHEN ORVIS, THE AGRARIAN QUESTION IN KENYA (1997); Smokin C. Wanjala, *Land Ownership and Use in Kenya: Past, Present and Future*, in ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA (Smokin C. Wanjala ed., 2000); Smokin C. Wanjala, *Land Tenure and Soil Conservation in Kenya*, in ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA (Smokin C. Wanjala ed., 2000).

the process. Although a 2003 United Nations Development Program report has projected Kenya's urban population to hit 47.2% by 2015,⁷⁹ Kenya's dependence on agriculture, both as a source of livelihood and as a source of export earnings, is unlikely to significantly change in the foreseeable future for several reasons. First, the demand for land remains high, as most people who migrate to urban centers do not sell their land but instead use their earnings to acquire more land from the rural poor.⁸⁰ Second, only about twenty percent of the land is considered medium to high potential while the rest is either arid or semi-arid.⁸¹ Third, traditional wood fuel still accounts for about 80.3% of the total energy consumption, implying that, unless other sources of energy are substituted for wood fuel, competition for land probably will intensify.

Intra-gender struggles are not different from other gender struggles. To the extent other gender struggles produce economic and political inequality—and thereby affect livelihoods and the ecosystem—we similarly expect intra-gender struggles whether they take intra- or inter-generational dimension to produce similar results. Inequality among women can occur as a consequence of competition for resources in which one of the parties in the winner-take-all system takes everything. In the context of the cases examined above, two women who formerly were being maintained by the deceased man/husband could end up on opposite ends of the economic scale if, for example, the court awards all the decedent's property to one and leaves the other with nothing. Inequality among women also can result from the subordination of women within the structures of the traditional family,⁸² for example, where women are subordinated by other women as we saw in woman-to-woman marriages, or where men in the patriarchal order mediate the struggles between women. In both situations, the ecological impact of over-exploitation of resources—associated with marginalization—combined with the artificial limits on access cannot be disassociated from the prevailing gender struggles that

79. KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS ET AL., TRADE POLICY AND POVERTY LINKAGES IN KENYA 31 (2007), *available at* http://www.odi.org.uk/pppg/poverty_and_inequality/publications/kb_Trade_Poverty_Linkage_KIPPRA_ODI.pdf (last visited Mar. 22, 2008) (referencing a 2003 United Nations Development Program Report, which found that the urban population in Kenya has risen steadily since 1975).

80. See HEIKE PANDER, LAND TENURE AND LAND POLICY IN THE TRANSMARA DISTRICT: KENYA SITUATIONS AND CONFLICTS (1995) (noting that because of their ignorance of the law of individualized tenure, the Maasai are being taken advantage of by more educated and informed persons).

81. See H.W.O. Okoth Ogendo, *Land Tenure and Natural Resource Management: The Kenya Experience* (1996), http://www.mekonginfo.org/mrc/html/oss/oko1_2.htm (last visited Feb. 4, 2008) (explaining that agriculture, which is the backbone of the country, can only be grown in the medium to high potential areas).

82. See generally Kwanele O. Jirira, *Our Struggle Ourselves: Shaping Feminist Theory in Our Context: The Zimbabwe Scenario*, 1 S. AFR. FEMINIST REV. 77 (1995).

produce them.

Gender discrimination can lead to or exacerbate poverty. For example, female-headed households in Zimbabwe and Botswana generally produce less income than male-headed households, in part because of gender discrimination in salaries.⁸³ Without registered title to land, many women find it difficult to take advantage of credit services.⁸⁴ Even where constitutional and legal prohibitions against discrimination have been enacted, women still face obstacles in property matters. Gender discrimination can also have an inter-generational effect. Many families lack the means to educate their children, thereby limiting the children's ability to secure employment in the formal economy.

In addition to limiting participation in the formal economy, dispossession resulting from gendered struggles over property can negatively affect the ecosystem in a variety of ways. Families who are landless or lack sufficient land for sustenance often relocate to, or squat in, fragile agro-ecological environments where they degrade the environment.⁸⁵ Lacking secure title and fearing eviction, many squatters focus on satisfying their immediate livelihood needs rather than practicing sound ecological management. The absence of secure title to land and the pressure to provide for the immediate needs of the household create an environment that further undermines women's ability to exercise their roles as resource managers. Specifically, it prevents women from applying methods, such as intercropping and the use of manure, that mitigate the exhaustion or depletion of renewable and non-renewable resources, pollution, or the "excessive use of sink and regulatory functions of the environment."⁸⁶ Because women's productive and reproductive roles are heavily dependent on the use of natural resources, in most cases they are the first casualties of ecological degradation.⁸⁷ Moreover, squatters do not

83. Rekha Mehra, *Women, Land and Sustainable Development*, ICRW REP. & PUBLICATIONS (1995) (citing ILO, *Women and Land: Report on the Regional African Workshop on Women's Access to Land as a Strategy for Employment Promotion, Poverty Alleviation and Household Food Security in Harare Zimbabwe*, October 17-21, 1988 (1989)).

