

### **CHAPTER 3: CONCEPTUAL FRAMEWORK: ENVIRONMENTAL RIGHTS, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT**

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The discussion in this chapter integrates theoretical perspectives underpinning this research with empirical examination of issues, allowing for a comprehensive analysis of how the judiciary interprets and applies laws related to sustainable development and environmental protection. Establishing the conceptual framework enables critical analysis of the extent to which the judiciary's decisions align with the principles of sustainable development and whether they effectively protect the environment while allowing for economic growth. In light of this research, the chapter illuminates the judiciary's role and how it (can) exercise its function within the context of environmental rights that are multi-layered and characterised by legal ambiguity. The ambiguity arises due to the complex, interdisciplinary nature of environmental issues such as sustainable development and health and wellbeing. Overall, the ambiguity in environmental laws stems from the need to balance environmental protection with political, economic and social interests. The evolving nature of definitions, scientific understanding and the differing priorities between actors and stakeholders make environmental rights fluid and amenable to divergent interpretations.

The judiciary's role in interpreting and applying the law within this discourse is crucial, as it can set precedents that either advance or hinder environmental justice and sustainable practices. This chapter explores the matters constituting environmental rights that the judiciary must consider and deal with in adjudicating environmental cases and making decisions. It reflects on some challenges that the principles of sustainable development and environment pose that contribute to or hinder the realisation of these goals in practice.

The discourse on environmental rights and sustainable development is topical in the legal field, globally. As Latour states, “law has a homeostatic quality which is produced by the obligation to keep the fragile tissue of rules and texts intact”.<sup>63</sup> The homeostatic quality means that law is like a finely tuned biological system, as human bodies strive to maintain internal stability while adapting to external changes. This delicate balance is maintained by the obligation to preserve the fragile tissue of rules and texts. This quest for balancing principles has been evident in cases such as *The Conservation Society of Monavale (COSMO) Trust and Others v. City of Harare and Others* case,<sup>64</sup> (hereafter referred as the COSMO case). This case aptly demonstrates the precautionary principle at the core of sustainable development. This principle asserts that when faced with serious or irreversible threats to human health or the ecosystem, scientific uncertainty should not be used as a reason to postpone preventive measures. In other words, even if people should prioritise taking precautionary actions to prevent harm.

The legal framework seeks equilibrium through its intricate interplay of norms and regulations.<sup>65</sup> However, the functional and compulsive nature of legally balancing environmental protection and ensuring an environment that caters for health and well-being remains partially veiled.<sup>66</sup> Like the intricate balance of systems in our bodies, the true essence of law’s balancing effect lies in paying attention to the unseen connections and all variables highlighted in environmental rights—a delicate composition that sustains order and justice. It is critical to bear in mind that even the most intricate systems have their vulnerabilities. Environmental protection often requires balancing trade-offs; for

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<sup>63</sup>In L Bruno, *The Making of Law: An Ethnography of the Conseil d’Etat* (Cambridge: Polity Press, 2010) 242–3.

<sup>64</sup> [ACC 22/18] [ACC 91/18] (18-AC-022).

<sup>65</sup> P W Birnie, & Boyle, A E, *International Law and the Environment* (2nd edition), 2002.

<sup>66</sup> R S, Dimitrov, “The Paris Agreement on Climate Change: Behind Closed Doors”, 2016, 16(3), *Global Environmental Politics*.

instance, conserving a forest might conflict with economic development.<sup>67</sup> Failure to interpret and expand principles of environmental law and environmental rights can represent a breach in the legal fabric.<sup>68</sup> The interpretation and expansion of environmental law principles play a pivotal role in shaping legal frameworks that safeguard the planet.<sup>69</sup> Environmental principles are omnipresent but often nebulous. Their content remains abstract until clearly unpacked and contextualised within specific legal cultures.<sup>70</sup> The essence of law's resilience lies in its ability to adapt and evolve to protect human values and address changing societal needs over time.

