

BALANCING OF SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL PROTECTION IN ZIMBABWE: *A Judiciary Perspective*



Tsiidzai Matsika

Balancing of Sustainable Development and Environmental Protection in Zimbabwe: A Judiciary Perspective

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BOOK SYNOPSIS

Zimbabwe's judiciary is pivotal in shaping the country's approach to sustainable development and environmental protection. This study employs critical discourse analysis to examine how the courts have adjudicated the right to a healthy environment within Zimbabwe's governance setting. Specifically, it explores the hindrances faced by the judiciary in upholding environmental rights and reviews the development (or lack thereof) of these rights in relation to court decisions. Zimbabwe's colonial period was marked by an economic development model often prioritising economic growth over environmental conservation. However, after gaining independence in 1980, Zimbabwe was recognised as a regional agricultural powerhouse. Despite subsequent challenges in the postcolonial era, the country still relies heavily on its extensive natural resource base, including minerals, agriculture, water resources, and wildlife. The 2013 Constitution recognises environmental rights as part of the Bill of Rights, binding the executive, legislature, and judiciary to uphold and protect these rights. This research employs a critical discourse analysis, examining court decisions, legal frameworks, and ideologies shaping the judiciary's environmental protection approach. By analysing judgments, legal texts, and scholarly commentary, the research illuminates underlying discourses and power dynamics that impact the adjudication of environmental rights in Zimbabwe. Understanding the judiciary's role in balancing sustainable development and environmental protection is crucial for effective policy formulation, legal reform, and environmental justice. By shedding light on the challenges faced by the courts, this research contributes to broader discussions on environmental governance and human rights in Zimbabwe.

DEDICATION

This one I am dedicating to myself - For all the times I have pushed myself.

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If I have seen further, it is by standing on the shoulders of giants, so I want to express much gratitude to Mr Mutsvadziwa, my supervisor, the academic giant on whose shoulders I have stood. Thank you for mentoring, encouraging and orienting me into this noble field.

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Noku Kelly and Tino Karl, you deserve a trip to Disney! Your patience and tolerance are amazing when I attend to all these your other siblings, taking your time.

Special thanks to my mom, my from day zero, my source of life, love and strength.

To God be all the Glory.

ACRONYMS

CDA	Critical Discourse Analysis
EMA	Environmental Management Act
EMA	Environmental Management Agency
EROL	Environmental Rule of Law
EU	European Union
MDGs	Millennium Development Goals
MEA	Multilateral Environmental Agreements
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
WCED	World Commission on Environment and Development
ZELA	Zimbabwe Environmental Lawyers Association
ZLHR	Zimbabwe Lawyers for Human Rights

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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.

CHAPTER 2: HISTORICAL CONTEXT AND THE LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT

During the colonial era, Zimbabwe's legal system primarily served the white minority and was more inclined towards economic interests, often at the expense of environmental concerns. The law's coercive power was mobilised by the colonial governments to advance the extraction of natural resources. The legal framework and consciousness developed within this context.³¹ Zimbabwe's legal framework has evolved to address environmental protection and sustainable development. The principal governing environmental frameworks in Zimbabwe are the 2002 Environmental Management Act (EMA) and the 2013 Constitution. EMA provides a comprehensive legal framework for environmental management. It emphasises pollution prevention, ecological conservation, and sustainable resource use.³² Environmental rights are specifically recognised in the 2013 Constitution. Among these rights is the right to a healthy environment that includes sustainable use of natural resources, promoting economic and social development, preventing pollution, and encouraging conservation.³³ This chapter considers how historical legacies and legal frameworks form the basis of judicial decisions for sustainable development and environmental protection in Zimbabwe. By examining the defining context and the constitutional and statutory provisions one can explore the background which influences judiciary decisions and impacts on balancing the crucial aspects of environmental protection and sustainable socioeconomic development.

Understanding Zimbabwe's historical background is crucial for analysing challenges and opportunities in environmental protection

³¹ Susanne Verheul, *History, Authority and the Law in Zimbabwe, 1950–2002*, Cambridge University Press, 2021.

³² Environmental Management Act [Chapter 20:27].

³³ Section 73 Constitution of Zimbabwe.

and sustainable development in Zimbabwe. It sheds light on the impacts of historical dynamics on contemporary environmental laws, practices and governance systems.

The history of environmental protection in Zimbabwe reveals a complex interplay between colonial legacies, post-independence policies, and global influences. During the colonial era, natural resources were exploited without regard for environmental consequences, leading to degradation and loss of biodiversity.³⁴ In colonial Zimbabwe, environmental protection laws and policies were influenced by the land tenure system and the economic interests of the colonial administration. The Land Tenure Apportionment Act of 1930 and its amendments, including the Native Husbandry Act of 1951, were key pieces of legislation during this period. The colonial government promulgated laws that disregarded the significance of environmental impact assessment programmes.³⁵ These laws were primarily designed to manage land use and ownership, but they often overlooked the environmental implications and sustainable development. Numerous laws controlled the extraction of natural resources, and several industry-specific policies restricted certain activities that harmed the environment. Most of these laws facilitated the exploitation of natural resources without sustainable management practices. The limitations of colonial laws such as the Natural Resources Act [Chapter 20:13], the Atmospheric Pollution Prevention Act [Chapter 20:03] and the Hazardous Substances and Articles Act [Chapter 15:05] were significant. They prioritised economic development over environmental protection. There was a lack of sound environmental policies that considered long-term ecological impact.

³⁴ M T Macheka, Environmental management and practises in Zimbabwe's Chivi district: A political ecology analysis, Cogent Social Sciences, Volume 7, 2021.

³⁵ I Makanyisa, Chemhuru M and E Masitera, The Land Tenure System And The Environmental Implications On Zimbabwean Society: Examining The Pre-Colonial To Post-Independent Zimbabwean Thinking And Policies Through History And Philosophy, 2012.

In 1941 the National Resources Act was enacted whose main objective was to control the use of resources. However, it could not be applied in the communal areas that covers about half of the total land area of Zimbabwe, since it was enforced via legal title to land. After gaining independence in 1980, The Natural Resources Act continued being used and was repealed and replaced by the EMA in 2002.

Land reform policies after independence while addressing historical imbalances, also impacted natural habitats. From the late 1990s Zimbabwe has been confronted by a plethora of socio-economic and environmental deterioration which has been characterised as the Zimbabwean crisis. Economic pressures, political instability, and system weaknesses have hindered the effectiveness of environmental conservation efforts. Understanding the historical background is crucial for analysing Zimbabwe's challenges and opportunities in environmental protection and sustainable development.

The enactment of EMA in 2002 and the 2013 Constitution represent a shift from a reactive to a proactive legal framework and measures for environmental conservation in Zimbabwe. The post-independence period saw a shift towards conservation and sustainable development, with initiatives like the creation of national parks and the implementation of environmental regulations.

