

Giving Natural Resources a Legal Personality: A Kenyan Perspective

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Abstract

This paper offers a critique of the current approach in natural resources management in both international and national laws which is mostly anthropocentric. The argument is that while the Earth Charter recognises nature and the need for environmental conservation, the same document also ties this with human rights and human needs, thus implying that the main reason for respect for the environment and Mother Nature is to be able to meet and fulfil the needs of the humankind. In addition, while some jurisdictions have taken the bold step of vesting nature with a legal personality and consequently rights based on its intrinsic nature, the practice has been to conserve the environment and natural resources guided by the sustainable development agenda which is largely anthropocentric, that is, putting the human being and the satisfaction of all their needs at the centre of these efforts. The paper examines the idea of giving natural resources a legal personality and relates this to the Kenyan context. It advocates for an approach that strikes a balance between ecocentrism/biocentrism and anthropocentrism approaches in environmental and natural resources management and conservation in Kenya.

1. Introduction

The Constitution of Kenya 2010 defines “natural resources” to mean the physical non-human factors and components, whether renewable or non-renewable, including

- (a) sunlight;
- (b) surface and groundwater;
- (c) forests, biodiversity and genetic resources; and
- (d) rocks, minerals, fossil fuels and other sources of energy.¹

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Under Kenya's *Environmental Management and Coordination Act*², natural resources include resources of the air, land, water, animals, and plants including their aesthetic qualities.³

Thus, natural resources include all aspects of the environment which are not man-made and are of value to human beings such as forests, minerals, oceans, freshwater, soil and air.⁴ Natural resources are classified as either renewable or non-renewable; *renewable resources* are those that can be replenished at about the same rate as they are used, while non-renewable resources are those that are depleted faster than they can regenerate.⁵

In 2011, Bolivia passed the world's first laws granting all nature equal rights to humans which included, inter alia: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; and the right to not have cellular structure modified or genetically altered.⁶ Notably, the proposal for the 'rights of nature' is credited to have initially developed in North America and Europe in the mid-twentieth century, and was built on a platform of ideas, including those of Leopold and proponents of animal rights such as Peter Singer, Tom Regan and Jeremy Bentham.⁷

The *Earth Charter*, which comes closest to acknowledging the intrinsic value of Mother Nature, is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century. It seeks to inspire in all people a new sense of global interdependence and

¹ Article 260, Constitution of Kenya 2010.

² *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya.

³ S. 2, Act No. 8 of 1999.

⁴ Devlin, R. & Grafton R, *Economic Rights and Environmental Wrongs: Property Rights for the Common Good*, (Edward Elgar Publishing, 1998).

⁵ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶ 'Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth' (*the Guardian*, 10 April 2011)

<<http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>> accessed 10 November 2020.

⁷ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 114.

shared responsibility for the well-being of the whole human family, the greater community of life, and future generations.⁸ It does not therefore offer an approach purely informed by the need to protect the nature as it is but by the need to ensure its continued supply of resources for the sake of human beings.

Conspicuously, anthropocentrism is deeply embedded in modern society, where human beings are treated as the central and most important entity in the world; superior to non-human life because they are the only ones that have consciousness, values and moral status. In this context, nature is seen as something separate from humans; it exists for the survival and development of human societies; it is the 'environment' of humans and a set of resources that can be exploited for their benefit.⁹

This paper challenges the current approaches, both international and national, to environmental and natural resources management which are largely based on an anthropocentric lens, that is, taking care of nature as a means to an end which is meeting the basic needs of the human beings and not necessarily for the sake of the nature itself and the other organisms that rely on it.

2. Legal Status of Natural Resources Management: International and National Approaches

While the international law is generally concerned with provision of guidelines and principles on management of environmental and natural resources by state parties as well as governance of the common areas such as seas and oceans, the international legal regime of natural resources has in several instruments affirmed the sovereignty of a state over the natural resources found within its territory.¹⁰ Notably, these legal instruments affirm

⁸ 'Earth Charter' (*Charter for Compassion*)

<<https://secure.charterforcompassion.org/350-org/earth-charter>> accessed 11 November 2020.