Zimbabwe's Constitution<sup>71</sup> provides for the setting up of the judiciary and the courts. The Constitution states that judicial authority is derived from the people of Zimbabwe.<sup>72</sup> Section 342 (1)<sup>73</sup> gives "[a] power, jurisdiction or right" conferred by the Constitution to be exercised, and "a duty imposed" by the Constitution "must be performed, whenever it is appropriate to do so." Section 143 (2) and 3 expand that "All institutions established by this Constitution have **all** powers necessary for them to fulfil their objectives and exercise their functions" and "Where a power, jurisdiction or right is conferred by this Constitution, any other powers or rights that are reasonably necessary or incidental to its exercise are **implied conferred** as well." (*Emphasis mine*). In Zimbabwe, the judiciary exercises its functions within the framework of a unitary, democratic, and sovereign state provided for in Chapter 8. The Constitution outlines the separation of power, and government functions into three arms: the legislature, the

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<sup>67</sup> Madebwe (n.20 above).

<sup>68</sup> J Nel & du Plessis, W, "An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation", 2008, *South African Journal of Environmental Law and Policy*.

<sup>69</sup> Tsabora (n.37 above).

<sup>70</sup> Birnie & Boyle (n.65 above).

<sup>71</sup> Chapter 8 Constitution of Zimbabwe.

<sup>72</sup> Section 162.

<sup>73</sup> Constitution of Zimbabwe.

executive, and the judiciary and outlines how each arm exercises specific functions within constitutional limits to ensure a balance of power and independence. The judiciary's authority, composition, independence and guiding principles are all provided for in sections 162, 163, 164 and 165 of the Constitution, respectively. So, by fulfilling their roles, overarched by the guiding principles, the judiciary in Zimbabwe can ensure that legal frameworks for environmental protection are implemented effectively and contribute to advancing the country's sustainable development goals.

Judicial independence is guaranteed in section 164(1) which provides that "courts are independent and only subject to the Constitution and the law, "which they must apply impartially, expeditiously and without fear, favour or prejudice". Independence, the impartiality of the courts are deemed central to the rule of law and democratic governance. In light of this, "neither the State nor any institution or agency of the government at any level, and no other person may interfere with the functioning of the courts."<sup>74</sup> The state is required, through legislative and other measures, to "assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness" and "to ensure that they comply with the set principles set out in section 165."<sup>75</sup> The judiciary should exercise authority guided by the principle that "justice must be done to all, irrespective of status"<sup>76</sup>, "justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness"<sup>77</sup>; and that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law."<sup>78</sup> Consequently, the rule of law serves as the benchmark by which courts evaluate acts pertaining to preserving, observing,

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<sup>74</sup> Section 164(2).

<sup>75</sup> Constitution of Zimbabwe.

<sup>76</sup> Section 165 (1) (a).

<sup>77</sup> Section 165 (1) (b).

<sup>78</sup> Section 165 (2).

advancing, and fully realising environmental rights. In section 165 (2), members of the judiciary are mandated to “respect and honour their judicial office as a public trust” and to “strive to enhance their independence to maintain public confidence in the judicial system”. The judiciary also plays a crucial role in upholding human rights and ensuring that laws are applied consistently across the country. The courts can oversee government actions to ensure they comply with environmental laws and policies. This includes reviewing decisions made by environmental agencies and holding them accountable for their actions.

Section 46 mandates courts, when interpreting the Declaration of Rights,<sup>79</sup> to “give full effect to the rights and freedoms enshrined in this Chapter”<sup>80</sup> and “must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom.”<sup>81</sup> This means that when interpreting constitutional provisions related to environmental rights, courts should give full effect to these rights. This implies that to protect the environment and advance sustainable development; they should interpret these rights broadly rather than narrowly or limiting their reach.

As a demonstration of how the judiciary is supposed to stay abreast with national and international developments and adopt international best practices, members of the judiciary are mandated to “take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular, must keep themselves abreast of developments in domestic and international law.”<sup>82</sup> This arguably reveals how the drafters of the Constitution were aware that, in a more globalised world, legal changes depend not just

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<sup>79</sup> Chapter 4 Constitution of Zimbabwe.

<sup>80</sup> Section 46 (1) (a).