EMA repealed several outdated laws. It replaced a fragmented system of environmental laws with a more integrated and comprehensive approach to environmental protection. EMA marked a significant change by providing a harmonised institutional, legal, and policy framework for sustainable environmental management. It aimed to address the requirements of sustainable development and set a solid platform for the enforcement of environmental management at a higher level than before. The Act aims to prevent pollution, promote

conservation, and ensure ecologically sustainable development.³⁶ Key provisions include establishing the Environmental Management Agency (EMA) to oversee environmental matters and the preparation of a National Environmental Plan and other management plans. Importantly, section 4(1)(a) of the Act provides that “[e]very person shall have a right to a clean environment that is not harmful to health.” In addition, section 4(1)(b) of the Act provides:

Every person shall have a right to –

(b) access to environmental information, and protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that –

(i) prevent pollution and environmental degradation; and

(ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

This aligned Zimbabwean law with various international conventions. It upholds several environmental law precepts connected to the environmental rights clause in the Constitution. EMA acknowledges internationally recognised environmental law principles, such as intergenerational equity, polluter pays and public participation principles.³⁷ However, it is argued that it left out key principles, such as the public trust theory, environmental justice and precautionary principles.³⁸

As Murombo asserts, “land is part of the natural resources of a country, and without sustainable management and use of natural resources, a country may not be able to promote and fulfil other

³⁶ Soyapi (n.17 above).

³⁷ J Tsabora, *Unpacking the Environmental Rights Clause in the Zimbabwean Constitution*, ZIMLII, 2020.

³⁸ *Ibid.*

human rights.”³⁹ Despite the many challenges bedevilling the nation, Zimbabwe still has an extensive natural resource base that consists of mineral extraction, agricultural activities, water resources, and wildlife. Approximately 70% of Zimbabweans live in rural areas and rely on these natural resources for livelihood. The country’s economy remains closely tied to its environment and natural resource base.⁴⁰ Thus, Murombo extends that if Zimbabwe was able to sustainably manage its natural resources in the spirit of the state’s trusteeship over natural resources, it could have been almost out of its economic whirlpool. Some current regulatory frameworks and resource laws, such as mining legislation, have been criticised for perpetuating unequal access to resources and environmental injustices.⁴¹ Moreover, the complexity and cost of environmental compliance mechanisms can be prohibitive for ordinary people, suggesting a need for reform and decolonisation of environmental law to align with sustainability and equitable resource access.

EMA introduced robust enforcement and compliance mechanisms. In Zimbabwe, certain projects are not allowed to commence without first obtaining an environmental impact assessment (EIA) certificate. EMA and SI 7 of 2007 govern EIAs. These regulations require specified projects to complete an EIA process before execution. EIA assesses potential environmental, social, and economic consequences of proposed projects, aiming to identify and prevent environmental degradation caused by human activities. Implementing a project without an EIA report is punishable by a fine, imprisonment (up to five years), or both.

Furthermore, in 2013, Zimbabwe enacted a new Constitution that included an environmental rights clause and made the Constitution

³⁹ Murombo (n.13 above).

⁴⁰ Madembwe (n.20 above).

⁴¹ Ibid.

the overarching legal framework in the country. This constitutional recognition of environmental rights underscores the proactive stance Zimbabwe has taken to ensure the protection and management of its natural resources and environment. The Constitution's environmental rights are also recognised as the right to a healthy environment.

These rights are comprehensive, covering health, well-being, and ecological sustainability. The constitutional mandate to protect the environment for future generations recognises the concept of intergenerational equity. It emphasises that the current generation has a stewardship role over the environment that must be preserved for those who come after. The constitution's call for "reasonable legislative and other measures"⁴² implies a dynamic approach where laws and policies must evolve with changing environmental conditions and advance sustainable socio-economic development to "achieve the progressive realisation of the rights"⁴³ set out in the Bill of Rights.

The Constitutional framework aligned Zimbabwean law with global developments by recognising the right to a healthy environment. Unlike the previous constitution which lacked an elaborate Bill of Rights, the 2013 Constitution explicitly acknowledges environmental rights.⁴⁴ The inclusion of environmental rights in Zimbabwe's Constitution was influenced by global movements for environmental protection. Notably, the 2002 Environmental Management Act initially introduced these rights before they became a constitutional provision.⁴⁵

With an economy heavily reliant on natural resources, balancing development and environmental protection is crucial for Zimbabwe.

⁴² Section 73 (2).

⁴³ Ibid.

⁴⁴ Madembwe (n.20 above).

⁴⁵ I Chirisa and A Muzenda, *Environmental Rights as a Substantive Area of the Zimbabwean Constitutional Debate: Implications for Policy and Action*, 2013.

Despite the constitutional recognition of environmental rights and the mandate on state institutions to respect, protect, promote, and fulfil these rights, there is limited scholarship critiquing the judiciary's development of these rights in relation to its court rulings.⁴⁶ The judiciary's rulings can significantly impact the livelihoods of those dependent on these resources.

Section 192 provides that '[t]he law to be administered by courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified. Importantly, this has meant that environmental rights have always existed as part of the common law of nuisance and delict.

In common law, environmental rights existed as part of the common law of nuisance and delict. Thus, before the 2013 Constitution, the existence of environmental rights was established by the law of delict to the extent that people might fairly expect to live in a clean environment. Where the negligent acts of another party, rooted in a failure to honour the duty of care, compromised this and led to damages occurring, the harmed party had a right of action to pursue redress. Similarly, environmental rights could be inferred to exist from the law of nuisance. This body of common law permitted legal action to be taken against a party that created a nuisance that led to a loss of patrimony or in cases where the nuisance persisted. The law of nuisance was significant because it established the right to an environment that does not pose risk to one's health or well-being. According to Madebwe the advantage of common law as an environmental protection regulatory framework was that the delictual basis of the rights meant that citizens were likely aware of the right of action created where they suffered harm, as part of their existing knowledge of the law of delict and nuisance.⁴⁷ Such knowledge would

⁴⁶ Ibid.

⁴⁷ Madebwe (n.20 above).

typically be motivated by financial self-interest, as citizens would be aware of the fact that violations of their rights would lead to the payment of compensation. The promise of compensation also meant that citizens were motivated to act in protection of their rights and, by extension, the environment, whenever environmentally deleterious activities occurred.⁴⁸ This meant that those acting in a potentially detrimental manner were effectively deterred from doing so by the fear of delictual actions and the potential for compensation to rights holders. The advantage of this approach was that environmental protection was within established law fields with clear principles.