⁹ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 107.

¹⁰ Schrijver, Nicolaas. "Self-determination of peoples and sovereignty over natural wealth and resources." (2013): 95-102; Gumplová, Petra. "Sovereignty over natural resources—A normative reinterpretation." *Global Constitutionalism* 9, no. 1 (2020): 7-37; United Nations General Assembly, *Resolution 1803 (XVII)*, 1962; 'Indigenous

the countries' legal right to exploit the resources as they wish with occasional guiding principles such as the principles of sustainable development meant to remind these countries to conserve the resources for the sake of future generations in those territories.¹¹

It has now become common for the most recent constitutions around the world to provide for norms concerning the environmental protection as a consequence to the increased attention over the past years towards ecological hardship.¹² However, these constitutional reforms which embrace strengthened proper rights of nature and similarly of ethnic rights also grant the State the right to exploit and commercialize natural resources and extractivism has increased.¹³ Indeed, it has rightly been pointed out that 'while the environmental dimension is incorporated into some constitutions, it appears purely in terms of the interest or usefulness that nature represents for people. The requirement of a 'healthy environment' does imply certain levels of quality, but not for living species or the integrity of the ecosystems, rather as an indispensable factor in ensuring human health.'¹⁴

It has been observed that natural resources law focuses mostly on extraction and primary production of goods and services, that is, consumption while environmental law focuses on secondary processing, transportation, manufacturing, and disposal, that is, it is more about the unwanted side

Peoples Permanent Sovereignty Over Natural Resources | Australian Human Rights Commission'

<<https://humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>> accessed 11 November 2020.

¹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹² Rebecca Romanò, 'Can Nature Be Entitled to Constitutional Rights? A Historical Overview and the Innovative Approach of Bolivia and Ecuador.'

¹³ Rickard Lalander, 'Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?' (2014) 3 *Iberoamerican Journal of Development Studies* 148.

¹⁴ 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

effects of consumption.¹⁵ Natural resources law is dominated by a "resource-ist," utilitarian approach rather than by a naturalist intrinsic value approach.¹⁶

The 2010 Constitution of Kenya includes provisions related to land, environment and natural resource management, and envisages development of new laws, policies, guidelines and other enabling legal instruments relating to different yet related sectors at the national and county levels.¹⁷ The enactment and implementation of these laws is to be guided by the national values and principles of governance which include: patriotism, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.¹⁸ Again, these values and principles are largely anthropocentric and have little or nothing to do with respecting nature for its own intrinsic value.

There are three main approaches to environmental ethics depending on how people think about and interact with their environment which are: anthropocentrism; ecocentrism and biocentrism. Anthropocentrism is a combination of egoistic and socialturistic values, held by those who emphasize the consequences of environmental deterioration for oneself and for human beings in general; a human-centered approach, meaning that human beings are the most important life forms; they consume natural resources to fulfil their own needs, hoping to develop the environment they most desire.¹⁹ Thus, under this approach, nature is valued for its convenience, and therefore it should be protected for the purpose of maintaining an appropriate quality of life for human beings.²⁰

¹⁵ Fischman, Robert L. "What Is Natural Resources Law?" 78 *University of Colorado Law Review* 717 (2007) (2007), 731.

¹⁶ *Ibid*, 733.

¹⁷ Constitution of Kenya 2010, Chapter Five.

¹⁸ Art.10 (2), Constitution of Kenya.

¹⁹ Surmeli, Hikmet, and Mehpare Saka. "Preservice teachers' anthropocentric, biocentric, and ecocentric environmental ethics approaches." *International Journal of Academic Research* 5, no. 5 (2013): 159-163.

²⁰ *Ibid*.

