

CHAPTER ONE: INTRODUCTION

Zimbabwe stands at a crossroads where the imperatives of sustainable development intersect with the urgent need for environmental protection. As a guardian of the Constitution and arbiter of justice, the judiciary plays a pivotal role in navigating this intersection. The judiciary is crucial in interpreting laws and policies impacting sustainable development and environmental protection. In Zimbabwe, the courts must navigate the complex interplay between economic growth, social development, and the preservation of the environment.

Unlike the previous constitution, the 2013 Constitution recognises environmental rights, including the right to a healthy environment.¹ The state, all its institutions and agencies, and every person and juristic person are mandated to “respect, protect, promote and fulfil” the rights in the Bill of Rights.² The Constitution provides for every person’s right to “an environment that is not harmful to their health or well-being”³ and “to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that...secure ecologically sustainable development and use of natural resources while promoting economic and social development.”⁴ The Zimbabwean Constitution, the supreme law of the land, requires all laws and conduct to accord with it.⁵ As the custodian of the Constitution and the supreme law of Zimbabwe, the judiciary is mandated to balance, interpret and expand all incorporated rights provided by section 73.

There is a strong connection between human rights and the environment that demands certain conditions on the ground. Human rights cannot be fully enjoyed without a safe, clean, and healthy environment. Conversely, sustainable environmental protection sets to and must establish respect for human rights.

¹ Sec 73 Constitution of Zimbabwe, 2013.

² Section 44 Constitution of Zimbabwe.

³ Section 73(1) (a).

⁴ Section 73 (1) (b).

⁵ See Section 2 Constitution of Zimbabwe.

The role of the Judiciary in promoting sustainable development was detailed as follows:

Sustainable development is increasingly promulgated in international and national legal contexts, but there is a long way to go in terms of the implementation. The role of the judiciary is thus of the greatest importance. At a national level, the judiciary, is faced with the task of explicating the law of sustainable development, case by case.⁶

Because courts often must balance the competing interests of, on one hand, environmental protection and, on the other, sustainable development, this research seeks to identify the role courts have been playing in Zimbabwe to protect the environment and balancing these intricate economic, social, and environmental aspects based on the various ways they have interpreted environmental rights.

As aptly captured by May and Daly⁷, “claims seeking to vindicate individual rights to a quality environment engender unavoidable challenges. First, courts need to develop or interpret new concepts and vocabulary, determining the scope of “environment” and the measurement of “healthy” or “quality”, for instance.⁸ So, balancing socio-economic development with environmental protection remains a delicate task. The judiciary’s role in environmental protection extends beyond legal interpretations. To balance environmental protection and development imperatives, courts must grapple with language and conceptual issues related to environmental rights. For instance, defining terms like “environment”, “healthy”, or “well-being” within environmental conservation can be complex. So, Critical Discourse Analysis (CDA) offers a comprehensive tool for analysing the complex interplay of language, power, ideology, and law. It is particularly suited for examining how Zimbabwe’s judiciary navigates the delicate

⁶ S Gupta S in “The Role of Judiciary in Promoting Sustainable Development: Need of Specialised Environment Court in India” *Journal of Sustainable Development* Vol 4, No 2; April 2011 at page 249.

⁷ J R. May & E Daly, *Global Judicial Handbook on Environmental Constitutionalism*, United Nations Environment Programme (UNEP), 2019.

⁸ May and Darly (n.7 above).

balance between the imperatives of sustainable development and the need for environmental protection.

It is against the background that environmental protection and sustainable development are pressing global concerns, and Zimbabwe is no exception. Sustainable development acts as both a pivotal point of orientation of environmental law and policy and as a *grundnorm* that anchors and orientates global environmental governance.⁹ Since its inception in the mid-1970s, sustainable development has drawn a lot of attention from environmental and supranational organisations, such as the United Nations and the European Union (EU)¹⁰. The Brundtland Commission¹¹ defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Environmentalists anticipated a shift in policy and law-making that would balance present and future needs by accounting for environmental externalities resulting from economic development.¹² They hoped that the concept of sustainable development would spawn legal rules and principles that would resolve legal disputes without sacrificing the interests of either the environment or development.