The drawback of common law, however, was that it's delictual and nuisance approach—which applies to rights-based actions was frequently on individuals' and citizens' ability to seek redress based on these rights. The state anticipated that affected persons would seek private remedy in cases where their rights were violated. Furthermore, the state would not give the injured party instructions on how to apply the compensation award once it had been obtained. Thus, as Murombo explains, “it was conceivable that once compensation awards were secured, they would not go toward restoring the environment to its former state for the public benefit.” In this context, there was limited *locus standi* and state motivation to assist litigants in meeting the costs of such litigation for them to bring actions which could reasonably be regarded as being for citizens' personal gain. Environmental rights and the *locus standi* are now extended by section 73 and section 85, respectively.⁴⁹

Environmental protection needs to be viewed from a broader perspective than national politics due to the nature of both national and global environmental concerns. Zimbabwe's legal framework on environmental protection is influenced by several international treaties

⁴⁸ Ibid.

⁴⁹ Constitution of Zimbabwe, 2013.

and conventions. It is a party to Multilateral Environmental Agreements (MEA). In accordance with section 46(1)(c)⁵⁰ when interpreting the chapter the Declaration of Rights⁵¹, a court “must take into account international law and all treaties and conventions to which Zimbabwe is a party” and section 327(6)⁵² that “every court and tribunal must adopt reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe.” MEAs are legally binding international conventions and treaties signed to address common environmental challenges collectively.

Some key agreements that Zimbabwe is a part of are the United Nations Convention on Biological Diversity (CBD), the global agreement on biodiversity conservation that emphasises the country’s commitment to protecting biological diversity, promoting sustainable use of its components, and ensuring fair and equitable sharing of benefits arising from genetic resources. The Basel, Rotterdam, and Stockholm (BRS) Conventions aim to manage hazardous chemicals and wastes. The Montreal Protocol treaty aims to phase out substances that deplete the ozone layer, and Zimbabwe’s involvement is crucial for global efforts to protect the ozone layer and climate. The Ramsar Convention aims to protect wetlands.

The United Nations Conference on the Human Environment, held in Stockholm in 1972 may rightly be called the *magna carta* of environment. This was the first major attempt to solve the global problems of conservation and regulation of the human environment at the international level. Principle 1 of the Report states that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-

⁵⁰ Constitution of Zimbabwe.

⁵¹ Chapter 4 Constitution of Zimbabwe.

⁵² Constitution of Zimbabwe,

being and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁵³

Subsequently, came the Rio Declaration. This declaration, while reaffirming the Stockholm Declaration, sought to build upon it, to establish a new and equitable global partnership by creating new levels of cooperation among states, key sectors of societies and people.

To support sustainable development, regional environmental trends have also shifted towards the recognition of environmental rights. The revised African Convention on the Conservation of Nature and Natural Resources recognises the principle of people's environmental rights in Article III. In line with the treaty's stipulations, member nations of the Southern African Development Community (SADC) "agree to cooperate in the areas of... natural resources and the environment."⁵⁴ These provisions presuppose some degree of legal harmonisation in member states' cooperation in environmental endeavours if not uniformity, in the ideologies and laws in the areas of co-operation. The provisions of the African Convention and the SADC treaty are both complemented by the African Charter of Human and Peoples' Rights (African Charter). Article 24⁵⁵ provides that '[a]ll peoples shall have a right to a general satisfactory environment favourable to their development'. The African Union Constitutive Act also furthers the 'promot[ion] [of] sustainable development at the economic, social and cultural levels and the integration of African economies'.⁵⁶ These regional advancements have a significant impact on nations' decisions to incorporate environmental rights into their constitutions to support sustainable development and address global environmental issues that transcend political and geographical demarcations.

⁵³ Report of the United Nations Conference on the Human Environment, Stockholm.

⁵⁴ African Convention on the Conservation of Nature and Natural Resources, Article III.

⁵⁵ African Charter of Human and Peoples' Rights, Article 24.

⁵⁶ African Union Constitutive Act, Article 3.

Protecting the environment in Zimbabwe is an international and regional trend toward harmonising environmental laws and rights. These agreements play a significant role in shaping national policies, strategies, and legislation related to environmental protection and sustainable development in Zimbabwe.

Regardless of its gaining momentum, the concept of sustainable development is still a norm of soft law and has not attained the status of customary international law.⁵⁷ Some have disregarded the concept's usefulness in discussions of international law discourse altogether, arguing that as soft law, the concept has not been widely accepted and uniformly deployed in state practices. It has been argued as vague, problematic, and only an "emergent legal principle."⁵⁸ Notwithstanding these arguments, sustainable development is the most important accepted benchmark of international environmental law that has gained broad acceptance, infiltrating national constitutions and regional environmental conventions to influence domestic environmental laws and policies.

The law provides mechanisms, frameworks, and accountability measures to achieve what has been referred to as Sustainable Development Goals (SDGs)⁵⁹. SDGs are part of a resolution called the 2030 Agenda or "Transforming our World: the 2030 Agenda for Sustainable Development."⁶⁰ The 2030 Agenda includes addressing global challenges such as poverty, inequality, climate change and environmental degradation and targets related to clean water and good health and well-being. In light of environmental protection's contribution to sustainable development, the judiciary has a role to

⁵⁷ Murombo (n.13 above).

⁵⁸ DB Magraw & LD Hawke 'Sustainable development' in Bodansky et al, 2007.

⁵⁹ SDGs are a collection of 17 global goals set by the United Nations General Assembly in 2015 for the year 2030.

⁶⁰ United Nations Department of Economic and Social Affairs Sustainable Development, 2015, <https://sdgs.un.org/goals>.

translate provided rights and visions into enforceable and actionable measures. So, legal frameworks such as the Zimbabwean Constitution are essential tools for achieving envisioned sustainable development. They provide for rights that can contribute to a healthier planet and a better future for all. It becomes critical to ensure the effective implementation of such provisions as those extended by environmental rights.

The substantive nature of environmental protection is that whilst environmental legislation is the product of political legislatures, it responds to real problems. Environmental legislation itself is constantly being amended and integrated into the legal order. Environmental law is a product of the complexity of environmental problems and the need to adapt the legal order to respond to those problems. Faced with the scientific and socio-political complexity of environmental problems, law appears to be an answer. Thus, those who are keen to protect the environment must see environmental law and environmental rights in instrumental terms, thus, seeing an international treaty, legislation, or courts as a solution to environmental problems. Fisher (2017) notes how environmental legislation can give rise to a new field of legal practice, and that the maintenance of environmental quality requires the steady and legitimate application and expansion of the law.⁶¹ So, in light of the above, the judiciary can play a crucial role in ensuring the development and implementation of legal frameworks for environmental protection and achieving sustainable development. The judiciary serves as the ultimate defender of the right to a healthy environment. Courts play a crucial role in interpreting and enforcing environmental laws. Landmark court decisions in various fields have shaped legal principles. By adjudicating cases related to environmental rights, the courts can ensure that environmental laws are effectively enforced.