Ecocentrism is the broadest term for worldviews that recognize intrinsic value in all lifeforms and ecosystems themselves, including their abiotic components.²¹ Ecocentrism goes beyond biocentrism (ethics that sees inherent value to all *living* things) by including environmental systems as wholes, and their abiotic aspects. It also goes beyond zoocentrism (seeing value in animals) on account of explicitly including flora and the ecological contexts for organisms.²² Some scholars see ecocentrism as the umbrella that includes biocentrism and zoocentrism, because all three of these worldviews value the non-human, with ecocentrism having the widest vision.²³

Thus, while anthropocentric concerns for the environment are narrowly aimed at preserving the welfare of humans, biocentric and ecocentric concerns are oriented toward protecting non-human organisms and nature as a whole.²⁴

3. Management and Governance of Natural Resources in Kenya: Challenges in Approaches

The management and governance of natural resources in Kenya is largely governed by the various values attached to these resources, including: economic, social or cultural, where; economically, natural resources are not only a source of food and raw materials but are also a source of income for individuals and the State; socially, natural resources like water bodies play recreational role amongst others, they also contribute to the improvement of the quality of life of individuals; and culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place.²⁵

²¹ Washington, Haydn, Bron Taylor, Helen Kopnina, Paul Cryer, and John J. Piccolo. "Why ecocentrism is the key pathway to sustainability." *The Ecological Citizen* 1, no. 1 (2017): 35-41, 35.

²² *Ibid*, 35.

²³ *Ibid*, 35.

²⁴ Joshua Rottman, 'Breaking down Biocentrism: Two Distinct Forms of Moral Concern for Nature' (2014) 5 *Frontiers in Psychology* <<https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00905/full>> accessed 11 November 2020.

²⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

The Constitution of Kenya outlines the obligations of the State in relation to the environment and natural resources as follows: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.²⁶ The Constitution also obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.²⁷

Notably, while these obligations are geared towards conservation measures, they lean towards an anthropocentric approach but have little to do with an ecocentric or biocentric approach. They seek to preserve and conserve environmental and natural resources for the sake of human needs. The law on environment and natural resources management and governance in Kenya thus takes the same approach taken by many other jurisdictions around the world where these resources are taken care of for as long as they can meet and satisfy the economic and social needs of the human race.²⁸ This is also affirmed in the Constitution's guarantee on the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations, through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.²⁹ While the law has evolved from the case of *Maathai v Kenya*

²⁶ Constitution of Kenya, 2010, Article 69(1).

²⁷ *Ibid*, Article 69(2).

²⁸ Ochola, Washington Odongo, Pascal C. Sanginga, and Isaac Bekalo, eds. *Managing natural resources for development in Africa: A resource book*. IDRC, 2010.

²⁹ Constitution of Kenya, 2010, Article 42.

*Times Media Trust Ltd*³⁰, where the Court ruled that a person must have *locus standi* before they can bring a petition before court for environmental damage, to a situation where one does not need to prove *locus standi*³¹, the Constitution still provides that if a person alleges that *a right to a clean and healthy environment recognised and protected under Article 42* has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter (emphasis added).³² The implication is that these provisions were coined along anthropocentric approach to conservation, that is, a clean and healthy environment should be maintained for the sake of enjoyment by human beings and not necessarily for its intrinsic value or for the benefit of the other non-human living and non-living things.

It is clear that inasmuch as there has been progress towards protection and conservation of environmental and natural resources in Kenya, the law still largely leans towards taking an anthropocentric approach, at least practically. While the Constitution acknowledges that the environment is the heritage of the people of Kenya, the same makes it clear that the same is to be respected and the determination is to sustain it for the benefit of future generations.³³

This is the approach that also mainly informs the sustainable development agenda, where these resources are to be conserved and utilized for the sake of meeting the needs of the current generation and future generations.³⁴

4. Giving Natural Resources a Legal Personality: Prospects and Challenges

Environmental law commentators have argued that while so much have been done both internationally and within countries to put in place laws to avert environmental degradation, scientific evidence indicates that the global environmental crisis is accelerating and that environmental laws have not

³⁰ *Maathai v Kenya Times Media Trust Ltd*, Civil Case No 5403 of 1989.