Before the 2013 Constitution, Murombo¹³ highlighted how constitutional protection of environmental rights was one of the key strategies towards achieving sustainable development and environmental protection in developing countries. In 2013 the enacted Constitution provided for environmental rights. However, the intricate

⁹ Kim, Rakhyun E., and Klaus Bosselmann, International environmental law in the Anthropocene: towards a purposive system of multilateral environmental agreements. *Transnational Environmental Law*, 2013, 2 (2): 285–309. <https://doi.org/10.1017/S2047102513000149>.

¹⁰ Luis A. Avilés, Sustainable development and the legal Protection of the Environment in Europe, *Sustainable Development Law & Policy* 12, no. 3, 2012.

¹¹ See WCED. 1987. *Our common future*. Oxford: Oxford University Press.

¹² Avilés (n.9 above).

¹³ T. Murombo, 'Balancing Interests Through Framework Environmental Legislation in Zimbabwe', in M. Faure and W. du Plessis (ed.), *The Balancing of Interests Through Framework Environmental Legislation in Africa* (PULP, 2011).

relationship between environmental protection, sustainable development, and the legal framework in Zimbabwe is multifaceted. Environmental rights present a dense body of rules, principles, ideals, and concepts that are complex and ambiguous. The conceptual and legal foundations for protecting environmental rights and strategies for sustainable development are not always clearly defined and understood, making this a critical yet complex subject. Environmental rights encompass the entitlements of individuals and communities to a healthy environment. These rights recognise that a clean and safe environment is essential for human well-being and dignity. It provides citizens the right to an environment that is not harmful to their health and well-being. This includes access to clean water, clean air and the conservation of natural resources.

While entrenching environmental rights in the constitution is essential, their efficacy hinges on several factors, such as context, good governance and effective implementation and enforcement of environmental laws. Globally, ideas of Environmental Rule of Law (EROL),¹⁴ environmental constitutionalism¹⁵ and environmental justice,¹⁶ thought to be prerequisites for stronger environmental law have gained traction. As Soyapi¹⁷ illuminates, courts can enforce the rule of (environmental) law to achieve environmental sustainability. They could, for example, use the idea of EROL as a yardstick against which to measure environmental decisions and enforce environmental rights. In this view, any effort to protect the environment and fulfil environmental rights must operate within and enforce EROL. Environmental laws must be effectively implemented and enforced to

¹⁴ UNEP, Environmental Rule of Law, 2013: The environmental rule of law is a set of principles that focus on strengthening environmental laws and decision-making.

¹⁵ See James R. May & Erin Daly, Global Judicial Handbook on Environmental Constitutionalism (3rd Edition), Environmental constitutionalism is a legal concept that recognizes the environment as a subject of constitutional protection and courts as a means of enforcing it.

¹⁶ W. Bowen, An Analytical Review of Environmental Justice Research: What do we really know, 2002.

¹⁷ BC Soyapi, The Judiciary and Environmental Protection in Zimbabwe, *Human Rights and the Environment under African Union Law* (2020): 349-379.

translate constitutional provisions into tangible outcomes. However, in practice, implementing environmental rights like many other rights has been hindered by a lack of resources, weak institutional capacity, lack of political will and competing interests. The social, economic, cultural, and political context significantly influences the impact of environmental rights.

How sustainability and environmental issues are discussed can influence the interpretation and implementation of laws. Despite the constitutional provisions, there are challenges in judicial decision-making related to environmental protection. There is a lack of scholarship critiquing the development of environmental rights in relation to the courts' work and the state of environmental degradation in Zimbabwe. This discussion delves into the evolution of environmental jurisprudence in Zimbabwe post-2013, examining the extent to which the judiciary has upheld environmental rights in the face of developmental challenges.