⁶¹ E Fisher, *Environmental Law: A Very Short Introduction*, Oxford University Press, 2017.

As ZELA puts it “Zimbabwe has sound laws and policies that can help address environmental issues related to climate change, environmental degradation, and pollution” but “there is need for a robust implementation of laws and policies.” It added: “There is need for effective participation by all relevant stakeholders in policy formulation, implementation, monitoring, and evaluation.”⁶² The judiciary has the power to interpret the various legal frameworks that exist for environmental protection. It has the role of interpreting laws to make them clear, practicable, and enforceable. Through their judgments, the judiciary can promote sustainable development by balancing environmental protection with economic and social development needs. This aligns with Zimbabwe’s commitment to the Sustainable Development Goals (SDGs) and it’s National Development Strategy.

This chapter illuminated the sources of environmental law in Zimbabwe and their co-relationship with environmental protection and sustainable development issues. Zimbabwe has modernised its environmental laws, but challenges remain. Economic pressures, political instability, weak interpretation of rights, and enforcement mechanisms have hindered the effectiveness of these efforts. So, the next chapter extends the discussion in this chapter by giving the conceptual framework of the analysis of Zimbabwe's judiciary interpretation and expansion of environmental rights. This provides clear lens through which the topic is examined and the relationship between selected variables. The chapter guides the selected variables and the analytical approaches for examining the judiciary’s decisions, legal reasoning, and the implications for sustainable development and environmental protection.

⁶² See F Matasva, Zimbabwe: The Zimbabwe Environmental Law Association calls on government to set up environmental courts and tribunals to speed up environmental justice, Business and Human Rights Resources Centre, 2022.

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

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”.⁶³ 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,⁶⁴ (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.⁶⁵ 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.⁶⁶ 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

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

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

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

⁶⁶ 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.⁶⁷ Failure to interpret and expand principles of environmental law and environmental rights can represent a breach in the legal fabric.⁶⁸ The interpretation and expansion of environmental law principles play a pivotal role in shaping legal frameworks that safeguard the planet.⁶⁹ Environmental principles are omnipresent but often nebulous. Their content remains abstract until clearly unpacked and contextualised within specific legal cultures.⁷⁰ 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 Constitution⁷¹ provides for the setting up of the judiciary and the courts. The Constitution states that judicial authority is derived from the people of Zimbabwe.⁷² Section 342 (1)⁷³ 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

⁶⁷ Madebwe (n.20 above).

⁶⁸ 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*.

⁶⁹ Tsabora (n.37 above).

⁷⁰ Birnie & Boyle (n.65 above).

⁷¹ Chapter 8 Constitution of Zimbabwe.

⁷² Section 162.

⁷³ 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."⁷⁴ 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."⁷⁵ The judiciary should exercise authority guided by the principle that "justice must be done to all, irrespective of status"⁷⁶, "justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness"⁷⁷; and that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law."⁷⁸ Consequently, the rule of law serves as the benchmark by which courts evaluate acts pertaining to preserving, observing,

⁷⁴ Section 164(2).

⁷⁵ Constitution of Zimbabwe.

⁷⁶ Section 165 (1) (a).

⁷⁷ Section 165 (1) (b).

⁷⁸ 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,⁷⁹ to “give full effect to the rights and freedoms enshrined in this Chapter”⁸⁰ and “must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom.”⁸¹ 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.”⁸² This arguably reveals how the drafters of the Constitution were aware that, in a more globalised world, legal changes depend not just

⁷⁹ Chapter 4 Constitution of Zimbabwe.

⁸⁰ Section 46 (1) (a).

⁸¹ Section 46 (1) (b).

⁸² S 165(7) of the Constitution.

on local developments but also on developments in other countries and international jurisdictions.⁸³ 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 needs⁸⁴. 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.⁸⁵

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 Constitution⁸⁶ 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.

⁸³ Soyapi (n.17 above).

⁸⁴ See WCED (n.10 above).

⁸⁵ Tsabora (n. 37 above).

⁸⁶ Constitution of Zimbabwe.

Health relates to human health that goes beyond physical to include mental and physical integrity, amongst other things.⁸⁷ The World Health Organisation (WHO) defines health as “complete physical, mental and social well-being.”⁸⁸ 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.⁸⁹

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.⁹⁰ 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.

⁸⁷ Ibid.

⁸⁸ Preamble to the Constitution of WHO, 1978.

⁸⁹ 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.

⁹⁰ 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.⁹¹ 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.”⁹² 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.”⁹³ 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

⁹¹ Murombo (n.13 above).

⁹² 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.

⁹³ 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.⁹⁴

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'.⁹⁵ 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

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

⁹⁵ 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.⁹⁶ Mafo and Iliff⁹⁷ 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

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

⁹⁷ 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 Act⁹⁸ 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*⁹⁹ 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.¹⁰⁰ 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.

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

⁹⁹ *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*.

¹⁰⁰ 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 report¹⁰¹ identifies correlations between improved court efficiency and the economy's growth rate and between businesses' perceptions of judicial independence and productivity growth.¹⁰² As Malaba elucidates, "A well-functioning judicial system also underpins economic development."¹⁰³The 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".¹⁰⁴The 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.

¹⁰¹ Joint Research Centre of the European Commission.

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

¹⁰³ Malaba (n.87 above).

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

CHAPTER 4: JUDICIAL ADJUDICATION OF ENVIRONMENTAL RIGHTS: A CRITICAL ANALYSIS

In Zimbabwe, specific cases pertaining to environmental rights have included disputes related to land use, wildlife conservation, requests to halt mining operations or developments on wetlands, challenges to Environmental Impact Assessment (EIA) certificates, actions to stop pollution of rivers and other water sources and air pollution by factories; and getting mining companies to promote infrastructure developments in local mining communities and mitigate environmental degradation and pollution.¹⁰⁵ This chapter sample a few cases, illuminating those issues and highlighting the inherent strengths and challenges the judiciary has in adjudicating environmental cases. The selected cases are representative enough and applicable to other cases on the issues and discourses on sustainable development and environmental protection.

Judges have a first-degree role in enforcing new instruments which might not have been duly implemented by political bodies. Legislation intended to reshape society and governance may represent a radical departure from previous precedents. Gilroy notes that “revolutionary laws” have always been as terrifying as courts with emergency powers. Both democratic and non-democratic authorities may exercise emergency powers, but the key difference lies in the presence of checks and balances to prevent arbitrary use. As Malaba states, “Whatever the model of the national justice system or the legal tradition in which it is anchored, independence, quality and efficiency are the essential parameters of an effective justice system and need to be ensured.”¹⁰⁶ Law is regarded as the most legitimate and stable medium to foster and maintain collective responses to environmental problems. “It is a

¹⁰⁵ ZHLR, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020.