³¹ See sec. 3, *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya; see also Article 70 (3), Constitution of Kenya 2010.

³² Constitution of Kenya 2010, Art. 70(1).

³³ *Ibid*, Preamble.

³⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016

been able to reverse the trend.³⁵ The trend is well summarized in the following quote:

“human activities are significantly influencing Earth’s environment in many ways in addition to greenhouse gas emissions and climate change.

Anthropogenic changes to Earth’s land surface, oceans, coasts and atmosphere and to biological diversity, the water cycle and biogeochemical cycles are clearly identifiable beyond natural variability. They are equal to some of the great forces of nature in their extent and impact. Many are accelerating. Global change is real and is happening now.”³⁶

It is further noted that this global change cannot be understood in terms of a simple cause and effect model since the human-driven changes cause multiple effects that cascade through the Earth system in complex ways, and these effects interact with one another and with local and regional-scale changes in multidimensional patterns that are challenging to understand and even more difficult to predict.³⁷

As a result of this deficiency, a movement to recognize nature as a rights holder argues that existing laws regulate, rather than stop, the destruction of the natural world, and instead of incrementally reforming such laws, a growing number of jurisdictions around the world have recognized rights for nature.³⁸

Rights for collectives, rights for animals, and rights of nature have been grounded in the interest theory of rights.³⁹ Since according to the interest

³⁵ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1; See also Rodgers Jr, William H. "Improving Laws, Declining World: The Tort of Contamination." *Valparaiso University Law Review* 38, no. 4 (2011): 1249-1261.

³⁶ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 110.

³⁷ *Ibid*, 110.

³⁸ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1.

³⁹ *Ibid*.

theory of rights, a person or other entity has a right if and only if they are capable of having rights, and some aspect of their interest or well-being is “a sufficient reason for holding some other person(s) to be under a duty”, some interests of nature that have been argued to be sufficient to produce rights include existence, habitat, and fulfilling ecological roles.⁴⁰

However, while the interest theory itself does not resolve whether nature is capable of having rights, some commentators have suggested that entities that have value for their own sake, rather than for the value they provide others, can have rights, and accordingly, rights-of-nature advocates make a moral assertion that nature does have this intrinsic value.⁴¹

Other rights arguments stem from religion or spirituality, as was the case in New Zealand’s recognition of the Whanganui River and surrounding area as the legal person Te Awa Tupua which arose out of a treaty settlement with a Maori tribe and that tribe’s spiritual connection to the river.⁴² This also informed the decision of the the Andean countries of Ecuador and Bolivia, where indigenous worldviews that prioritise harmony with nature over economic development have been enshrined in law.⁴³ The ideals encapsulated in the concept of *Buen Vivir* (“good way of living”) and the recognition of the rights of Mother Nature draw from ancient Andean indigenous traditions that pre-date the Spanish colonial era.⁴⁴ The “good way of living” (or *Buen Vivir* in Spanish) is rooted in the cosmovision of the Quechua peoples of the Andes, of “sumac kawsay”, a kichwa term which denotes the fullness of life, rooted in community and harmony with other people and nature.⁴⁵

Notably, even among most African traditional societies, land belonged first to God, and then to the clan or sub-clan and its access and use is controlled

⁴⁰ Ibid.

⁴¹ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ Science, 1.

⁴² Ibid.

⁴³ ‘Buen Vivir: The Rights of Nature in Bolivia and Ecuador’

<<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁴ Ibid.

