

# Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View

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## Abstract

*States around the world are progressively protecting environmental rights. The Constitution of Kenya 2010 provides for environmental rights under Articles 42, 69 and 70. However, this study argues that there is need to reconceptualise the right to a clean and healthy environment as established under Article 42, as the right is geared towards human utility rather than intrinsic environmental protection. Thus, the right is shrouded with anthropocentric concerns which may be construed as insufficient in the protection of natural resources, ecosystems and other non-human species for their ecological and intrinsic value. Accordingly, the study examines the right to a clean and healthy environment as envisaged in the Constitution of Kenya 2010 and, from that context, assesses the efficacy of anthropocentric environmental rights in environmental conservation highlighting the potential challenges faced in their implementation. As a way forward, the study recommends bicentric environmental rights as an alternative to anthropocentric environmental rights. The study realises its objectives through the use of case law and literature review.*

**Keywords:** Anthropocentric, ecocentric, bicentric, environmental rights

## I. Introduction

A constitutional environmental right contains provisions aimed at protecting and conserving the environment while ensuring that people within a State have a right to an environment that is clean and healthy.<sup>1</sup> Constitutional

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<sup>1</sup> Daly E, 'Constitutional protection for environmental rights: The benefits of environmental process' 17(2) *International Journal of Peace Studies*, 2012, 71-72. See also Bruckerhoff J, 'Giving nature

environmental rights come in different forms. Some of them are explicit,<sup>2</sup> for instance, in the Kenyan context, the right to a clean and healthy environment as established under Article 42 of the Constitution of Kenya, 2010 (CoK).<sup>3</sup> Alternatively, some of them can be implied from other rights,<sup>4</sup> such as the right to clean and safe water,<sup>5</sup> the right to the highest attainable standard of health<sup>6</sup> or the right to reasonable standards of sanitation.<sup>7</sup> Constitutional environmental rights can either refer to a specific aspect of the environment such as ecosystems, biodiversity, natural resources, plant and animal species or the environment holistically.<sup>8</sup> Generally, the rights attempt to establish a goal or objective towards environmental conservation and protection.<sup>9</sup> The right may be to a clean and healthy environment, or one that is ecologically balanced or even biologically diverse.<sup>10</sup>

Kenya has been progressively improving its environmental protection, management and conservation legal framework, as the country has moved from an era without environmental rights to an era with environmental rights.<sup>11</sup> The CoK marked a paradigm shift to the recognition of environmental rights as it explicitly provides for environmental rights under Articles 42, 69 and 70<sup>12</sup> and implicitly through the social and economic rights under Article 43,<sup>13</sup> and other rights in the Bill of Rights.<sup>14</sup> The study focuses exclusively on constitutional

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constitutional protection: A less anthropocentric interpretation of environmental rights' 86(3) *Texas law review*, 2008, 621.

<sup>2</sup> Daly E, 'Constitutional protection for environmental rights', 71-72.

<sup>3</sup> Article 42, *Constitution of Kenya* (2010).

<sup>4</sup> Daly E, 'Constitutional protection for environmental rights', 71-72.

<sup>5</sup> Article 43 (d), *Constitution of Kenya* (2010).

<sup>6</sup> Article 43 (a), *Constitution of Kenya* (2010).

<sup>7</sup> Article 43 (b), *Constitution of Kenya* (2010). This can also be established in the case of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others* (2018) eKLR, where the court stated that 'It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights'.

<sup>8</sup> Daly E, 'Constitutional protection for environmental rights', 71-72.

<sup>9</sup> Daly E, 'Constitutional protection for environmental rights', 71-72.

<sup>10</sup> Daly E, 'Constitutional protection for environmental rights', 71. For instance, Article 225 of the Brazilian Constitution states that, 'Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life'. See Article 225(1), *Constitution of Brazil* (1988).

<sup>11</sup> Joel K, 'Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges' 14(2) *African Human Rights Law Journal*, 2014, 494.

<sup>12</sup> Articles 42, 67, 70, *Constitution of Kenya* (2010).

<sup>13</sup> Article 43, *Constitution of Kenya* (2010).

<sup>14</sup> Chapter 4, *Constitution of Kenya* (2010). For instance, the Right to life under Article 26 and the Right to human dignity under Article 28. This can be established in the Ugandan case of *Uganda*

environmental rights as they offer superior protection to the environment, due to their supremacy in the hierarchy of laws and rigidity. Moreover, constitutional environmental rights are not prone to the everyday politics of a country as is the case for statutes and subsidiary legislation.<sup>15</sup> This is because in most instances constitutional provisions do not just depend on majorities in legislative bodies as certain provisions in some constitutions can only be changed or amended through a referendum.<sup>16</sup>

For instance, if a statute states that only clean energy (such as solar and wind) can be used in a country and a few months after enactment, coal, a relatively cheap but highly environmentally destructive source of energy is discovered, the legislative body in the country may repeal the statute thus allowing coal mining in the country. This may even be for short-term political reasons such as to ensure affordable energy, thus making citizens content especially ahead of an upcoming election, which will in the long-term cause more harm than benefit.<sup>17</sup> Thus, Schlickeisen asserts that when it comes to environmental protection and conservation, ‘relying on ordinary statutes alone is insufficient because normal legislative processes are systemically biased in favour of current benefits as opposed to the long-term future’.<sup>18</sup>

