

Enhancing Recognition of Environmental Rights as Human Rights for Sustainable Development

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1.1 Introduction

Rights can be inferred from a legal positivist view or a natural law theory view. Legal positivism reasons that rights are created by the government and encrusted in law, whereas natural law theorists posit that rights are inherent in nature, granted by the Creator and the State cannot take them away but can only secure them.¹

Human rights are described as those rights which are inherent to the nature and well-being of man, needing enforcement and protection for optimal living.

Common categorizations of human rights include civil and political rights, and socio-economic and cultural rights². Rights have a co-relation of entitlement, duty and responsibility³. The State has a duty to respect, protect and fulfil these rights within their required context. The State must also make it possible for the rights to be claimed by citizens.

Enforcement of rights will depend on the type of right, i.e. Civil and political rights demand a compulsory enforcement whereas socio-economic and cultural rights though equally important, are allowed to be enforced progressively⁴.

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¹John G. Sprankling, *Understanding Property Law*, Professor of Law McGeorge School of Law University of the Pacific

² United Nations Human Rights, 'What are Human Rights' available at <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx#main>

³ Lyons.D., *The Correlativity of Rights and Duties*, *Nous*, Volume.4, No.1,

⁴ Judicial Enforcement of Economic, Social and Cultural Rights, available at <https://www.icj.org/wp-content/uploads/2015/07/Universal-Judicial-Enforcement-ESCR-Geneva-Forum-Series-2-Publications-Conference-Report-2015-ENG.pdf>

Although considered controversial in some quarters, Human rights have a nature of being universal and metaphysical. Rights are inherent in and spread across societies in a trans-boundary manner⁵. The universality of human rights therefore implores communities and state parties to enforce these rights at civil & political, economic and social as well as at humanitarian levels.

Since the environment is the base for all living, environmental rights form a vital part of the human right that is right to life (a fundamental right, inalienable and the core of all existence).

Consequently, the right to a clean and healthy environment hugely impacts on the quality of that right to life. As we shall see later, Environmental rights are encapsulated in the major categories of human rights.

1.2 Recognition of Environmental Rights as Human Rights

In recent times, the recognition of environmental human rights has come to the fore under the ambit of environmental justice. Environmental rights as human rights is core to the safeguarding of sanctity of life in its natural and bio-diverse forms since man coexists with other living and non-living organisms which form part of the environment.

To illustrate the above, an environment that is polluted threatens the dignity of life of man, and also may shorten the life span of man and all living organisms in that environment arising from diseases emanating from a poor waste disposal and management system allowing hazardous chemical pollutants to be deposited in air, water and land⁶.

Modern environmental justice activism has seen some community groups lobby successfully for the recognition of some sectors of the environment as a distinct personality with independent rights. For example, the Maori of New Zealand through the *TeUrewera Act (2001)* had the government revoke the status of their national park from a protected area to a legal person with

⁵ United Nations Population Fund, *Human Rights Principles*, available at <https://www.unfpa.org/resources/human-rights-principles>

⁶ F. Navarro & T. Vincenzo., *Waste Mismanagement in Developing Countries: A Review of Global Issues*, International Journal of Environmental Research and Public Health, Volume 16, No.6

similar rights as human rights⁷. In this instance, this community exercised civil and political rights to enforce their socio-economic and cultural rights.

References to Environmental Rights under Human Rights are captured expressly and impliedly in various constitutional, legal and institutional texts, both at local and international levels.

(a) *The Constitution of Kenya (2010)*

The *Preamble* introduces the recognition of the environment as a vital part of living, and calls for sustainable management of the same to provide for current and future generations.

Chapter Four on *The Bill of Rights* spells out rights and duties which affect the utilization of the environment in one way or another. Basic human needs are mentioned, and which can only be satisfactorily met in a clean, healthy and stable environment.

Some of these basic rights include right to dignity, right to a clean and healthy environment, right to land, right to culture, right to access to information, public participation, access justice and the right to a free and fair trial, among others.