¹⁰⁶ Malaba (n.87 above).

dense thicket of legislation, delegated legislation, treaties, policies, regulatory strategies, and case law shaped by the complexities of many different environmental problems”¹⁰⁷, so its clear interpretation is imperative, especially when operating in highly politicised contexts such as Zimbabwe. The goal is to ensure consistency, predictability and fairness in legal outcomes. Quoting Bradley, “Unless there is an independent Judiciary, able to interpret and apply laws in a manner based on legal rules and principles rather than on political intentions or calculations, the concept of law itself is brought into question.”¹⁰⁸

Judges must focus on legal reasoning and objective analysis in their decisions. Malaba expands:

Judges are not immune to criticism. Their decisions must be scrutinised, commented on and even criticised... If that is observed, it develops the jurisprudence of the country because the criticism ceases to be mere criticism and becomes a contestation of ideas between and amongst intellectuals. Constructive criticism implies knowledge and understanding of the law prescribing the standard against which the legality of the conduct in dispute is to be measured. It involves setting out the requirements of the law and pointing out the errors committed by the court in its findings of the facts in issue or in its interpretation or application of the law to the facts of the conduct.

This is the spirit guiding this analysis. The selection of cases in this chapter is based on the extent to which, directly or indirectly, efforts to ensure environmental protection and/or sustainable development were highlighted and sought in courts. The discussion looks at cases where the courts have expanded or had the potential to expand environmental rights as provided for in the Constitution. The analysis details some significant cases where environmental protection and sustainable development were implicated.

¹⁰⁷ Fisher (n.61 above) p.25.

¹⁰⁸ A Bradley, “The New Constitutional Relationship Between the Judiciary, Government and Parliament” at para 2.

Environmental rights also benefited from an expanded *locus standi*.¹⁰⁹ This refers to the legal right of an individual or group to bring a case before the courts. There has been a significant shift in Zimbabwe towards the liberalising *locus standi* under section 85(1) of the Constitution. The Declaration of Rights drafters recognised that the concept of granting rights to the underprivileged and marginalised is undermined by standing restrictions. The common law-based *locus standi*'s narrow reach under the old Constitution significantly hampered the advancement and defence of justiciable environmental rights. The Lancaster House Constitution provided that:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which lawfully available, that person (or that other person) may, subject to the provision of subsection (3) apply to the Supreme Court for redress.¹¹⁰

Dhiwayo notes that this provision “limited and stifled *locus standi* as a person who wanted to vindicate rights provided for under the Declaration of Rights had to show a direct and substantial interest in the case.”¹¹¹ The *United Parties v Minister of Justice, Legal and Parliamentary Affairs* case best demonstrates the limited scope of *locus standi* under the old Constitution. In that case, Gubbay CJ as he then was held that:

Section 24 (1) affords the applicant legal standing to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained. It has no right to do either on behalf of the general public or anyone else.’¹¹²

¹⁰⁹ Section 85 Constitution of Zimbabwe.

¹¹⁰ Section 24 (1) of the Lancaster House Constitution.

¹¹¹ M Dhiwayo, ‘A Critical Examination of the Scope, Content and Extent of Environmental Rights in the Constitution of Zimbabwe’, 2016.

¹¹² *United Parties v Minister of Justice, Legal and Parliamentary Affairs* 1997(2) ZLR 254 (SC).

However, section 85(1)¹¹³ permits legal action to be taken against alleged violators of the rights in the Declaration of Rights by any of the following: individuals acting in their own interests, individuals acting on behalf of an individual who is unable to act for themselves, individuals acting as members of a group or class of individuals; associations acting on behalf of their members; and any of the aforementioned groups. In the *Harare Wetlands Trust and Newlands Residents Association v Life Covenant Church and Others*¹¹⁴ case (hereinafter referred to as the Life Covenant Church (LCC case), the court elaborated on the issue of standing. Dhlakama, Tsabora and Dhlwayo referred to this case as setting an important precedent for wetland conservation and use conflicts with other basic rights in Zimbabwe's constitutional system. The first issue to be addressed was the issue of legal standing of the applicants.¹¹⁵ The necessity to "publicize the importance and value of enhancing the protection of the wetlands and their adjacent areas" was noted by Chinamora J as one of the objectives of the Harare Wetlands Trust. The judge's reasoning was based on section 46(1) of the Constitution that allows courts to "consider relevant foreign law ... in the interpretation of the Constitution."¹¹⁶ He further considered the judgement in *R v Inspectorate of Pollution & Anor: Ex Parte Greenpeace Ltd*¹¹⁷, where the High Court ruled that denying Greenpeace legal standing would effectively deny its representative constituency an opportunity to have their issues heard by the court. Chinamora inevitably concluded that the two public interest organisations had legal standing.

Ironically, in the LLC case, the judge went at length to look at the interpretation of standing for the applicants in a foreign jurisdiction

¹¹³ Constitution of Zimbabwe.

¹¹⁴ *Harare Wetlands Trust and Newlands Residents Association v Life Covenant Church and Others* HH819-19.

¹¹⁵ Dhlwayo (n.105 above).

¹¹⁶ *Ibid.*

¹¹⁷ 1994] 4 All ER 329.

when he could have just used section 85.¹¹⁸ Section 85's scope had been comprehensively encapsulated in the *Mudzuru & Others v. Minister of Justice & Ors*¹¹⁹ case. It was stated that:

Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impact upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered a legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

Interestingly, Chinamora still arrived at the same conclusion he would have reached if he had used the section 85 Constitutional provision. This reflects the stability of law, especially in well-established principles such as the *locus standi*. Legal systems are developed around a set of legal ideas and concepts. The consistent application of the law to a specific set of facts ensures legal stability. Legal arguments consistent with well-established rules and principles guarantee the rule of law and justice. When legislation is passed and comes into operation, it, like all laws, gives rise to ambiguities and questions in need of adjudication. Law evolves but must remain committed to stability, rule of law, constitutionality and justice. In light of this, it is critical to develop a body of environmental case law and legal practice that is grounded in robust legal reasoning and a commitment to ideals of environmental protection and sustainable development.

While many factors affected the realisation of environmental rights under the old Constitution¹²⁰ and EMA, the lack of standing was one of the major reasons. Whilst the courts still must be satisfied that parties in the case have an interest in the matter at hand and are “not mere

¹¹⁸ Constitution of Zimbabwe.

¹¹⁹ *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 12/15.