There are two major theoretical foundations underlying environmental rights. The first one is anthropocentrism, which is a human-centred approach towards environmental conservation and protection.<sup>19</sup> Anthropocentrism has

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*Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd* (2010), where the judge stated that: ‘the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with the physical and mental well-being of human beings...a clean and healthy environment is measured in both the ethical and medical contexts. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem and poor access to health services. That right is not restricted to a clinical model’. See *Uganda Electricity Transmission Co. Ltd v De Samaline Incorporation Ltd* (2000), The High Court of Uganda.

<sup>15</sup> Bruckerhoff J, ‘Giving nature constitutional protection’, 623.

<sup>16</sup> For instance, Chapter 16 of the Constitution of Kenya 2010 provides for mechanisms to be used to amend the Constitution. Article 255 in the chapter, provides that a provision in the bill of rights, which contains Kenya’s environmental rights, can only be amended through a referendum. See Article 255, *Constitution of Kenya* (2010).

<sup>17</sup> Coal causes numerous respiratory diseases and leads to the formation of acid rain which increases acidity in soil, making it agriculturally unproductive; as a result of coal mining mercury and other metals which are harmful to both humans and animals are released to the environment. See the United States of America Energy Information Administration, ‘Coal and the environment’, 23 March 2018 <[https://www.eia.gov/energyexplained/index.php?page=coal\\_environment](https://www.eia.gov/energyexplained/index.php?page=coal_environment)> on 18 December 2018.

<sup>18</sup> Schlickeisen R, ‘Protecting biodiversity for future generations: an argument for a constitutional amendment’ 8(1) *Tulane Environmental Law Journal*, 1994, 182.

<sup>19</sup> Du Plessis A, ‘Fulfilment of South Africa’s constitutional environmental right in the local government

been criticised by many environmental scholars and commentators for focusing excessively on human well-being while neglecting intrinsic environmental conservation.<sup>20</sup> The second theoretical foundation for environmental rights is ecocentrism, which is an intrinsic value approach towards environmental conservation and protection.<sup>21</sup> Ecocentrism faces feasibility challenges in terms of implementation as it tends to neglect humanity's domineering role towards the environment.<sup>22</sup> An intermediate of the two major theoretical foundations is bicentrism, which borrows aspects from both the anthropocentric and ecocentric approaches.<sup>23</sup>

Article 42 was formulated to facilitate the realisation of environmental rights and to ensure effective environmental protection, management and conservation in Kenya.<sup>24</sup> However, the right to a clean and healthy environment, as envisaged under Article 42, seems to focus disproportionately on human well-being rather than holistic and intrinsic environmental protection and conservation. As a result, the right has not met its expectations as it is shrouded with anthropocentric concerns which create barriers in the effective realisation of the right.

The anthropocentric nature of the right has negative consequences on environmental conservation and protection as the environment in such a regime of environmental rights is conserved not for its own worth or subsistence, but only to the extent necessary to serve human needs or utility.<sup>25</sup> For instance, it can be argued that the purpose of wildlife conservation from an anthropocentric point of view is neither the maintenance of a viable population of animal and plant species nor the protection of ecosystems and natural habitats but, instead, the promotion of tourism as an economic activity. This can lead to a scenario where wildlife conservation measures diminish, once the tourism goals have

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sphere' Published LLD Thesis, North-West University, Potchefstroom, 2008, 29.

<sup>20</sup> Scholtz W, 'The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa' 1 *Journal of South African Law*, 2005, 70. See also Bosselmann K, 'Human rights and the environment: Redefining fundamental principles?' University of Auckland, 2001, 13 and Satish C, 'Environmental ethics anthropocentric to eco-centric approach: A paradigm shift' 55(4) *Journal of Indian Law Institute*, 2013, 525.

<sup>21</sup> Du Plessis A, 'Fulfilment of South Africa's constitutional environmental right in the local government sphere', 35.

<sup>22</sup> Scholtz W, 'The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa', 71.

<sup>23</sup> Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development' Published LLM Thesis, University of Kwa-Zulu Natal, Durban, 75.

<sup>24</sup> Constitution of Kenya Review Commission, *Expert review of the draft bill seminar*, 2003, 63-64.

<sup>25</sup> Satish C, 'Environmental ethics anthropocentric to eco-centric approach', 525.

been achieved, even if at that point ecosystems and natural habitats have not been effectively protected.

This study hypothesises that Article 42 of the CoK is anthropocentric in nature thus it does not sufficiently protect and conserve the environment since it fails to appreciate the environment's intrinsic value. To remedy this, the study argues that there is need to reconceptualise Article 42, as it is the principal environmental right in Kenya and is also a right in the Kenyan Bill of Rights.