- A. 4& 11 *Culture and Social Rights*. The protection of the environment includes a cultural dimension under public participation. Environmental stewardship was an integral component of African Customary Law.⁸
- A.26 *Right to Life* (and quality of life). This is the basis on which the right to a clean and healthy environment is argued.
- A.27 has such progressive provisions as *Equality and Freedom from Discrimination*; women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The State shall not discriminate directly or indirectly

⁷ Te Urewera Act, available at

<https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html>

⁸ The *Endoroi* case is an example of an indigenous community taking up their cultural rights based on knowledge of, protection of indigenous species and cultural engagement with the forest in which they were resident. Traditional knowledge is a crucial part of understanding the workings towards conservation, of the environment around us.

against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

- *A.28 Right to Human Dignity* Most environmental wrongs are decisions made by a few elite groups excluding the most vulnerable groups most likely to be affected by the wrongs. For instance, dumping of hazardous waste is common along neighbourhoods of low income earners. Environmental justice thus finds strength based on this right.
- *A.30 Freedom from Slavery, Servitude and Forced Labour*—marginalized communities are involved in economic activities which unfortunately
- *A. 53-55 Protecting Marginalized Groups* The Bill of Rights provides for ensuring women's right to equal treatment, as well as laying out steps for affirmative action for marginalized groups. For example, it provides for 1/3 women on government boards and county assemblies, youth and persons living with disabilities for a wider inclusion in decision making at both levels of government.

These marginalized groups daily interact with the environment and their exclusion in providing solutions for environmental wrongs makes it more difficult to sustain state efforts in environmental management.

- *As. 33-34 Freedom of Expression and Media Rights* Provides for access to information in the public and private sectors. Any information pertinent to the health of the environment should be accessible to citizens to help them make informed choices on the management of the environment. For the whistleblowers against environmental wrongs, A. 34(media freedom) forbids the State to exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.
- *A.35 Access to Information* – stakeholders in the environment sector have a right to information regarding development planning to monitor employment of the Principle of Sustainable Development.
- *A.41 Fair Labour Practices* – a majority of workers in the agricultural, horticultural and mining sectors are covered by Constitutional provisions for better employment terms. The modern workplace demands an environmental safety consciousness in its strategic planning business.

- *A. 10 Promotes Equal and Fair Use of National Resources* The Constitution provides for Public Participation, Democracy, Inter/Intra generational Equity, Sustainable Development and Access to Justice as also captured in S. 3 of EMCA.
- *A.40 Property Rights* – regulation of real property (land rights) and intellectual property rights (traditional knowledge of indigenous species and protection of innovative technological advances in research - safeguarded in the Constitution.
- Tax revenues to be fairly distributed between the national government and County governments, which will receive and share at least 15 percent of revenue raised by the state. Another 0.5 percent will go to an equalization fund for the government to use to provide services to marginalized communities for the next 20 years.
- The commission on revenue allocation determines how much each county receives out of the national government’s revenues and the senate would vote every five years on resolutions about sharing resources among counties. The question, however, is there intentionality in budgeting for the allocation of resources towards environmental stewardship at both levels of government?
- There is a system of tax separation – county governments should collect property, entertainment and other taxes approved by Parliament, while only the national government will collect income tax, customs, excise and value added taxes.
- County Governments have the opportunity to utilize property and other taxes collected to strengthen environmental protection initiatives, such as awareness, disaster preparedness and mitigation and intervention initiatives. The extractives industry where natural resources are concerned can benefit from investment arising out of these kind of taxes.

Environmental Sectoral Laws

(b) Judiciary

The Environment and Lands Court instituted under the High Court is an integral institution in defining, adjudicating and initiating processes aimed at promoting better environmental stewardship in Kenya under A. 42⁹. The Supreme Court Advisory opinion in *National Land Commission vs CS*

⁹ Constitution of Kenya, 2010, Article 162 (2) (b)

Ministry of Lands was a good start in distinguishing and contra-distinguishing the roles of two institutions managing land, an important sector within the environment. Magistrate courts are also now empowered to handle environmental rights disputes cases.

(c) A.6 Devolution and Access to Services

The realization of socio-economic and cultural rights under A. 43 can be best achieved by the pro-active engagement of county governments where most natural resources are based. Core functions like education, health, infrastructure, water and sanitation, etc under the Fourth Schedule interpretation leaves the county governments on the periphery of the “real work”¹⁰ yet have the human resource to effect natural resource policies at the grassroots level.