⁴⁵ Ibid.

by elders, and everyone was under obligation to care for the environment, water and pastures.⁴⁶ However, the creation of modern institutions for natural resources management has undermined the effectiveness of traditional institutions, yet in most areas it is still traditional institutions that are found on the ground.⁴⁷

The Bolivian Constitution of 2009 recognises Buen Vivir as a principle to guide state action.⁴⁸ Bolivia's 2011 Law of Mother Nature was the first national-level legislation in the world to bestow rights to the natural world.⁴⁹

Unlike the anthropocentric approach to conservation in which nature is valued for the utility or the benefits it provides (conventionally as use or exchange value), biocentrism, which is a narrower aspect of ecocentrism, defends the intrinsic values of nature as independent of the value of the non-human world for human uses and purposes.⁵⁰

There is a need for the stakeholders in the environmental and natural resource governance and management sector in Kenya to consider moving away from the anthropocentric approach only and embrace an ecocentric approach for the sake of all living and non-living organisms that rely on the nature for their wellbeing.⁵¹ It is in such an approach that human needs will also be met through natural resources exploitation, as a by-product and not necessarily as an end in itself.

⁴⁶ International Union for Conservation of Nature, 'Local rules and customary regulations on natural resource management in Lower Tana catchment, Kenya,' *Building Drought Resilience Project*, April, 2013, 2.

⁴⁷ *Ibid*, 4.

⁴⁸ 'Buen Vivir: The Rights of Nature in Bolivia and Ecuador' <<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁹ *Ibid*.

⁵⁰ 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁵¹ Muigua, K., 'The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 2, (2017).

The Constitutional provisions on land and environment which recognize environment as an important part of humanity are not enough; there may be a need to consider granting nature some rights that should exist independently of its usefulness in meeting human needs.

Granting nature a legal personality, however, does not automatically guarantee efficiency in environmental conservation and protection. Some authors have argued that despite Ecuador and Bolivia granting nature a legal personality, they are yet to achieve the expected ideal experience as far as environmental conservation and natural resources protection are concerned.

4.1. Place of Human Beings in the Biodiversity Conservation Debate

It is now an established fact that human civilization has had a huge negative impact on biodiversity, particularly since the industrial revolution through such activities as overfishing and hunting, the destruction of habitats through agriculture and urban sprawl, the use of pesticides and herbicides, and the release of other toxic compounds into the environment.⁵² While some organisms have been able to adapt to the changing environmental conditions, the impact of mankind on biodiversity has clearly been detrimental to many animals, plants and the natural environment in general.⁵³

The anthropocentric approach which places man at the centre of nature and his environmental surroundings has all the more contributed to this wanton destruction of nature as man seeks to meet his needs using environmental and natural resources despite the negative effects left on the environment.⁵⁴ This is attributable to the fact that anthropocentrism regards humans as separate from and superior to nature and holds that human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of

⁵² Philip Hunter, 'The Human Impact on Biological Diversity. How Species Adapt to Urban Challenges Sheds Light on Evolution and Provides Clues about Conservation' (2007) 8 EMBO Reports 316; Anastasia A Kokovkina, 'Ecological Crisis and Global Responsibility Ethics', *Proceedings of the XXIII World Congress of Philosophy* (2018).

⁵³ Ibid.

⁵⁴ Richard A Gray, 'Ecology and Ethics: Is There a Duty to Nature?' (1994) 22 Reference Services Review 57; Berfin Kart, 'Ethical Responsibility of Man for Ecological Problems in Context of HPP (Hydroelectrical Power Plant)'.

humankind.⁵⁵ Anthropocentrism is heavily reflected in the sustainable development debate as first captured in the *Report of the World Commission on Environment and Development: Our Common Future*⁵⁶ which stated, *inter alia*:

*This Commission believes that people can build a future that is more prosperous, more just, and more secure. Our report, Our Common Future, is not a prediction of ever increasing environmental decay, poverty, and hardship in an ever more polluted world among ever decreasing resources. We see instead the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world.*⁵⁷

Despite this conflict between humans and the nature, it is an open secret that human beings need the nature to meet most if not all of their basic needs.⁵⁸ It is for this reason that some commentators have challenged the possibility

⁵⁵ ‘Anthropocentrism | Philosophy’ (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/anthropocentrism>> accessed 13 November 2020.