¹²⁰ Lancaster House Constitution.

meddlesome busybodies”,¹²¹ the Constitution has expanded legal standing. This is favourable in environmental rights, where representative constituencies have an opportunity to have their issues heard by the court. Environmental issues typically involve the public interest and impact both individuals and groups of people. The new Constitution offers procedural and substantive rights that can be leveraged to advance the implementation of environmental rights. The turn to substantive and procedural environmental rights in this manner is “a move that promises to invigorate civil litigation’s role as a complement to state-led enforcement efforts in Zimbabwean law.”¹²²

Zimbabwean courts have generally embraced the expanded *locus standi* provision, especially concerning environmental protection cases. Ndlovu explains how courts have been instrumental in developing the law on *locus standi* in environmental cases and relaxing the technicalities in Public Interest Litigation (PIL).¹²³ For example, in the Augar Investments OU case, the court pointed out that the first respondent was barred in terms of Rule 238(2b) of the Rules of the High Court 1971 for failing to file its heads of argument on time but “[t]he court’s view was that neither party would be prejudiced by these concessions, so they were allowed.”¹²⁴ Ndlovu comments how, in most cases brought to court by ZELA, the respondents would challenge the legal standing of the applicants, but the courts would relax the rules related to standing and allow the matters to be heard on their merits.¹²⁵ There are cases such as the COSMO Trust case, *Debshan (Pvt) Ltd. v Provincial Mining Director, Mat. South Province & Others*¹²⁶ and *Hillside Residents Association v Glorious All Time Functions (Private)*

¹²¹ LCC Case (n.105 above).

¹²² Madebwe, (n.20 above) p108.

¹²³ F Ndlovu, An appraisal of the judicial enforcement of environmental protection in Zimbabwe, North-West University, 2021.

¹²⁴ See Augar Case.

¹²⁵ Ndlovu (n.118 above).

¹²⁶ HB 11/17.

Limited and Others.¹²⁷ Relaxing rules on standing expresses an explicit recognition of the importance of environmental protection and that technicalities such as issues having to do with standing cannot be a barrier against protecting the environment.

Section 85, similar to section 38 of the South African Constitution, expands the meaning of *locus standi* by granting procedural rights. This is significant because it makes access to justice more democratic by enabling a larger range of people to use the legal system to defend their legal rights. This gives more meaning to the equality provisions in the Constitution and militates against discrimination based on economic circumstances.¹²⁸

Judicial activism is an approach in which judges actively interpret legal provisions, particularly constitutional ones, and are more willing to invalidate legislative or executive actions.¹²⁹ Regarding environmental rights, judicial activism is crucial in shaping environmental jurisprudence. Although the term is frequently used in describing a judicial decision or philosophy, it can bear several meanings. Rather than giving precedence to the opinions of past courts or other government authorities, activist judges uphold their own interpretation of the Constitution's provisions. Referring to judges as activists in this sense is to argue that they decide cases based on their own extension and interpretation of the law rather than governmental policy preferences and they “legislate from the bench.”¹³⁰ In Zimbabwe, there have been conscious attempts in some cases to promote the concept of sustainable development.

¹²⁷ 19-HH-349.

¹²⁸ ZELA, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020, <https://zela.org/public-interest-litigationthe-pain-of-litigating-environmental-issues-in-zimbabwe/>.

¹²⁹ K Roosevelt, Britannica, <https://www.britannica.com/topic/judicial-activism>.

¹³⁰ Fisher, (n.61 above).

Challenges in adjudicating environmental rights include interpreting the constitutional text. This brings us to what Dhlakama *et al.*¹³¹ capture as “the definitional conundrum.” In the few environmental cases that are brought before the courts, there seem to be many missed opportunities to clarify the definitions and expand on environmental constitutionalism. The LCC case is one of the rare cases in which sustainable development was mentioned, and the judiciary had an opportunity to make a pronouncement on the concept of sustainable development. The first respondent, New Life Covenant Church, was building a superstructure on a wetland. The applicants asserted that the development would result in detrimental and irreparable harm to the environment in violation of sections 73 and 4 of the Constitution and the EMA respectively, that provide for the right to a clean and healthy environment which is not harmful to one’s health and encompassing sustainable development. Chinamora pointed out the need to strike a balance between development and sustainable environmental management that is at the heart of the concept of sustainable development. He articulated the concept by noting, “In each individual case, the particular economic and benefits of planned action must be assessed and weighed against the environmental costs, alternatives must be considered which would affect the balance of values.”¹³² Based on the necessity to strike a balance between economic development and environmental protection, the court granted both a declaratory order and an interdict that was sought by the applicants. Dhlakama *et al.* commend that “the court was on sound ground in as far as the concept of sustainable development is concerned” as it was “alive to the environmental considerations of the case, declaring that in no way, should economic, environmental and social considerations trump each other in the quest to achieve sustainable development.”¹³³

¹³¹ Dhlakama et al (n.109 above).

¹³² LCC, p1.

¹³³ Dhakama et al (n.109 above).

The LCC case also becomes significant from an international best standard practice as it references the Ramsar Convention, an international instrument and how it fits within the global environmental conservation discourse.¹³⁴ As the Ramsar Convention states, "conservation, management, and wise use of wetlands"¹³⁵ must be encouraged. Notwithstanding the definitions in the EMA and the Ramsar Convention, the usage of wetlands and their boundaries have always been controversial topics. The first respondent in the LCC case argued that the area in question did not meet the wetland concept defined by the Ramsar Convention. Because the area in question was not a wetland as defined by the EMA, the church objected to the requirement to comply with section 46(2) of the Water Act.¹³⁶ In determining what is or is not a wetland, the court referred to the judgement in the Augar Investments case,¹³⁷ where it was stated that:

The definition of a wetland is clear. It is a question of fact, not law, whether a piece of land is a wetland. Not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must surely be based on scientific study and determination of such ecological sensitivity.

EMA defines a wetland as any area that is a "marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, and includes riparian land adjacent to the wetland."¹³⁸ This definition was wide enough to encamp the area that was in question in the LCC case. The court concluded that the area in question fell within the definition of a wetland, a position that was also supported by LCC's own EIA consultant's report.¹³⁹ In the end, the court decided that since a permit is granted after careful evaluation of several factors, one was required before the development could start. This could be interpreted as a

¹³⁴ Ibid.

¹³⁵ See Ramsar Convention.

¹³⁶ Water Act [Chapter 20:24].

¹³⁷ Augar Investments OU v Minister of Water and Climate & Anor HH 278-15, Page 6.

¹³⁸ Section 2.

¹³⁹ LCC, Page 12 paragraph 5.

wetland's designation would not prevent development in that area provided that one possesses the required authorisation.