The study will be divided into six main sections. The first section has been an introduction as discussed above, which introduces the topic. The second section briefly highlights Kenya's environmental constitutional provisions. The third section will analyse anthropocentric environmental rights highlighting the ineffectiveness of the rights in environmental protection and conservation. Correspondingly, the section will also analyse the anthropocentric nature of the right to a clean and healthy environment as envisaged in Article 42 of the CoK. The section will likewise show the anthropocentric bias emanating from Kenyan jurisprudence as a result of the anthropocentric nature of Article 42.<sup>26</sup> A brief analysis and discussion on ecocentric environmental rights is to be made in the fourth section, concentrating on their viability and feasibility in the constitutional and human rights architecture.

Additionally, the fifth section will look into the concept of the bicentric approach to environmental rights.<sup>27</sup> It will focus on the inclusive aspect of the approach which is fundamental in environmental protection and conservation.<sup>28</sup> Lastly, a conclusion and some recommendations will be provided in the last two sections.

<sup>26</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* (2018) eKLR. See also *Kenya Association of Manufacturers and 2 others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 others* (2017) eKLR.

<sup>27</sup> Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development', 75.

<sup>28</sup> Muir A, 'An interpretation of the South African constitutional "environmental right" (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development', 75.

## II. Environmental Provisions under the Constitution of Kenya, 2010

The CoK has an array of environmental provisions aimed at the promotion and protection of environmental rights. Article 42 states that ‘every person has the right 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’,<sup>29</sup> and ‘to have obligations relating to the environment fulfilled under Article 70’.<sup>29</sup> Article 69(1) outlines the obligations of the State with respect to the environment and the measures the State shall undertake in protecting and conserving the environment.<sup>30</sup> Article 69(2), on the other hand, 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.<sup>31</sup>

In enforcing environmental rights, Article 70(1) provides that one may apply to a court of law for redress, if the right to a clean and healthy environment established under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened.<sup>32</sup> Accordingly, Article 70(2) provides for the orders or directions a court may give if Article 70(1) is violated. They are mainly injunctions to prevent environmental harm and compensation to victims of environmental degradation.<sup>33</sup> Article 70(3) on the other hand provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.<sup>34</sup>

Article 70 is a very critical provision with regard to environmental protection and conservation in Kenya, as it was formulated to remedy past environmental injustices. During the pre-2010 constitutional era, procedural barriers created difficulties in accessing justice. In the environmental context, the maxim

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<sup>29</sup> Article 42, *Constitution of Kenya* (2010).

<sup>30</sup> The obligations of the state with respect to the environment include: sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensuring the equitable sharing of the accruing benefits; achieving and maintaining a tree cover of at least ten per cent of the land area of Kenya; protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encouraging public participation in the management, protection and conservation of the environment; protecting genetic resources and biological diversity; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminating processes and activities that are likely to endanger the environment; and utilising the environment and natural resources for the benefit of the people of Kenya. See Article 69 (1), *Constitution of Kenya* (2010).

<sup>31</sup> Article 69(2), *Constitution of Kenya* (2010).

<sup>32</sup> Article 70(1), *Constitution of Kenya* (2010).

<sup>33</sup> Article 70(2), *Constitution of Kenya* (2010).

<sup>34</sup> Article 70(3), *Constitution of Kenya* (2010).

*locus standi*<sup>35</sup> prevented litigants acting in public interest from bringing a legal action or claim concerning environmental matters in a court of law.<sup>36</sup> For instance, in *Wangari Maathai v Kenya Times Media Trust*, the petitioner, who was a coordinator of an environmental pressure group, sought a temporary injunction to restrain the respondent company from constructing an office complex in the public park which could have led to the destruction of the park's ecosystem.<sup>37</sup> However, the court dismissed the applicant's claim on the grounds that the petitioner lacked the *locus standi* to initiate such an action, stating that the law then only allowed the Attorney General to bring a legal action or claim on behalf of the public.<sup>38</sup>

Lastly, Article 162(2) requires parliament to establish a court with an equivalent status as the High Court to hear and determine disputes relating to the environment and land.<sup>39</sup> This led to the enactment of the Environment and Land Court Act which established the Environment and Land Court which hears and determines environmental and land matters.<sup>40</sup>

### III. An Anthropocentric Approach to Environmental Rights

The CoK provides for a comprehensive and systematically organised framework for environmental rights as it does not only provide for the right to a clean and healthy environment under Article 42,<sup>41</sup> but it also provides for duties relating to the right under Article 69.<sup>42</sup> Moreover, the Constitution also provides for mechanisms to ensure the right is enforced and implemented in courts of law under Article 70<sup>43</sup> and further provides for the establishment of a specific court to deal with issues or disputes relating to the right under Article 160(2).<sup>44</sup>

Despite the CoK having an elaborate and comprehensive framework for environmental rights, a challenge still arises in the implementation of the right to a clean and healthy environment as envisaged in Article 42. The challenge is the

<sup>35</sup> The right or competence to bring an action or to be heard in a court of law. See Black's law dictionary, 9ed.

<sup>36</sup> This was witnessed and established in the *Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

<sup>37</sup> *Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

<sup>38</sup> *Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

<sup>39</sup> Article 162(2), *Constitution of Kenya* (2010).