(d) Constitutional Commissions

A. 248 of the Constitution establishes 10 independent commissions. The Human Rights and Equality Commission also features. These commissions look into providing terms for crucial areas of service. Unfortunately, as important as the Environment is crucial to the existence and survival of life and nonlife organisms, there is no specific commission tasked with securing the rights of the environment. Perhaps it is time to propose for the formation of one by environment’s protection enthusiasts?

(e) International Human Rights Instruments

United Nations Human Rights Council previously *United Nations Commission on Human Rights* since 2006, for the enforcement of international human rights law. Environmental law is now being hosted by human rights law.

¹⁰Sihanya B, *Constitutional Implementation in Kenya, 2010-2015:Challenges and Prospects*,(2011) FES, P39

*Universal Declaration of Human Rights*¹¹ – This is a UN General Assembly declaration. It does not in form create binding international human rights law but serves as an authoritative human rights reference. Seen as evidence of customary international law, it provides the basis of many international human rights instruments such as:

International Covenant on Civil and Political Rights(ICCPR)¹². Political rights such as freedom of expression, association, media freedoms, access to justice and fair trial concerning the environment are covered in this convention.

International Covenant on Economic, Social and Cultural Rights) (ICESCR)¹³ . The enforcement of environmental rights is realized progressively under socio-economic rights banner.

The *Convention Relating to the Status of Refugees (CSR)*¹⁴ (adopted in 1951 and entered into force in 1954). Due to climate change patterns, a new group of climate refugee climates is arising.

The *Convention on the Elimination of All Forms of Racial Discrimination*¹⁵ (**CERD**) (adopted in 1965 and entered into force in 1969);^[4] Environmental justice requires that all consumers of environment’s public goods are treated fairly and without bias.

The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*¹⁶ (entered into force in 1981); Women are equal and

¹¹ *Universal Declaration of Human Rights*, available at <https://www.un.org/sites/un2.un.org/files/udhr.pdf>

¹² *International Covenant on Civil and Political Rights* <https://www.ohchr.org/documents/professionalinterest/ccpr.pdf>

¹³ *International Covenant on Economic, Social and Cultural Rights*, available at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

¹⁴ *The Convention Relating to the Status of Refugees*, available at <https://www.unhcr.org/1951-refugee-convention.html>

¹⁵ *The Convention on the Elimination of All Forms of Racial Discrimination*, available at <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

¹⁶ *The Convention on the Elimination of All Forms of Discrimination Against Women*, available at <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>

important users of the environment and their participation in decision making will improve environmental stewardship.

The *Convention on the Rights of the Child*¹⁷ (**CRC**) (adopted in 1989 and entered into force in 1990);^[7] Under sustainable development, the inter-generational rights of the child and the youth have to be considered.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*¹⁸ (**ICRMW**) (adopted in 1990 and entered into force in 2003);

The *Convention on the Rights of Persons with Disabilities*¹⁹ (**CRPD**) (entered into force on May 3, 2008); and

The *International Convention for the Protection of All Persons from Enforced Disappearance*²⁰ (adopted in 2006 and entered into force in 2010). A few environmental activists like Ken Saro Wiwain the Shell BP *Ogoni* case should not have been executed if this convention were to be applied seriously,

The *African Charter on Human and Peoples' Rights for Africa*²¹ of 1981, in force since 1986; Has been instrumental in recognizing the cultural and intellectual property rights of indigenous communities, in decisions made in *Endorois* case.

(f) Conclusion

¹⁷ The Convention on the Rights of the Child, available at

<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹⁸ The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at <https://www.ohchr.org/en/professionalinterest/pages/cmww.aspx>

¹⁹ The *Convention on the Rights of Persons with Disabilities*, available at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

²⁰ The *International Convention for the Protection of All Persons from Enforced Disappearance*, available at <https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>

²¹ *African Charter on Human and Peoples' Rights for Africa*, available at <https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>

Environmental rights are beginning to get prominence from recent past events where natural disasters have arisen due to unstable topography caused by heavy and careless human industrial activity. This situation if goes unchecked may be ticking time bomb.

Unfortunately, Environmental rights suffer the fate of human rights which are relegated to second place after civil and political rights. More emphasis on civil and political rights seem out of place in the developing world where socio-economic and cultural rights are yet to be fully implemented, worsened by the progressive implementation nature placed upon them. There is need to increase awareness and activism on environmental rights, hinged on crucial socio-economic rights.

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