The LCC case can be paralleled with the *Augar Investments* case. In the case, the issue for determination was whether the first respondent, the Minister of Water and Climate, was empowered to declare that a piece of land is a 'wetland' or whether his powers were confined to declaring an existing wetland to be 'an ecologically sensitive area'. Section 113 (1) of EMA on the Protection of Wetlands provides that "The Minister may declare any wetland to be an ecologically sensitive area and may impose "limitations on development in or around such area."

The relief sought by applicants was granted, as it was ordered that the General Notices that declared the land described in the schedule as wetlands were a nullity and of no force or effect. The judge concluded that whether a piece of land is a wetland is a question of fact, not law. He explained how not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must be based on scientific study and determination of such ecological sensitivity and that a wetland not become ecologically sensitive just because it has been declared so. However, this need for scientific evidence contradicts the acclaimed, internationally recognised key sustainable development principle, the precautionary theory. It states that when there is scientific uncertainty about the potential harm of an action, decision-makers should err on the side of caution to prevent irreversible damage. In wetlands, this principle emphasises the need to protect these ecologically sensitive areas. This was enunciated in the *COSMO* case. In the *Augar* case, the court concluded that no evidence was placed before the court that it could rely on to deny the applicant permission to develop its land. The judge based his judgment on the natural justice principles and ruled that there was no proper representation and inadequate time was given to the applicant with a

particular interest in this issue. The case highlights the importance of proper procedures and adequate representation when designating wetlands. Though elements of environmental justice are illuminated in this case, it ignored balancing it with the precautionary principle, a principle that anchors sustainable development. The principle is a risk management strategy that emphasises exercising caution, stopping, and reviewing new developments that may prove disastrous. Environmental justice goes beyond environmental protection and considers the well-being of affected people and communities who bear the costs of environmental degradation. Environmental justice is a critical concept that intersects with sustainable development that provides equity for all social groups by guaranteeing that everyone, regardless of race or socioeconomic status, is treated fairly. To avoid contradictions, sustainability provides a foundation for achieving environmental justice by promoting long-term well-being. It considers social equity and ensures that environmental benefits and burdens are distributed fairly.

This case presents what Dhlakama *et al.* regarded as a missed opportunity upon which clarity in Zimbabwe's legal system on "whether wetlands could be used or not at all for any developments in the future" could have been given.¹⁴⁰ To use Dhlakama *et al.*'s words,¹⁴¹ "the court rowed in safe waters", in mentioning sustainable development. In obiter, the judge said, "It is hoped that the citizens of Zimbabwe vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment."¹⁴² This was not married to how, in his decisions, he was balancing the issues of protecting the environment for future generations and considering the progressive

¹⁴⁰ Dhlakama et al (n.109 above).

¹⁴¹ Though they used it in the LCC case, it is more applicable here.

¹⁴² See Augar Case.

realisation of using natural resources whilst promoting socio-economic development.

Ironically, the Augar case is a 2015 judgement and, in its deliberations, it relied solely on the EMA and not even a single reference or implied acknowledgement of the Constitution that was enacted in 2013 and has explicit, overarching provisions on environmental rights. In referring to EMA, enacted in 2002, the judge says, “This is a relatively new piece of legislation in this country, and its ability to nurture and protect the environment may be dependent upon the interpretation given to its provisions.”¹⁴³ Judicial reviews are essential for ensuring constitutionalism and constitutional efficacy. Zimbabwe’s Constitution is the supreme law of the land.¹⁴⁴ All legislation must thus be interpreted in a manner that conforms with the Constitution wherever possible. Considering both statutes and constitutional principles ensures a robust legal framework for environmental protection. Ignoring either could lead to legal uncertainty and undermine the rule of law and constitutionalism. Commenting on the Augar case, Chinamora asserted that “the nullification of the subsidiary by CHIGUMBA J does not affect the ecological or factual definition of the area of construction as wetland”.¹⁴⁵ Generally, a constitution is designed to create a network of prevention and control mechanisms – checks and balances – throughout all levels of state authority exercise, thereby removing the arbitrary application of constitutional principles.¹⁴⁶ Furthermore, the courts must regard international best practice in interpreting these constitutional rights. Thus, like many other countries, including South Africa, Zimbabwe's environmental law has been reinforced by the Constitution. Nonetheless, measures should be taken to establish legal, economic, and social frameworks that unequivocally require the government, civic organisations, and

¹⁴³ Augar, para 1.

¹⁴⁴ Sec 2 Constitution of Zimbabwe.

¹⁴⁵ LCC Case.

¹⁴⁶ J Kokott and M Kaspar, Ensuring Constitutional Efficacy, 2012.

private individuals to act as knowledgeable and accountable guardians of the environment.

Contrary to the Augar case, the *COSMO* case is critical for its detailed expansion of environmental rights and critical engagement with all aspects as provided in the Constitution. In the case of *COSMO Trust*, the Administrative Court conducted such a balancing act. The case was on the awarding of a development permit by the City of Harare to construct a cluster of houses on part of a stand within a wetland which attracts a range of birds and mammals. It was argued that the wetland attracts a diverse range of migratory birds from all over the world for breeding purposes. However, no scientific studies determined what attracted these birds to this wetland. In that case, Mandeya J relied heavily on the Ugandan case of *Amooti Godfrey Nyakaana v. National Environmental Management Authority and 6 Others*¹⁴⁷ to provide an understanding of the concept of the precautionary principle alongside the polluter-pays principle. The judge in the Ugandan case's definition calls for the State to identify, stop, and combat the root causes of environmental deterioration. Consequently, actions to avoid environmental deterioration should not be delayed due to a lack of scientific assurance when there is a substantial threat of serious and irreparable damage. In the case, the Chief Justice (CJ) of Uganda articulated that:

A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution that requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole.¹⁴⁸

The Ugandan judge furthers that “[t]he individual’s interest must be viewed in the context of the larger interest of society as a whole and in

¹⁴⁷ CA 5/11, 2011.

¹⁴⁸ *Ibid.*

the context of the Constitution and the laws made there under.”¹⁴⁹ In the COSMO case, all the parties agreed that the proposed area for constructing the housing units was a wetland. The court reasoned that allowing the project could result in massive degradation and irreparable destruction of the wetland, affecting the bird habitat and the wetland's natural water processes. The case detailed what sustainable development entails and weighed the environmental rights of citizens and future generations to protect their water source by preserving an internationally protected wetland. This was ahead of the rights of private property owners to derive the short-term economic benefits of constructing a housing development on their property. The judge held that private property rights must be exercised reasonably and with due regard to the rights and freedoms of others.