<sup>40</sup> Preamble, *Environment and Land Court Act* (Act No. 19 of 2011).

<sup>41</sup> Article 42, *Constitution of Kenya* (2010).

<sup>42</sup> Article 69, *Constitution of Kenya* (2010).

<sup>43</sup> Article 70, *Constitution of Kenya* (2010).

<sup>44</sup> Article 162(2), *Constitution of Kenya* (2010).



anthropocentric nature of the right. Plessis, an environmental scholar, defines anthropocentrism as a human-centred approach towards environmental rights, which asserts that the environment should be holistically maintained, protected and conserved only to the extent necessary to facilitate human health, utility and well-being as opposed to the environment's intrinsic value.<sup>45</sup> The Supreme Court of India in the case of *T.N Godavarman Thirumulpad v Union of India* described anthropocentrism as follows:

'Anthropocentrism considers humans to be the most important factor and value in the universe and states that humans have greater intrinsic value than other species. Resultantly, any species that are of potential use to humans can be a reserve to be exploited which leads to the point of extinction of biological reserves. Furthermore, the principle highlights that human obligations towards the environment only arise out of instrumental, educational, scientific, cultural, recreational and aesthetic values that the environment has to offer humans. Under this approach, the environment is only protected as a consequence of and to the extent needed to protect human well-being'.<sup>46</sup>

From Plessis's definition of anthropocentrism and the Supreme Court of India's description of anthropocentrism in the *Godavarman* case, it can be argued that an environmental right that is anthropocentric in nature, only conserves the environment for human benefit or utility rather than for its intrinsic value.<sup>47</sup> As a result, many other scholars have been at the forefront of criticising the anthropocentric approach to environmental rights.<sup>48</sup> The environment not only includes human beings but also natural resources, ecosystems and other non-human species.<sup>49</sup> Hence conserving the environment with only human beings, human needs or utility in mind is fundamentally flawed, as it reinforces the idea that other components of the environment such as ecosystems, natural resources and other non-human species exist only for human utility.<sup>50</sup> Thus Professor Klaus Bosselmann posits that, 'an anthropocentric environmental right subjugates all other needs, interest and values of nature, to those of humanity'.<sup>51</sup>

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<sup>45</sup> Du Plessis, 'Fulfilment of South Africa's constitutional environmental right in the local government sphere', 29.

<sup>46</sup> *T.N Godavarman Thirumulpad v Union of India* (2012), The Supreme Court of India, para. 20.

<sup>47</sup> Du Plessis, 'Fulfilment of South Africa's constitutional environmental right in the local government sphere', 29.

<sup>48</sup> Scholtz W, 'The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa', 70. See also Bosselmann K, 'Human rights and the environment: redefining fundamental principles?', 131 and Satish C, 'Environmental ethics anthropocentric to eco-centric approach', 525.

<sup>49</sup> Section 2, *Environment Management and Co-ordination Act* (No. 8 of 1999).

<sup>50</sup> Bosselmann K, 'Human rights and the environment: redefining fundamental principles?', 13.

<sup>51</sup> Bosselmann K, 'Human rights and the environment: redefining fundamental principles?', 14.



i. *The anthropocentric concerns in the right to a clean and healthy environment in Kenya*

Article 42 of the CoK states that, ‘every person has the right to a clean and healthy environment’.<sup>52</sup> The phrase ‘every person’ in the right presumably refers to humans as Article 260 of the Constitution, which is concerned with interpretation matters, defines a person to mean human beings and other human entities such as companies, associations and bodies of persons whether incorporated or unincorporated.<sup>53</sup> The environment not only includes humans but also all species of plants and animals living on land and in water.<sup>54</sup> Article 42 thus raises the question, why then should non-human species not be entitled to a clean and healthy environment as humans are, yet they are also an important part of the environment?<sup>55</sup> For instance, in the two cases which have been discussed below, *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 Others* and *Kenya Association of Manufacturers and 2 Others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 Others*, the courts seem to interpret Article 42 literally as they only considered environmental issues that affect human beings rather than holistic environmental issues that affect both human and other non-human species, including the natural environment.

Article 42(a) states that the right includes the right to have the environment protected for the benefit of present and future generations.<sup>56</sup> The present and future generations aspect in Article 42(a) may be simply incorporating an intragenerational<sup>57</sup> and intergenerational<sup>58</sup> equity principle,<sup>59</sup> which in other words may be expressed as utilisation of natural resources in a manner that meets

<sup>52</sup> Article 42, *Constitution of Kenya* (2010).

<sup>53</sup> Article 260, *Constitution of Kenya* (2010).

<sup>54</sup> Section 2, *Environment Management and Co-ordination Act* (Act No.8 of 1999).

<sup>55</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 119.

<sup>56</sup> Article 42, *Constitution of Kenya* (2010).

<sup>57</sup> Intragenerational equity means that ‘all people within the present generation have the right to benefit equally from the exploitation of the environment, and that they have an equal entitlement to a clean and healthy environment’. See Section 2, *Environment Management and Co-ordination Act* (Act No. 8 of 1999).