⁵⁶ World Commission on Environment and Development (ed), *Our Common Future* (Oxford University Press 1987).

⁵⁷ World Commission on Environment and Development (ed), *Our Common Future*, para. 3.

⁵⁸ Richard Wilk, ‘Consumption, Human Needs, and Global Environmental Change’ (2002) 12 *Global environmental change* 5; David Kaimowitz and Douglas Sheil, ‘Conserving What and for Whom? Why Conservation Should Help Meet Basic Human Needs in the Tropics’ (2007) 39 *Biotropica* 567; Bjørn P Kaltenborn, John DC Linnell and Erik Gómez-Baggethun, ‘Can Cultural Ecosystem Services Contribute to Satisfying Basic Human Needs? A Case Study from the Lofoten Archipelago, Northern Norway’ (2020) 120 *Applied Geography* 102229; Farhan Ali, Shaoan Huang and Roland Cheo, ‘Climatic Impacts on Basic Human Needs in the United States of America: A Panel Data Analysis’ (2020) 12 *Sustainability* 1508; Juan Angel Chica Urzola and Vanessa Benavides Miranda, ‘Sustainable Development, Human Needs, Well-Being and Energy’ (2018) 5 *International Journal of Innovation and Research in Education Sciences-IJIREES* 52; Jona Razzaque, ‘Human Rights and the Environment: The National Experience in South Asia and Africa’; Elisa Lanzi and others, ‘Developing Pathways to Sustainability: Fulfilling Human Needs and Aspirations While Maintaining Human Life Support Systems’.

of adopting an exclusively ecocentric approach to environmental conservation and natural resources management due to the arguably complicated relationship between human beings and their environment.⁵⁹

To demonstrate the complicated relationship that different cultures and groups of people have with the environment, some authors have argued that since there are different approaches to this relationship or views, disagreement, competition and even conflict between rival individuals and groups is not a social aberration but, on the contrary, an essential characteristic of society's uncertain relationship with its environment.⁶⁰ This may be used to explain the often witnessed conflict between government agencies seeking to 'uproot' communities from what they consider to be their homes for conservation purposes, as evidenced by the Mau forest evictions in Kenya.⁶¹ The proponents of the argument seeking to strike a balance between anthropocentrism and ecocentrism approaches to environmental challenges suggest if the governing institutions would be willing to entertain all the views, the reward for tolerating a degree of apparent internal inconsistency is the discovery of synergies between opposed views.⁶² To them, under conditions of uncertainty, legitimacy should be extended to all

⁵⁹ See Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 International Research in Geographical and Environmental Education 36.

⁶⁰ Ibid.

⁶¹ 'Mau Forest Evictions Leave Ogiek Homeless'

<<http://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 16 November 2020; 'Ministry of Environment and Forestry » Blog Archive » Second Phase of Mau Evictions to Kick off Soon' <<http://www.environment.go.ke/?p=6844>> accessed 16 November 2020; 'Kenya Forest Service Evicts 300 Ogiek Families from Their Homes in the Mau Forest. Despite the African Court on Human and Peoples' Rights 2017 Ruling That the Ogiek Should Not Be Evicted | REDD-Monitor' <<https://redd-monitor.org/2020/07/16/kenya-forest-service-evicts-300-ogiek-families-from-their-homes-in-the-mau-forest-despite-the-african-court-on-human-and-peoples-rights-2017-ruling-that-the-ogiek-should-not-be-evicted/>> accessed 16 November 2020; <https://www.the-star.co.ke/authors/gilbertkoech>, 'Environment CS Stops Eastern Mau Forest Evictions' (*The Star*) <<https://www.the-star.co.ke/counties/rift-valley/2020-07-23-environment-cs-stops-eastern-mau-forest-evictions/>> accessed 16 November 2020.