The problem statement is that, while policy and legal frameworks are in place to conserve the environmental resource base, the nation continues to suffer from severe environmental problems that range from deforestation, soil erosion, and land and wetland degradation¹⁸. A mere focus on the gaps in policy implementation and practice is less useful without questioning the existence of the policies and regulations whose interpretation and implementation are often caught up in a web of political interactions, ambiguities and paradoxes as diverse stakeholders seek to represent their interests in the use of natural resources. In this respect, the judiciary is considered the "ultimate vanguard" of environmental rights. The courts in Zimbabwe have adjudicated cases related to the right to a healthy environment. However, one area of increasing importance, but comparatively little explored, is critiquing the development (or lack thereof) of this right in

¹⁸ Murombo (n.13 above).

relation to the judiciary. Despite the constitutionalisation of environmental rights in the 2013 Constitution, the practical enforcement and development of these rights through judicial decisions remain underexplored. There is a discernible gap in how judicial decisions, legal frameworks and the judiciary's institutional behaviour influence Zimbabwe's trajectory towards sustainable development in the context of environmental protection.

Considering this, the aims and objectives of this discussion are to explore how Zimbabwe's judiciary has balanced the intersection of environmental protection and sustainable development. This research examines the evolution of environmental rights within Zimbabwe's legal framework and conceptualises environmental protection and sustainable development as entrenched within this right. This entails exploring how the Zimbabwean judiciary interprets the constitutional mandate for environmental protection in the context of sustainable development. The study critically evaluates how Zimbabwe's judiciary has adjudicated cases related to environmental protection and sustainable development. The question becomes, how have environmental protection and sustainable development principles been integrated into Zimbabwe's judicial decision-making process? The discussion also examines how the courts have attempted to balance the interests of environmental protection and sustainable development in their rulings, and the challenges faced by the judiciary in balancing environmental protection and economic development.

This backdrop provides a strong legal framework for examining how the judiciary interprets and applies these rights. Zimbabwe's 2013 Constitution mandates the state, its institutions, and all persons to respect, protect, promote, and fulfil the Bill of Rights that includes environmental rights.¹⁹ In this context, understanding the legal foundations and practical implications of environmental rights

¹⁹Section 44 Constitution of Zimbabwe.

becomes essential. Over the years, there have been many calls for greater recognition of environmental human rights within international human rights law, particularly for the proclamation of a good environment. Law creators and nation-states can respond to these calls by modifying existing laws and the courts through their interpretation of laws. This research argues that legal and pragmatic issues must be considered in determining how environmental rights should be constructed and construed. Particular care is required to ensure that the rights are meaningful and do not undermine the integrity of the fundamental human rights framework.

It is essential to recognise the judiciary's role in adjudicating the right to a healthy environment and the challenges it faces within Zimbabwe's governance setting. The judiciary plays a crucial role in interpreting laws. It can either advance or hinder sustainable development goals. Balancing competing interests in environmental protection and development is crucial for a country where a large proportion of the population relies on natural resources for their livelihood. Adopting sound laws can lead to sustainable development that advances the economy without regressing on the protection of the environment. By interpreting and enforcing environmental laws, the judiciary contributes to achieving both environmental justice and sustainable development.

Sustainable management, protection and utilisation of natural resources are prerequisites for promoting other human rights. Without effective stewardship, a country may struggle to fulfil socio-economic rights that depend on resource availability. Environmental rights directly impact the fulfilment of socio-economic, cultural and political rights. Examining the intersection of law, governance and natural resource management sheds light on a more sustainable and ecologically responsible future. Recognising this interdependence is crucial for holistic development. How Zimbabwean courts navigate the

delicate balance between environmental protection and sustainable development sheds light on the judiciary's challenges in upholding citizens' right to a healthy environment. By dissecting the judiciary's discourse, the research aims to reveal the underlying values, priorities and power dynamics that shape judicial decisions. A CDA approach is an opportunity to explore the intersection of law, language and environmental ethics in a critical and evolving context. It provides valuable insights into environmental protection and sustainable development's legal, social, and political dimensions. Given the global importance of environmental protection and sustainable development, the study could contribute to the broader discourse on global environmental constitutionalism by examining how Zimbabwe's judiciary aligns with global trends in constitutional environmental rights and protection measures. Understanding the effectiveness of the judiciary in environmental matters can directly impact the quality of life for Zimbabweans, ensuring their right to live in a clean and healthy environment.²⁰

The methodology used in this research is desktop-based and entails the study of primary and secondary literature relevant to the topic. Data was collected from various sources, including legal documents, court cases, policy papers, and interviews with legal experts, environmentalists, and other stakeholders in Zimbabwe. The research methods to be adopted are descriptive and doctrinal analysis. Critical discourse analysis (CDA) is used to analyse the data.