<sup>58</sup> Intergenerational equity means that ‘the present generation should ensure that in exercising its rights to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations’. See Section 2, *Environment Management and Co-ordination Act* (Act No. 8 of 1999).

<sup>59</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 119.

‘the needs of the present generation without compromising the ability of future generations to meet their own needs’.<sup>60</sup> While it can be argued from an ecocentric perspective that generations could apply equally to other organisms and not necessarily only to humans, in truth, generations are most likely presumed to refer to humans.<sup>61</sup> Thus, Article 42(a) can be interpreted as requiring the present generation to protect, maintain and utilise natural resources sustainably not necessarily for the environment’s intrinsic worth but for utilisation by future generations. This shows that the environment is being maintained, preserved or protected as it is essential for the continued existence of the human race and that the survival of mankind is the sole criterion to safeguard natural resources and maintain their quality.<sup>62</sup>

The anthropocentric concerns in the right to a clean and healthy environment are not only manifest in Article 42 of the CoK, but are also manifest in the jurisprudence emanating from Kenyan courts when interpreting the right. For instance, the *Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 Others* case involved an environmental dispute concerning a waste disposal site in Nakuru County. The court when analysing violations and infringements on Article 42, stated the following:

‘The dumpsite attracts chickens, cows, goats and sheep that are left unattended and when they consume the refuse from the dumpsite they get infected only to be later slaughtered and consumed by the unsuspecting public; flies that get attracted to decomposing refuse fly to homesteads thus spreading diseases like dysentery; that the dumpsite harbours rodents like rats and reptiles like snakes which find their way to people’s homes: that the dumpsite emits offensive gases which are toxic and pose the risk of causing respiratory ailments...’<sup>63</sup>

The court in the *Martin Osano* case evidently showed an anthropocentric bias, as it did not consider any holistic harm caused to the environment or other components of the environment surrounding the dumpsite. It only considered environmental harm linked to human beings, even the non-human species considered by the court such as livestock, were considered not necessarily for their intrinsic worth or as a component of the environment, but because they would cause harm to humans if consumed after eating refuse from the dumpsite.<sup>64</sup>

<sup>60</sup> The World Commission on Environment and Development, *Our common future*, 1987, 24.

<sup>61</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 119.

<sup>62</sup> Satish C, ‘Environmental ethics anthropocentric to eco-centric approach’, 523.

<sup>63</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* (2018) eKLR.

<sup>64</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* (2018) eKLR.

The anthropocentric bias when interpreting Article 42 is also apparent in the case of the *Kenya Association of Manufacturers and 2 Others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 Others*.<sup>65</sup> This case concerned the ban on the use of plastic bags in Kenya, where the Kenya Association of Manufacturers challenged the ban citing issues such as no public participation and stakeholder consultations before issuance of the ban.<sup>66</sup> The judge in the *Kenya Association of Manufacturers* case when weighing the economic loss to be suffered by the manufacturers and the infringement of Article 42 caused by the use of plastic bags stated the following:

In my view, this apprehended loss is to be carefully weighed against the public interest of the over 40 million Kenyans whose right to a clean environment the legal notice seeks to secure. Grant of a conservative order in the circumstances of this dispute would mean that the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags dealers. In my view, that would offend Kenya's constitutional and legal framework on protection and management of the environment'.<sup>67</sup>

The court in the *Kenya Association of Manufacturers* case seemed to ignore the harm plastic bags cause to the environment holistically and instead only considered the harm they cause to the environment that affects human well-being. In the interest of holistic environmental conservation and protection, the court could have instead considered the effects plastic bags have on both human beings and the environment intrinsically, as pollution due to plastic bags leads to extensive environmental harm and degradation. For example: plastic bags are to blame for deaths in other non-human species such as sea animals through ingestion and suffocation; plastic bags also degrade the aesthetic natural beauty of landscapes and lead to visual, noise and thermal pollution; lastly when plastic bags disintegrate, they break into powdery plastic dusts which contaminate all life forms including soil and water.<sup>68</sup>

<sup>65</sup> *Kenya Association of Manufacturers and 2 others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 others* (2017) eKLR, para. 58-59.

<sup>66</sup> *Kenya Association of Manufacturers and 2 others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 others* (2017) eKLR, para. 58-59.

<sup>67</sup> *Kenya Association of Manufacturers and 2 others v Cabinet Secretary of the Ministry of Environment and Natural Resources & 3 others* (2017) eKLR, para. 32.

<sup>68</sup> Professor Gregory Wahungu, 'Speech during the stakeholder forum on plastic carrier bags ban', National Environmental Management Authority, 21 June 2017 – <[https://www.nema.go.ke/images/featured/NEMA\\_Director\\_General\\_talking\\_points\\_during\\_the\\_stakeholder\\_forum\\_at\\_UNEP.doc](https://www.nema.go.ke/images/featured/NEMA_Director_General_talking_points_during_the_stakeholder_forum_at_UNEP.doc)> on 3 November 2018.