⁶² Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 International Research in Geographical and Environmental Education 36.

possible perspectives on human-nature relationships as a way of ensuring that there is an acknowledgment of the role of institutions' and actors' "social involvements".⁶³ This is perhaps the part where conflict management would come in handy, using more of the collaborative approaches such as negotiation, mediation and conciliation, among others.⁶⁴

Regarding the debate to accord nature a legal personality status, some of the earliest proponents have rightly observed that:

*"The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"-those who are holding rights at the time."*⁶⁵

The above was meant to elicit a debate toward considering human beings and the law in general giving legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole.⁶⁶ The suggestion was that we should have a system in which, when a friend of a natural object perceives it to be endangered, he or she can apply to a court for the creation of a guardianship.⁶⁷ In such a system, it was suggested, the law would have provisions which could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land, effectively securing an effective voice for the environment.⁶⁸

Coming back to the Kenyan scenario, the Constitution of Kenya 2010 defines a 'person' to 'include a company, association or other body of persons

⁶³ Ibid.

⁶⁴ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, chapt. 16; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶⁵ Stone, Christopher D. "Should Trees Have Standing? Towards Legal Rights for Natural Objects." *Southern California Law Review* 45 (1972): 450-501, 455.

⁶⁶ Ibid, 456.

⁶⁷ Ibid, 466.

⁶⁸ Ibid, 465, 470.

whether incorporated or unincorporated'.⁶⁹ Notably, this recognition comes with rights and responsibilities. While the Constitution and the relevant statutes may not outline 'responsibilities' for the environment and all it entails (for what other responsibilities or duties should we place on the environment while we already view it as the source of our livelihoods?), we may consider granting the same a legal personality for purposes of protecting it for its intrinsic value, away from the basis of taking care of it for the goods and services that we get from it as human beings. This constitutional provision may therefore need to be expanded in light of granting nature a 'legal personality' as was done in Ecuador and Bolivia, for the sake of protecting the environment for its intrinsic value in the ecosystem and not necessarily for the sake of the benefits that accrue to the human beings. The recognition the 'legal standing' and 'independent voice' of a major river on NZ's North Island (Whanganui River represents a noteworthy milestone in a broader movement towards the legal recognition of the rights of nature.⁷⁰ There is the case of the Río Atrato in Colombia, recognised as a legal person by the domestic Constitutional Court in November 2016, in a decision not released publicly until May 2017.⁷¹ According to the Colombian Constitutional Court, the Atrato River needs better care and is "subject to the rights that implicate its protection, conservation, maintenance and in this specific case, restoration." The Court also called out the state on its neglectful behaviour and ordered that the river be cleaned up.⁷² Commenting

⁶⁹ Article 260, Constitution of Kenya, 2010.

⁷⁰ Good, Meg. "The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia." *National Environmental Law Review* 1 (2013): 34.

⁷¹ Elizabeth Macpherson and Felipe Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020; 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

⁷² 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

on the place of human beings in nature, the Colombian Constitutional Court stated as follows:

5.9. Finally, *the ecocentric approach starts from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species* [86]. According to this interpretation, *the human species is just one more event in a long evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet.* Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it (emphasis added).⁷³

The court's sentiments in the above case affirms the position that an anthropocentric approach to relating with the environment makes the humans forget that they are not really lords over every other aspect of the environment and their actions should reflect this.

The Court also commented on what they identified as bio-cultural rights and the special relationship that exists between a community's culture and the environment and had the following to say:

5.11. The first thing that must be pointed out is that so-called *biocultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories --according to their own laws and customs --and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity. These rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous*

⁷³ Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016), para. 5.9.

communities that inhabit them, which are interdependent with each other and cannot be understood in isolation. The central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple life forms. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega-biodiverse countries in the world, and which has natural forests and paramos in about 53% of its territory --which provides water to 70% of the national population --and in which there are more than 54,871 animal and plant species, 341 different types of ecosystems, and 32 terrestrial biomes [92], and including important ancestral cultures. The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa (emphasis added).⁷⁴