84. *Id.*

85. See Kivutha Kibwana, *Land Tenure, Spontaneous Settlement and Environmental Management in Kenya*, in *ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA* 107 (Smokin C. Wanjala ed., 2000) (arguing that although there are other factors that impact environmental degradation, increasing amounts of "spontaneous settlement" will eventually cause squatting to be the major factor in ecological mismanagement).

86. See generally LOCAL ENVIRONMENT CHANGE AND SOCIETY IN AFRICA (M.A. Mohamed Salih ed., 2000) (illustrating that environmental degradation has hindered local communities from participating in the economy and has impacted the locals' abilities to work for their livelihood).

87. See generally IRENE DANKELMAN & JOAN DAVIDSON, *WOMEN AND ENVIRONMENT IN THE THIRD WORLD: ALLIANCE FOR THE FUTURE* (1988) (providing

have access to the benefits, such as the services of agricultural extension officers, enjoyed by households with titled land.

Gender struggles in female homosocial spheres also could produce heterosocial effects when viewed inter-generationally. Theoretically, the cases examined above implied that the disputes over property only involved and affected women. To the extent that property outcomes affect both the male and female children of the women involved, however, these disputes are, to a degree, heterosocial in theory and in practice. The Law of Succession only recognizes wives and children as legitimate heirs to the deceased husband or father. Consequently, there is a risk that in some instances the court might decide to award a partial judgment which provides children fathered by the deceased access to part of his estate without awarding the mother any rights at all. This could happen, for example, where a woman's inheritance or succession claim is based on cohabitation, rather than on an existing legitimate marriage with the deceased. Based on the foregoing standard, it is also possible for the court may reject the disputant's claim in entirety despite a showing that the disputant was receiving support from the deceased as a matter of fact. In other cases, the court might recognize multiple claims by other women who, until the decedent's death, were unknown to the "official wife," defeating the official wife's claim to the full estate of the deceased. It therefore seems that adjudication of these disputes does not necessarily guarantee equitable outcome regardless of the position or situation of a disputant.

Moreover, because courts generally base decisions on legal entitlement, rather than on a holistic examination of the claimant's situation, it is possible to have a legal but socially inequitable outcome. While the forms of support the deceased provided the claimant before his death may be admitted into evidence to demonstrate the existence of the relationship, courts are not bound to award a share of the estate consistent with the extent of support the claimant used to receive if they fail to prove legal entitlement. In other words, the claimant will only receive a share for the decedent's children and the claimants other children that had not been adopted prior to the deceased's passing away might get nothing even though in reality the deceased may have previously supported them.

V. CONCLUSION

This Article has examined the centrality of gender equity in

that although women are the primary managers of natural resources, their counsel is rarely sought and their interests are seldom considered in developing strategies to manage environmental problems); *Introduction to AFRICAN WOMEN AS ENVIRONMENTAL MANAGERS* 1 (Patricia Kameri-Mbote ed., 1992).

conceptualizing and applying the idea of sustainable development in postcolonial Kenya. The concept of sustainable development has evolved, in part, as a consequence of modernity's failure to deliver a good life to many in the developing world. It is questionable, however, whether repackaging development as "sustainable" in and of itself will reverse colonial and post-colonial exploitation. Using Kenya as example of one such society—and specifically using succession disputes in which two or more women attempt to inherit from a deceased man under Kenya's plural marriage law system—this Article has demonstrated that gender struggles in the homosocial sphere affect both the ecosystem as well as livelihood outcomes. In sum, a review of these cases suggests that policymakers need to pay attention to the variety of contexts in which gender struggle take place. In particular, policymakers must address gender issues not only in heterosocial settings but also in homosocial arenas when promulgating sustainable development policies. More importantly, sustainable development programs and initiatives must be anchored in the local political economy if they are to have a chance of producing positive outcomes in the local milieu. In other words, the global sustainable development paradigm must be reinterpreted at the local level if sustainable development is to achieve its stated goal of leaving the earth to future generations in better shape than we found it. This Article therefore suggests employing an expanded concept of gender equity that—incorporates both the homosocial and heterosocial dimensions—as a framework in seeking to internalize sustainable development as a strategy for resolving economic and ecological problems at the local level.