#### IV. An Ecocentric Approach to Environmental Rights

An ecocentric approach towards environmental rights aims principally to protect all forms of life, including all aspects of the environment focusing on their intrinsic value, not just those that benefit humans.<sup>69</sup> There are two international instruments which recognise and protect the environment for its intrinsic value. These are the World Charter for Nature, and the Convention on Biological Diversity.<sup>70</sup> The Preamble of the Convention on Biological Diversity provides a fitting description of the purposes and goals of biodiversity protection as seen below:

‘The contracting parties, conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components,

Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere,

Affirming that the conservation of biological diversity is a common concern of humankind’.<sup>71</sup>

The World Charter for Nature, on the other hand, provides that: ‘Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action...’<sup>72</sup>

The above stated international instruments are distinctively ecocentric in that their primary focus is the intrinsic value of the environment. They also recognise the benefits of the environment to human beings. Furthermore, they explicitly show the interrelationship between the environment and human beings. The ecocentric approach to environmental rights seems to be the most viable approach with regard to environmental conservation and protection, as it seeks to protect the environment for its intrinsic value. However, feasibility challenges arise during the implementation of such rights, since although the rights recognise the interrelationship between the environment and human beings, they tend to focus unduly on the intrinsic value of the environment rather than the human

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<sup>69</sup> Du Plessis A, ‘Fulfilment of South Africa’s constitutional environmental right in the local government sphere’, 35.

<sup>70</sup> The World Conservation Union, Commission on Environmental Law and International Council of Environmental Law, *Draft international covenant on environment and development*, 4ed, 1995, xix.

<sup>71</sup> Preamble, *Convention on biological diversity*, 5 June 1992, 1760 UNTS 79.

<sup>72</sup> UNGA, *World charter for nature*, UN A/Res/37/7 28 October 1982.

component.<sup>73</sup> This creates feasibility challenges as humanity is an essential element of environmental conservation and protection.<sup>74</sup> Human beings and the environment are interrelated and interdependent. The environment influences the life of human beings, and human beings modify their environment as a result of their activities. This concept was espoused by Folke when he stated that:

“Throughout history, humanity has shaped nature and nature has shaped the development of human society. We are currently living in the anthropocene era where most aspects of the functioning of the earth system cannot be understood without accounting for the strong influence of humanity...”<sup>75</sup>

## V. The Bicentric Approach to Environmental Rights: A Feasible Approach Towards Maintaining an Ecologically Balanced Environment

Due to the challenges in the implementation of an ecocentric environmental right, there was need for development of a right that would effectively protect the environment for its intrinsic value while correspondingly recognising mankind’s domineering role towards the environment.<sup>76</sup> Thus, many environmental scholars agree that a degree of anthropocentrism is necessary in environmental rights.<sup>77</sup> This may also be due to the fact that there is no legal framework for purely ecocentric environmental rights, which are normally referred to as rights of nature<sup>78</sup> but there exists an elaborate and comprehensive human rights legal framework worldwide, both at the local and international levels.<sup>79</sup> Thus, an

<sup>73</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 76.

<sup>74</sup> Scholtz W, ‘The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa’, 71.

<sup>75</sup> Folke C, ‘Reserves and resilience: from single equilibrium to complex systems’ 32(6) *Journal of the Human Environment*, (2003), 379.

<sup>76</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 76.

<sup>77</sup> Bosselmann K, ‘Human rights and the environment: redefining fundamental principles?’, 134. See also Scholtz W, ‘The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa’, 72.

<sup>78</sup> Bosselmann K, ‘Human rights and the environment: redefining fundamental principles?’, 133.

<sup>79</sup> There exist numerous international instruments on human rights such as: the African Charter on Human and People Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights et cetera. Many countries worldwide have a Bill of Rights, for example Kenya’s is established under Chapter 4 of the Constitution of Kenya 2010.

environmental right with a degree of anthropocentrism can be infused into the existing human rights legal framework. Accordingly, environmental rights should identify the uniqueness of man's right to the environment and conform more closely to the characterisation of this relationship as a fiduciary one not devoted solely to the attainment of immediate human needs.<sup>80</sup> Bosselmann posits that human rights should be formulated in a manner that takes into account the intrinsic value of the environment, the needs of both the present and future generations and the competing interests of humanity.<sup>81</sup> At the international level, numerous environmental treaties have recognised human utility on the one hand and nature's intrinsic value on the other hand. For example, Article 3 of the Protocol on Environmental Protection to the Antarctic states that:

‘the protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area’.<sup>82</sup>

The treaty considers not only the intrinsic value of Antarctica but also the human utility to be derived from Antarctica. This link is also factored in the Cartagena protocol on biosafety to the convention on biological diversity which considers both the harm caused to the environment holistically and to human health by biotechnology. Article 2 of the instrument states that: ‘the parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health’.<sup>83</sup>

Therefore, environmental rights need to be appreciated in view of the paradoxical relationship between man and the environment;<sup>84</sup> at one level these rights are ecocentric as the environment needs to be protected for its own intrinsic value.<sup>85</sup> On the other hand, environmental rights should be anthropocentric to some extent as there needs to be some form of human interest in the right

<sup>80</sup> Bosselmann K, ‘Human rights and the environment: redefining fundamental principles?’, 134.

