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When can a river sue you? Implementing a rights of nature approach in environmental management

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The court held that the respondents had failed in their duty of failing to stop the processes and activities that contribute to the pollution of the rivers, which infringed on the petitioners' right to a clean and healthy environment.

However, what may have gone unnoticed at the time is the judge's by-the-way statement made as she delivered her judgment. Justice Bor referred to the rights of nature approach adopted by New Zealand in granting the Whanganui River legal personality, and the decision by the Supreme Court of Columbia in recognising that the Amazon River has rights deserving protection. She pointed out that these are some of the creative and effective approaches adopted globally to deal with pollution. While the learned judge did not in this instance recognise the rights possessed by the Nairobi and Athi rivers, her decision points to the increasing awareness of the need to adopt a different approach in protecting the environment.

THE RIGHTS OF NATURE APPROACH

The rights of nature approach propounds that ecosystems should have legal personalities that give them the right to defend themselves against environmental deterioration or climate change. This approach emphasises that ecosystems have the right to flourish and organically evolve without human interference. Early proponents of the rights of nature approach include Christopher Stone, who in his book *Should Trees Have Standing?: Law, Morality and Environment*, suggests that natural resources such as rivers should have the ability to:

- lodge a suit against a polluter in the river's name;
- hold the polluter liable for changing its state from oxygenated to polluted and lifeless; and
- obtain judgment in the river's favour where any monetary sums paid would be used in restoring the river rather than compensating the residents of the area who have been affected by the pollution.

As such, according nature legal personhood signifies that nature has a set of legal rights akin to human rights. However, unlike human rights, the rights of nature do not ascribe civil and political rights but comprise of three main elements: the right to sue and be sued; the right to own property; and the right to enter and enforce legal contracts.

INTERNATIONAL EXAMPLES

Such an approach is increasingly being adopted in different parts of the world. It has been adopted in India where the High Court of Uttarakhand declared the Ganga River and Yamuna River to be living entities with corresponding rights, duties and liabilities to those of a

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living person. The court treated the two rivers as minors and therefore appointed guardians to conserve, protect and preserve them. More recently, in April 2022, the Madras High Court in India held that Mother Nature has all corresponding rights, duties and liabilities of a living person, and should therefore be treated as such. In Ecuador, the constitution provides that nature has the right to integral respect, maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. The Constitutional Court has recognised and upheld the rights of the Los Cedros Forest by revoking mining permits issued to mining corporations to conduct exploratory mining in Los Cedros, arguing that the mining activities threatened the biodiversity and fragile ecosystems of the forest. In this instance, the court called for the adoption of precautionary and restrictive measures to protect the forest.

In Columbia, the courts have declared both the Amazon Forest and the Atrato River to be legal entities with the right to protection, conservation, maintenance and restoration by the state. On its part, New Zealand enacted the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Act) which stipulates that the Whanganui River is a living entity and a legal person. The Act establishes the river's guardian body to act and speak for the river and to promote and protect the environmental, social, cultural, and economic health and well-being of the river. The Act also establishes a strategy group comprising community representatives, local authorities, the Government, commercial and recreational users and environmental groups whose purpose is to act collaboratively to advance the health and well-being of the river.

The guardians administer a fund, Te Korotete, which provides financial support to the well-being of the Whanganui River. In the US, Lake Mary Jane, Lake Hart, the Crosby Island Marsh, and two streams have filed a suit against Orange County, seeking to protect themselves from the rampant construction and development in the region which threatens the ecosystems' existence.

ANTHROPOCENTRISM V BIOCENTRISM

The running theme in India, Columbia, Ecuador, the US and New Zealand in recognising nature's legal personality is the progressive biocentric approach preferred in place of the traditional anthropocentric approach. The differing approaches draw attention to the constant conflict between human beings and the environment. The anthropocentric approach is centred on the belief

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that the earth and everything in it is meant to serve and meet the needs of human beings. Proponents of this approach believe that the earth will and should continually give towards meeting human needs, which justifies any action taken in meeting these needs. As such, all objects in the universe derive their value based on the value they give human beings. The anthropocentric ideology was eloquently captured by Kurt Baier who asserted that, "*the universe was made for the express purpose of providing a stage on which to enact a drama starring Man in the title role.*"

On the other hand, the biocentric approach rejects the idea that human beings have greater value than nature and advocates for the recognition of nature and human beings as having equal value, capable of protection. In contributing to the debate on biocentrism v anthropocentrism, Frederick Ferré commented that, "*the exclusive short-sighted attention to what is good for Homo sapiens has proven ruinous, and promises to inflict even more environmental damage in the future*"

IMPLICATIONS OF A RIGHTS OF NATURE APPROACH

In jurisdictions that recognise the rights of nature, it may be through constitutional guarantee, as in the case of Ecuador. A Statute could also be enacted to grant rights to the natural resource and form a trust, similar to directors in a corporation, to act on behalf of the natural resource. The trust initiates legal suits on behalf of the natural resource and acts solely for the benefit of the resource. The trust receives donations and compensation for violation of rights and uses the money to restore the natural resource.

If adopted in Kenya, for example, the recognition of nature's rights would give nature the locus standi to initiate proceedings on its own behalf. While the Constitution of Kenya has broadened the capacity to bring an action or to appear in court by allowing any person to initiate proceedings in the public interest, this right to sue is often utilised by human beings or corporate entities in seeking compensation for persons affected by pollution or damaged ecosystems, rather than by nature seeking redress for the damage to the natural resource itself. This is not surprising, given that Kenya has not granted nature legal personality.

Granting such legal personality would allow the guardians to any natural resource to initiate proceedings claiming the violation of its right by any entity, placing the natural resource front and centre as an injured party. Where a judgment is issued in favour of a natural resource, trustees can help in ensuring the effective implementation of the award to ensure that the environment

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obtains the benefit provided for in the judgment, with damages in such cases often assessed according to the costs of restoring the ecosystem to its pre-damaged state.

CONCLUSION

In the *Isaiah Luyara Odando* case, Justice Bor directed the respondents to take all practical measures to prevent the pollution of the rivers, to clean up the rivers to free them from any pollution, and to file reports in court every four months showing the water quality samples of the rivers. In making this decision, she was informed by the rights of nature discourse ongoing in various parts of the world.

However, the judge only granted each of the petitioners nominal damages (Kes 10,000.00). Had the rivers sued in their names and prayed for monetary damages, the compensation would likely have been higher. Nonetheless, this decision highlights a growing shift for environmental management in the country, with the likelihood that the global movement witnessed in other countries to accord nature legal personality may be localised as the understanding of the rights of nature concept continues to gain ground. As such, a river in Kenya may not be able to currently sue you, but in time it probably will. Should such a biocentric approach be adopted in Kenya, it would require changes in law to assert the rights of nature, to grant nature personhood, and to ensure nature is truly seen and heard.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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