Regarding the above two instances (Colombia and New Zealand), it has also been noted that “recognizing that the river is a person is an attempt to accommodate diverse legal and cultural interests in the river, in order to establish a new collaborative relationship between the state and river communities. Whether either model results in improved river outcomes, or increased indigenous or community jurisdiction to govern, turns not on the fiction that the river is a person but on the surrounding institutional framework, which has been carefully designed to engender enforceability”.⁷⁵

It is therefore worth considering extending the same treatment to the natural resources and the environment in Kenya and also recognise the special relationship between nature and human beings especially among the indigenous communities and those who interact with certain aspects of the environment on a day to day basis. It is not enough for the Constitution of Kenya to place what seems like a secondary duty on every persons to merely

⁷⁴ Ibid, para. 5.11.

⁷⁵ Elizabeth Macpherson and Felipe Clavijo Ospina, ‘The Pluralism of River Rights in Aotearoa, New Zealand and Colombia’ (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020.

‘cooperate’ with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁶ There is a need for active involvement of communities in these efforts. In some instances, they could even elect amongst themselves who would act like the ‘legal guardians’ of certain resources or natural features on behalf of the community and country in general. Article 11 of the Constitution on culture should be positively implemented and extended to utilize unique communities’ cultural and traditional ecological knowledge to achieve conservation and sustainability.⁷⁷

The argument for "personifying" the environment would allow the law to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.⁷⁸

It is, however, acknowledged that legal person models are certainly context-specific, but further comparative studies of the Colombian and New Zealand models is needed to examine if and how legal personality improves river governance and state-community relationships, not just for future generations but for the entire human species.⁷⁹

⁷⁶ Article 69(2), Constitution of Kenya 2010.

⁷⁷ 11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall--

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

(b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to--

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

⁷⁸ Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 475.

⁷⁹ *Ibid*, 30.

5. Conclusion

As rightly pointed out, whether nature has moral rights is likely to remain debated, but nature clearly can have legal rights, and does so in jurisdictions that have recognized, granted, or enacted them.⁸⁰

Arguably, rights of nature may offer benefits lacking in other types of legal protection for the environment, and these nature rights can lead to a remedy when regulations fail to correct injustices.⁸¹ This is because, majority or all of conservation laws only seek to protect the nature from destruction but do not expressly grant nature the right to exist on their own, so that if these conservation laws were to be repealed, there would be no incentive to protect the nature from destruction or overexploitation.

Arguably, nature should be treated as the possessor of intrinsic values and these values are proper to the environment itself and do not depend on its usefulness or appropriation by human beings; they represent the intrinsic value of living beings and their physical underpinning.⁸² The implications of this ecocentric/biocentric approach would be at least on three levels: ethical, legitimizing a debate on the values the non-human environment encompasses; moral, from which obligations such as ensuring the preservation of biodiversity are derived; and political, expressed in aspects that range from Constitutional authority to the elaboration of a new legal framework.⁸³

An anthropocentric approach does not afford proper protection of natural resources as it leans towards ensuring that these resources are taken care of as a means towards satisfying the needs of humankind as opposed to protecting them from destruction based on their own intrinsic value. It is time for stakeholders to reconsider the approach taken in coming up with environmental and natural resources laws in Kenya. An ecocentric approach

⁸⁰ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' *Science*, 1.

⁸¹ *Ibid*, 2.

⁸² 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁸³ *Ibid*.

which would enable nature to be granted legal personality would possibly achieve better results in conserving the environmental resources. It is for this reason that there arises a need for taking an approach that strikes a balance between anthropocentrism and ecocentrism in efforts geared towards addressing the continuing environmental uncertainty in Kenya.⁸⁴ The conservation and protection of environmental and natural resources should be based on the recognition of the intrinsic values of the resources and the whole ecological system and not merely as part of securing human needs that rely on these resources for satisfaction. It is the high time that human beings recognised that they are merely a part of the larger natural system and not the fulcrum around which the system revolves as the current human beings mentality seems to suggest, at least through their actions.

⁸⁴ Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

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