<sup>81</sup> Bosselmann K, ‘Human rights and the environment: redefining fundamental principles?’, 134.

<sup>82</sup> Article 3, Protocol on environmental protection to the Antarctic, 4 October 1991, 402 UNTS 71.

<sup>83</sup> Article 2, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 2226 UNTS 208.

<sup>84</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 75.

<sup>85</sup> Du Plessis A, ‘Fulfilment of South Africa’s constitutional environmental right in the local government sphere’, 35.

for it to be feasible in the human rights architecture.<sup>86</sup> Hence environmental rights should have two simultaneous centres of focus, they should neither be anthropocentric nor ecocentric but ‘bicentric’.<sup>87</sup>

The bicentric environmental right as noted by Andrew Muir provides for the ‘anthropocentric protection of humans from their environment and for accumulation by humans of benefits from their environment while simultaneously and equally providing for ecocentric protection of the environment from humans and the stewardship or trusteeship role which humans have in respect of the environment’.<sup>88</sup>

A draft model of an environmental right recommended by Joshua Bruckerhoff demonstrates that it is possible to create a balance between ecocentrism and anthropocentrism hence coming up with a bicentric environmental right. The draft model provides that, ‘all persons, including future generations, have a right to a clean, healthy, biologically diverse, and ecologically balanced environment’.<sup>89</sup>

It is noteworthy that the draft provides for the right to a biologically diverse and ecologically balanced environment. According to the Organization for Economic Cooperation and Development (OECD) ecological balance is the ‘equilibrium between, and harmonious coexistence of, organisms and their environment’.<sup>90</sup> Biodiversity according to the Convention on Biological Diversity refers to ‘variability among living organisms from all sources including... terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems’.<sup>91</sup>

<sup>86</sup> Scholtz W, ‘The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa’, 71.

<sup>87</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 75.

<sup>88</sup> Muir A, ‘An interpretation of the South African constitutional “environmental right” (Section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development’, 75.

<sup>89</sup> Bruckerhoff J, ‘Giving nature constitutional protection: A less anthropocentric interpretation of environmental rights’, 636.

<sup>90</sup> Organization for Economic Cooperation and Development (OECD), ‘Glossary of statistical terms’, 25 September 2001 – <<https://stats.oecd.org/glossary/detail.asp?ID=713>> on 6 November 2018.

<sup>91</sup> Article 2, *Convention on biological diversity*, 5 June 1992, 1760 UNTS 79.



The ecological balance and biodiversity aspect of the draft model right ensures that ecological concerns and biodiversity factors which are primarily ecocentric in nature are considered alongside human factors when interpreting the Article.<sup>92</sup> Biodiversity and ecological balance are not only critical aspects in the maintenance of a healthy environment for non-human species and the natural environment, but they are also important in maintaining a liveable environment for humanity.<sup>93</sup> Protecting biodiversity and ensuring that the environment is ecologically balanced guarantees humanity adequate and quality food sources, clean air to breathe and clean water to drink. Thus, many environmentalists and scientists have emphasised the importance of protecting and conserving biodiversity and ecosystems while simultaneously ensuring that the environment is ecologically balanced.<sup>94</sup>

The protection of biodiversity is provided for under Article 69(e) of the CoK on obligations in respect of the environment.<sup>95</sup> It would be a major improvement of paramount significance to include the aspect of biodiversity in Article 42 rather than it just being a mere obligation with regard to the environment. Including the aspect of biodiversity in Article 42 would be both a bold and innovative step in transition of the right from just concentrating on the anthropocentric approach towards environmental protection to a more bicentric approach towards environmental protection.

For instance, if the *Kenya Association of Manufacturers* case was interpreted in light of the draft model, the court would not only have focused on the harm that plastic bags have on the environment that affects the Kenyan population, but also the harm plastic bags have on Kenya's ecological balance and biodiversity. This encompasses human beings, other non-human species and the natural environment.<sup>96</sup> If the *Martin Osano* case was interpreted in the same

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<sup>92</sup> Ecological factors or concerns may include ecological processes such as 'natural disturbance, hydrology, nutrient cycling, biotic interactions, population dynamics, and evolution' which determine a species' composition, habitat structure, and ecological health. These processes generally play a critical role in the maintenance of ecosystems. See United States of America Environmental Protection Agency, 'Considering ecological processes in environmental impact assessments' -<<https://www.epa.gov/sites/production/files/2014-08/documents/ecological-processes-cia-pg.pdf>>- on 6 November 2018.

<sup>93</sup> Bruckerhoff J, 'Giving nature constitutional protection: A less anthropocentric interpretation of environmental rights', 619.

<sup>94</sup> Bruckerhoff J, 'Giving nature constitutional protection: A less anthropocentric interpretation of environmental rights', 619.

<sup>95</sup> Article 69 (e), *Constitution of Kenya* (2010).