CDA is a methodological approach that examines how language or communicative events such as (procedures, proceedings, trials and measures) enact, confirm, legitimate, reproduce, or challenge ideologies within a society. It involves a detailed examination of the legal texts, judicial decisions and other relevant communicative texts to

²⁰ T Madebwe, *A rights-based approach to environmental protection: The Zimbabwean experience*, 2015.

understand how the judiciary interprets and applies laws related to environmental protection and sustainable development. Critical analysis of environmental protection and sustainable development discourses in Zimbabwe particularly within the legal field, is a significant endeavour. Specific cases were selected and analysed, highlighting the reasoning and outcomes of these cases to understand how the judiciary interprets and applies the law. Despite the constitutional recognition of environmental rights, there is limited scholarship and commentary on the right to a healthy environment in Zimbabwe. Most existing commentaries focus on constitutionalisation or mechanisms for environmental protection rather than critiquing the development (or lack thereof) of the right within the courts' work. Consequently, there is a dearth of analysis regarding how the courts have adjudicated the right to a healthy environment and the challenges they face in doing so.²¹

Scholars such as Murombo and Soyapi highlight how Zimbabwe's history of colonialism includes a development model skewed toward economic progress at the expense of the environment.²² After gaining independence in 1980, the country briefly transitioned to being the "bread basket" of Southern Africa. However, subsequent challenges led to a shift from development to misrule and confusion and these have made Zimbabwe to be referred to as a "basket case"²³. Despite these setbacks, Zimbabwe still possesses abundant natural resources, including minerals, agriculture, water, and wildlife. Approximately 70% of Zimbabweans live in rural areas, relying on these resources for their livelihoods.²⁴ Environmental degradation, driven by factors such as deforestation, soil erosion and pollution, poses a significant threat to

²¹ Soyapi (n.17 above).

²² Murombo (n.13 above) and Soyapi (n.17 above).

²³ I Scoones, Zimbabwe's agricultural sector goes from 'bread basket to basket case'? Or is it (again) a bit more complicated? 2013.

²⁴ N. N. Wekwete, Population and the Environment in Zimbabwe: The Case of Rural Households, 1995.

the country's natural resources and ecosystems. At the same time, Zimbabwe is striving to achieve sustainable development goals that promote economic growth, social inclusion, and environmental sustainability. Balancing these competing priorities necessitates a nuanced understanding of the interconnectedness between environmental conservation efforts and development initiatives.

Achieving sustainable development requires harmonising economic, social and environmental protection. In Southern Africa, particularly Zimbabwe, this balance has been challenging. Zimbabwe's legal landscape has also grappled with balancing economic development and environmental conservation. The compound effect of different factors—ranging from resource extraction to development needs, has influenced environmental conservation efforts. Understanding the judiciary's role in safeguarding environmental rights is crucial for sustainable development in the nation. As Gubbay ACJ comments in the *Zimnat Insurance Co Ltd v Chahwanda* case, “Today the expectations amongst people all over the world, and particularly in developing countries, are arising ...the Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.”²⁵ Though he was commenting in the context of labour rights, his assertion is relevant in expanding environmental rights which have been regarded as embracing human rights. Gubbay expands on how the judiciary has an “opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country.”²⁶ Murombo²⁷ consents that “the efficacy of environmental rights is dependent on many variables which could include a country’s politics, the absence or presence of the rule of law, and the implementation and enforcement of environmental law”. As Hunter *et al.* assert:

²⁵ *Zimnat Insurance Co Ltd v Chahwanda* 1990 (2) ZLR 143 (S).

²⁶ *Ibid.*

²⁷ Murombo (n.13 above).