<sup>81</sup> Section 46 (1) (b).

<sup>82</sup> S 165(7) of the Constitution.

on local developments but also on developments in other countries and international jurisdictions.<sup>83</sup> Such provisions encourage judges to engage in comparative borrowing.

Environmental rights and sustainable development are two concepts that are closely intertwined. Environmental rights are the rights of individuals and communities to a healthy environment, while sustainable development refers to the development that meets the needs of the present without compromising the ability of future generations to meet their own needs<sup>84</sup>. The 2013 Constitution introduced an environmental rights clause which was absent in the previous Lancaster House Constitution. This novel clause reflects the country's aspirations in environmental governance and establishes a solid foundation for an integrated environmental framework.<sup>85</sup>

The environmental rights clause encompasses several essential principles. It encompasses the proclamation of human rights related to the quality of environmental conditions. The interplay between human rights and the environment is profound. A safe, clean, and healthy environment is essential to enjoy human rights, while sustainable environmental governance relies on respecting rights provided in the Constitution. The Constitution<sup>86</sup> guarantees a healthy environment, not harmful to their well-being, to every person in the first part, and the second part mandates the State to have the environment protected through reasonable legislation to ensure compliance with the first part. The State is prohibited from infringing on the right to environmental protection and is further required to ensure ecologically sustainable development of natural resources while promoting economic and social development.

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<sup>83</sup> Soyapi (n.17 above).

<sup>84</sup> See WCED (n.10 above).

<sup>85</sup> Tsabora (n. 37 above).

<sup>86</sup> Constitution of Zimbabwe.

Health relates to human health that goes beyond physical to include mental and physical integrity, amongst other things.<sup>87</sup> The World Health Organisation (WHO) defines health as “complete physical, mental and social well-being.”<sup>88</sup> From this perspective, it is submitted that section 73 seeks to ensure that the environment is maintained in ways that enable people to live and work under conditions that do not compromise their physical health (or cause physical harm, injury or disease), mental and social well-being. Environmental rights provide that certain situations, such as exposure to dangerous substances or air pollution and the use of contaminated water supplies for household use, could be detrimental to an individual's health or the health of the general public. In this situation, it is possible to interpret the right to a healthy environment as being closely related to the provision of essential municipal services, such as roads, waste management, drainage, and the supply of clean, drinkable water and sanitation.<sup>89</sup>

The constitutionalising of environmental rights aligns with the broader concept of the Environmental Rule of Law (EROL). EROL emphasises the importance of environmental rights as part of the overall rule of law framework.<sup>90</sup> Zimbabwe's commitment to environmental rights underscores the nation's dedication to sustainable development, public well-being, and responsible resource management. As Malaba enunciates:

All States in the modern world are based on the rule of law and they have a constitutional obligation to promote and protect the abovementioned fundamental rights. The Judiciary, as an organ of State, plays a central role in the realisation of sustainable development and hence funds must be provided to it to enable it to properly discharge its functions.

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<sup>87</sup> Ibid.

<sup>88</sup> Preamble to the Constitution of WHO, 1978.

<sup>89</sup> L K Masekesa, A human rights-based approach to implementing Target 11.6 of Sustainable Development Goal 11 in Zimbabwe, *African Human Rights Law Journal*, 2022.

<sup>90</sup> Ibid.

The development of environmental rights in a proper legal framework enables citizens of a nation to enjoy the right to a safe and healthy environment and to effectively participate in the sustainable and equitable exploitation of natural resources and their conservation. Social welfare issues must be addressed to protect environmental rights, and economic disparities must be lessened. The legal and intellectual underpinnings of the constitutional protection of environmental rights are not always well understood, even though it is one of the most important tactics for attaining sustainability in developing nations.<sup>91</sup> One reason sustainable development is not easy to reconcile is its ambiguity. The ambiguity makes it difficult to “derive legal norms or rules that create duties or obligations subject to review by courts.”<sup>92</sup> The Zimbabwean Constitution's vision of environmental rights which includes sustainable development, provides a rationale for the increased awareness of the need to protect the environment without impeding reasonable socioeconomic development. Environmental protection has mostly been subordinated to developmental goals. The essence of the environmental issue lies in the notion that “this planet is fragile and its inhabitants are vulnerable.”<sup>93</sup> Environmental regulation is an important means of addressing environmental challenges. The purpose of the legal system is to safeguard individuals, society, and the environment.