<sup>96</sup> *Kenya Association of Manufacturers and 2 others v Cabinet Secretary of the ministry of environment and natural resources & 3 others* (2017) eKLR.

manner, the court would have gone beyond the human based environmental harm factors it considered to include ecological and biodiversity factors affected by the dumpsite in the case.<sup>97</sup>

## VI. Recommendations

The study recommends a constitutional amendment of Article 42 of the CoK, since the environment is one of the indispensable and irreplaceable resources required to sustain human life from a social, economic and even cultural point of view. It cannot be recovered once lost, for example: once a plant or animal species becomes extinct it ceases to exist. The study proposes a two-pronged constitutional provision.<sup>98</sup> The first clause of the provision includes bicentric environmental goals. The second clause contains a statement of public policy on ecocentric environmental protection and conservation that is significantly more ecocentric than the first clause.<sup>99</sup>

Such a provision can be worded according to the example below as noted from Joshua Bruckerhoff: 'All persons, including future generations, have a right to a healthy, biologically diverse, and ecologically balanced environment'.<sup>100</sup> Every form of life is unique, warranting respect regardless of its worth'.<sup>101</sup>

While the CoK has obligations with regard to the environment under Article 69, the following provisions may be added to enhance protection and conservation of the environment for its intrinsic value:

<sup>97</sup> *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* (2018) eKLR.

<sup>98</sup> Bruckerhoff J, 'Giving nature constitutional protection', 636.

<sup>99</sup> The above approach of drafting a constitutional environmental right is based on the Constitutions of Brazil and Portugal, For instance. Article 225 of the Brazilian Constitution states that, 'Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The government and the community have a duty to defend and to preserve the environment for present and future generations'. The Article further provides that the government must, 'preserve and restore the essential ecological processes and provide for the ecological treatment of species and ecosystems; ... preserve the diversity and integrity of the genetic patrimony of the country; and protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty'. See Article 225(1) and (2), *Constitution of Brazil* (1988).

<sup>100</sup> Bruckerhoff J, 'Giving nature constitutional protection', 636.

<sup>101</sup> Bruckerhoff J, 'Giving nature constitutional protection', 636. This language parallels language in the UN World Charter for Nature. See UNGA, *World Charter for Nature*, UN Doc A/Res/37/7 (28 October 1982).

‘Recognizing the intrinsic value of nature, the government shall:

- a) provide for the conservation of ecological diversity;
- b) provide for the protection of flora and fauna to reduce the risk to their ecological function, reduce the extinction of species, and reduce cruelty to animals;
- c) promote the protection of ecosystems and natural habitats, and the maintenance of viable populations of species in natural surroundings;’<sup>102</sup>

## VII. Conclusion

It is improbable or quite unlikely to have a constitutional environmental provision that is non-anthropocentric in nature, as it would be like trying to enforce a human right that according to Joshua Bruckerhoff is, ‘by its very definition, not connected to a human concern’. Therefore, an ecocentric environmental right is not likely to be enforceable. However, constitutional environmental rights should have provisions which are ecocentric in nature to help incorporate ecocentric principles (biological diversity and ecological balance) into the environmental right, making it bicentric in nature.

The bicentric environmental right as espoused by Bosselmann ‘attempts to reconcile the philosophical foundations of human rights with ecological principles’. Its objective is to ensure that the intrinsic value of the environment is included in a constitutional environmental right, making the right take cognisance of the fact that human beings not only live in a social, economic, cultural and political environment but also in a natural environment. Thus, Bosselmann further asserts that, ‘just as much as the individual respects the intrinsic value of fellow human beings, the individual ought to respect the intrinsic value of other fellow beings (animals, plants, ecosystems)’.

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<sup>102</sup> Bruckerhoff J, ‘Giving nature constitutional protection’ 86(3) *Texas Law Review*, 2008, 637.

# Cognition and Volition Impairment in Criminal Conduct: A Look into the Application of the M’Naghten Test in Kenya

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## Abstract

*The M’Naghten test of insanity is applied in many common law countries including Kenya. It provides that to be legally insane, one must prove that the act or omission came from a disease of the mind that restricted someone from knowing what they are doing, and whether what they are doing is right or wrong in law. These requirements focus on the cognitive aspect of committing a crime. However, there exist cases where the accused commits an action based on an irresistible impulse that makes them unable to refrain from doing a certain action. This amounts to volitional impairment. Cognition and volition are important aspects to consider when evaluating legal insanity as a defence. This study seeks to explain the need for cognition and volition to be considered in the defence of insanity by describing the requirements of the M’Naghten rules with the objective to show its ignorance of the volitional aspect. Additionally, the study will delve into the need for both cognition and volition by expounding on what they entail and showing their application through the Model Penal Code test. Therein, the study will propose the use of the Model Penal Code test as a substitute for the M’Naghten rules applied in Kenya since it recognises the presence of both cognition and volition when committing a crime.*

**Key words:** M’Naghten rules, cognition, volition, model penal code test, insanity.

## I. Introduction

A general principle in Kenyan criminal law is that a person is not criminally liable for an offence unless it is proven by concrete evidence that they committed the offence, or omitted to act, voluntarily and with a blameworthy mind; hence the

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