[F]ailure to protect and promote human rights prevents progress towards environmental protection and sustainable development ... It is no accident that where the environment has been most devastated from large uncontrolled development projects, human rights abuses are the most severe.²⁸

Legal discourse is situated within specific social contexts, and heightened attention is paid to those questions foundational to law, “democracy, equality, fairness, and justice.”²⁹ Examining court decisions enables exploring the tensions between economic interests, environmental concerns and human rights. Such an analysis would contribute to a deeper understanding of the judiciary’s role in shaping environmental policy and practice in Zimbabwe.³⁰ By critically analysing discourse, we gain a deeper understanding of environmental protection and its complexities. CDA helps identify gaps or inconsistencies in the language used and how it affects the implementation of environmental policies.

The rule of law is pre-eminent to achieving environmental protection and sustainable development. In the legal context, judges being such an important part of the legal establishment – must necessarily be sensitively involved in the progressive realisation of rights. The legal profession, in general, assumes a particular responsibility to ensure a balance of powerful and not-so-powerful or even voiceless (and powerless) interests. How they interpret laws and give them effect is critical in safeguarding the interests of future generations, ecological systems and the poor. The principles enshrined in environmental rights, that is, well-being, a healthy environment, environment conservation, and sustainable development, can in this case be a working tool for transforming and reforming the legal system. There is a need to elevate the standing of the principles of protecting the

²⁸ D Hunter *et al International environmental law and policy* (2002) p.1281.

²⁹ B McKenna, “Critical discourse studies: where to from here?” *Critical discourse studies* 1, p9.

³⁰ Soyapi (n.17 above).

environment while also giving precedence to health and well-being by moving them up the hierarchy of legal norms and principles. This prevents them from being lightly brushed aside by political, commercial or other interests that seek to advance 'development' at the cost of a healthy environment and the well-being of all. The legal aspects of environmental protection can promote equitable and sustained economic growth while safeguarding our natural resources.

Though most cases brought before the courts regarding environmental degradation and pollution involve mining, this analysis will not delve much into mining issues and cases. This is because mining cases are intricate and multifaceted, involving various legal, economic, social, political, and environmental dimensions. While mining cases are essential, analysing judicial decisions across other environmental contexts, especially on wetlands, provides a holistic view of discourse issues also applicable to mining cases. Mining often intersects with economic interests, corporate influence and political considerations that might distract the focus of this discussion on discourse.

Chapter 1: Introduction

This is generally the introduction. It encompasses the background of the study, the research questions, the research objectives and methodology, and gives a brief outline of each chapter.

Chapter 2: Historical Context and Legal Framework for Environmental Protection and Sustainable Development

Chapter 2 traces the evolution of environmental rights, policies and legislation in Zimbabwe. It examines the historical context and relevant statutes, regulations and constitutional provisions.

Chapter 3: Conceptual Framework: Environmental Rights, environmental protection and sustainable development

This Chapter provides an overview of the conceptual and theoretical underpinnings of environmental rights and sustainable development

and how they relate to Zimbabwe's legal context. It integrates the role of the judiciary and underpinning principles in adjudication.

Chapter 4: Judicial Adjudication: A Critical Analysis

This Chapter examines specific legal cases related to environmental protection and sustainable development. It explores court decisions, precedents, and their impact on policy and practice. It illuminates the inherent challenges and the gaps which hinder the effective implementation of environmental rights and laws.

Chapter 5: Conclusion

In Chapter 5, the key findings and insights in this research will be summarised. The discussion is concluded by providing some recommendations and innovative approaches to enhance sustainable development through legal frameworks.

This chapter sets the stage for a comprehensive exploration of the judiciary's role in environmental governance, providing a foundation for further research and discussion on this critical topic. Environmental rights as constitutional rights seek to enhance environmental protection, a healthy environment for all, and sustainable development practices. Enhancing broader discourses on balancing economic growth with ecological well-being is critical in ensuring Zimbabwe's natural resources benefit both present and future generations⁶. The research could potentially fill a gap in the literature and offer a nuanced perspective on the challenges and opportunities within Zimbabwe's legal framework relating to environmental rights.