Sustainable development is dependent on environmental protection. It is made possible by preserving biodiversity, safeguarding wetlands, preventing environmental pollution, and promoting ecological equilibrium. It is imperative to protect the environment because balancing food security with sustainable land use practices remains a

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<sup>91</sup> Murombo (n.13 above).

<sup>92</sup> L. A. Avilés, "Sustainable Development and the Legal Protection of the Environment in Europe." *Sustainable Development Law & Policy* 12, no. 3 (2012):29-34, 56-57.

<sup>93</sup> Rekacewicz, Introduction, in – *Planet in Peril: An Atlas of Current Threats to People and Environment*, UNEP/ GRID-Arendal and Le Monde Diplomatique, Paris. 2006.



priority. Zimbabwe's agrarian economy relies heavily on agriculture. Responsible mining practices are crucial. Mineral extraction contributes significantly to the economy but poses risks to ecosystems. Deforestation, driven by logging and agriculture, threatens Zimbabwe's unique flora and fauna, so conservation efforts are essential.

The theories of sustainable development and environmental protection are deeply intertwined. They focus on balancing meeting human needs and preserving the environment for future generations. Sustainable development has evolved to include a range of goals, from the sustainable use of natural resources to broader objectives like the Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs). Sustainability advocates for the preservation of natural capital. Malaba defined that:

Sustainable development refers to maintaining a delicate balance between the human need to improve lifestyles and preserving natural resources and ecosystems, on which future generations depend. In short, it is development which meets the present needs without compromising the ability of future generations to meet their needs. It aims at striking a balance between human needs and environmental protection. Sustainable development is the well-being of mankind. It integrates three activities; that is, a) economic growth, b) social development, and c) environmental protection.<sup>94</sup>

Inherent in the conceptualisation of sustainable development is the integration of environmental, economic and social objectives. Integration is the process of 'mak[ing] whole or becoming complete; bring[ing] (parts) together into a whole ... remov[ing] barriers imposing segregation'.<sup>95</sup> The need to integrate many components of sustainable development typically refers to the legislative, executive, and judicial branches' requirements to make sure that social and

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<sup>94</sup> L Malaba, "Opportunities and Challenges Facing the World's Courts", Presentation at the International Association For Court Administration Conference In Nur-Sultan, Kazakhstan, 2019.

<sup>95</sup> C Voigt, Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law, 2009.

economic interests—where they are represented—do not come before environmental concerns. The conventional opinion is to give equal weight to the diverse parts. Because of this, integration is seen as a delicate balancing act with purportedly inevitable trade-offs, often on the environmental side.

Some trade-offs cannot be made without rendering the outcome unsustainable. While it is undeniable that sustainable development depends on striking a balance between environmental, economic, and social elements, in the absence of conceptual clarity, equal treatment can be no more than an illusory or idealised goal. Understanding how the courts interpret and protect the right to a healthy environment is essential. It gives insight into these issues and hindrances that impede the balancing of environmental rights variables. Hindrances include inherent ambiguities in the discourse, contextual factors and governance issues.

In most cases, especially in Zimbabwe, business profit and considerations are made vis-à-vis environmental and social concerns. Mubonderi illuminates how the 'new' government's "Zimbabwe is open for business" call has had negative impacts on environmental protection as it has exacerbated environmental degradation and land pollution associated with the expansion of agricultural, mining, and entrepreneurial activities.<sup>96</sup> Mafo and Iliff<sup>97</sup> highlight how Zimbabwe Lawyers of Human Rights (ZLHR) and Zimbabwe Environmental Lawyers Association (ZELA) increasingly must deal with challenging mining activities in National Parks and Wilderness Areas such as Chimanimani, Hwange and Mavuradonha. Unfortunately, the Mines and Minerals Act, Parks and Wildlife Act and the National Museums

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<sup>96</sup> J Mubonderi, Environmental Protection and Economic Development in Zimbabwe, *Journal of Environmental and Public Health*, 2023, <https://doi.org/10.1155/2023/3232851>.

<sup>97</sup> M Mafo and F Iliff, "An Overview of Environmental Rights Litigation in Zimbabwe", *Public Interest Litigation and Social Change In Zimbabwe*, ZLHR, 2021.

and Monuments Act<sup>98</sup> do not prevent mining activities in these protected areas that may be authorised in terms of a special grant authorised by the President. Such grants are increasingly being given to foreign companies. One example is the case of *ZELA & Fidelis Chima v Zimbabwe Mining Development Corporation (ZMDC), Zhongxin Mining Group Tongmao Coal Company, Minister of Mines and Minister Development & the Environmental Management Agency*<sup>99</sup> to challenge coal mining in Hwange National Park without an EIA, but the matter was struck off the roll for non-citation of the President and the Minister of Environment, Tourism and Hospitality Industry.

Sustainable development has been recognised widely both by international and national legislatures and jurisprudential practice.<sup>100</sup> This general recognition of its normative content can be understood as forming an *opinio juris communis*. The normative force of sustainable development, balancing the environmental, economic and social interests, must be exercised in dispute resolution. In this respect, there is agreement that in the hands of judges, the principle 'could operate as some sort of "intervening principle" mediating between potentially conflicting rules or principles'. The written law is "corrected" by legal principles. Giving effect to environmental protection legal principles bridges the gap between the 'law as it is' and the 'law as it ought to be'. It gives vitality to environmental rights.

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<sup>98</sup> Mines and Minerals Act [Chapter 21:05], Parks and Wildlife Act [Chapter 20:14] and the National Museums and Monuments Act [Chapter 25:11].

<sup>99</sup> *ZELA & Fidelis Chima v Zimbabwe Mining Development Corporation (ZMDC), Zhongxin Mining Group Tongmao Coal Company, Minister of Mines and Minister Development & the Environmental Management Agency*.

<sup>100</sup> Portugal was the first country to enshrine the right to a healthy environment in its constitution in 1976, South Africa's National Environmental Management Act recognises the importance of sustainable development and environmental rights, Brazil has made efforts to incorporate environmental rights into its legal framework, although challenges remain in enforcement, India has recognised environmental rights in its constitution and has passed various laws to promote sustainable development. See 'The Right to a Healthy Environment', IUCN, The Right to a Healthy Environment | IUCN

Sustainable development is partly influenced by the urgency of the law to respond effectively to environmental needs. A 2017 report<sup>101</sup> identifies correlations between improved court efficiency and the economy's growth rate and between businesses' perceptions of judicial independence and productivity growth.<sup>102</sup> As Malaba elucidates, "A well-functioning judicial system also underpins economic development."<sup>103</sup>The lawmakers, judiciary and policy-makers "may have embraced principles of sustainable development, but they have been reticent to explicate their meaning, circumstances of application and precise details of the means of implementation".<sup>104</sup>The judiciary, therefore, is faced with the task of explicating the law of sustainable development in respective cases.

In Zimbabwe, just like in many other countries, such as South Africa, Germany and India, national constitutions and laws confer authority upon the state to undertake various measures to direct executive decision-making in the direction of sustainable development. Given these ambiguous and often conflicting principles, it is reasonable to draw some conclusions when the legal principle of sustainable development is applied to the resolution of disputes. The next section considers how the Zimbabwean courts have or have attempted to articulate the elusive principle of sustainable development when resolving environmental disputes. The legal and regulatory responses to environmental degradation have implications for the broader substantive and systemic principles and processes of law.

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<sup>101</sup> Joint Research Centre of the European Commission.

<sup>102</sup> "The Judicial System and Economic Development Across EU Member States", JRC, available at: <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC104594/jrc1045>.

<sup>103</sup> Malaba (n.87 above).

<sup>104</sup> R Kumar, Judicial Recognition for Sustainable Development in India, 2018 JETIR November 2018, Volume 5, Issue 1.