One can note that in the majority of the wetlands cases, such as the LCC case, *Trustees of the Harare Wetlands Trust v. University of Zimbabwe* and *Hillside Park Association v. Glorious All Time Functions (Pvt) Ltd*, have resulted in orders and judgments declaring developments that lack the necessary permits—such as an EIA certificate, development permit, and permit from the Catchment Council unlawful. As ZHLR clarifies, rather than forbidding the projects because of their potential negative environmental effects, these rulings and decrees have regrettably been restricted to procedural irregularities. Therefore, private developers have not been barred from simply applying for the required permits afterwards. In the Augar case¹⁵⁰, the Minister withdrew the gazetting of some wetlands that had previously been granted. The court determined that although wetlands had been defined as "wetlands," which was a factual rather than a legal term, the legislation only permitted their proclamation and protection as "ecologically sensitive areas." The court further declared that no consultation had taken place throughout the gazetting procedure with

¹⁴⁹ Ibid.

¹⁵⁰ Augar case.

the private owners of the wetlands. Therefore, it is currently unknown if wetlands be designated as ecologically sensitive areas and what limitations be imposed on the mapped wetland locations.

It is also highlighted that in some cases, developers have disregarded court orders and rulings in several wetlands cases, allowing development to proceed. Developers disregarded both a contempt order and an interdict in the Latimer Road wetland in Greendale, Harare, until, eventually, a demolition order was requested. The High Court ordered the City of Harare to immediately demolish houses illegally constructed on the wetlands and slapped the council with costs. These cases show that in the absence of specific legislation protecting wetlands as non-development sites, the government continue to issue permits for these sites, and the degradation of wetlands continues.

Environmental rights provide a framework for appreciating the interrelationship between environmental outcomes and other fundamental human rights,¹⁵¹ such as the right to access information, the right to life, the right to safe, clean and potable water and human dignity.¹⁵² The Nepalese Supreme Court in the Godavari Marble case enunciated that:

Article 12(1) of the Interim Constitution has also incorporated the right to live with dignity under the right to life. It shall be erroneous and incomplete to have a narrow thinking that the right to life is only a matter of sustaining life. Rather it should be understood that all rights necessary for living a dignified life as a human being are included in it. Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers.¹⁵³

¹⁵¹ J May and Darly E, *Global Judicial Handbook on Environmental Constitutionalism*, United Nations Environment Programme (UNEP), 2019.

¹⁵² Sec 51.

¹⁵³ Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others.

Incorporating other human rights, such as the right to life and dignity, is “relevant in at least three phases of constitutional litigation: defining the cause of action, getting into court, and remedies.”¹⁵⁴

Expanding definitions of provisions in environmental rights ensures that all provided rights are adequately covered, protected and upheld. The intertwining of human rights and the environment is pervasive. Human rights cannot be fully enjoyed without a safe, clean, and healthy environment. Conversely, sustainable environmental governance cannot exist without establishing and respecting other human rights. Health or well-being is stressed as part of every person’s right, specifically against harm to health due to environmental-induced toxicity.¹⁵⁵ Courts that have dealt with the right to a healthy environment have mostly emphasised what can potentially be harmful to human health. Very limited attention has been paid to the meaning of health and well-being. This illuminates how people, lawyers and courts generally have a limited real meaning and a particularly narrow view of the meaning of “the environment”. The content and meaning of section 73 rights in Zimbabwe, a developing nation grappling with socio-economic challenges, remain unclear and underutilised.

In Zimbabwe, we are yet to see the courts marrying the essential principles in their adjudication. Though we have cases like the *Hillside Residents Association v Glorious All Time Functions (Private) Limited and Others*¹⁵⁶ cases linked environmental rights to other fundamental rights, such as the right to food and water, they are few. In this case, the applicant wanted to establish a function or a wedding venue on a wetland without an Environmental Impact Assessment (EIA) certificate. In granting the order to stop the construction of the

¹⁵⁴ May and Darly, (n.147 above) p90.

¹⁵⁵ Sec 73 (1) (a).

¹⁵⁶ SC 327/19, 2019.

venue without EIA certification, the judge illustrated that the applicant, Hillside Residents Association, was representing the public interest, specifically residents' rights to protection of Harare's natural resources in terms of sections 73¹⁵⁷, 77¹⁵⁸ that provides for the right to food and water and section 4 of the Environmental Management Act. Considering that well-being has a distinct meaning and has been purposefully added to Zimbabwe's constitutional environmental right, it is critical to strengthen and broaden this particular right's protection within the courts. Given the language of Section 73 and the state's obligation to uphold, defend, encourage, and carry out every one of the rights outlined in the Bill of Rights. Unlike other jurisdictions such as South Africa and India, no attempts have been made in Zimbabwe to articulate aspects of the potential meaning of well-being as it features in the Constitution. So, the question to be addressed is what this suggests for the duty-bearers to ensure the indivisibility of rights.

The indivisibility of rights and the centrality of environmental human rights in the constitutional landscape is well captured in the Lahore High Court case in Pakistan. The court highlighted that:

Fundamental rights, like the right to life which includes the right to a healthy and clean environment and right to human dignity read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a centre stage in the scheme of our constitutional rights.¹⁵⁹

The indivisibility of environmental rights emphasises that these rights are interconnected, and recognising this interdependence promotes a holistic approach to human well-being and socio-economic development. This outcome must be sought in multiple ways,

¹⁵⁷ Constitution of Zimbabwe.

¹⁵⁸ Ibid.

¹⁵⁹ Ashgar Leghari v. Federation of Pakistan (2018).

including via the principles guiding environmental decision-making and how authorities decide on priorities in judicial adjudication.

In 2019, in the *Community Water Alliance (CWA) v Environmental Management* case, the High Court of Zimbabwe delivered what ZELA considers a landmark judgment critical for environmental justice in Zimbabwe that had great implications for the realisation of environmental rights in the country. In this case, the CWA, an organisation that provides civic education, monitors and observes water service delivery, disseminates information, and provides capacity building and research on issues pertaining to water, sued Environmental Management of Zimbabwe and the minister responsible for the Environment. CWA's case was premised on the lack of access to information on the Environmental Impact Assessment document. It argued that section 180 of EMA's¹⁶⁰ restricting members of the public from making copies or reproducing EIA documents violated the right to access to information provided for in the Constitution¹⁶¹. Further, they argued that SI 7 of 2007's prescription fees for one to inspect the document limits the right to access information. They sought a declaratory order to have section 108 unlawful and inconsistent with the right to access information. They further prayed for an order declaring the prescribed fee ultra vires section 62 of the Constitution.¹⁶² The court decided that Section 180 of EMA was ultra vires section 62 of the Constitution and null and void to the extent it prohibits the reproduction of documents by the public. It declared members to be allowed to inspect the machine-readable record and make notes of EIA reports and copies thereof. The Minister of Environment was ordered to take reasonable measures to review the

¹⁶⁰ EMA (Chapter 20:27).

¹⁶¹ ZELA, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020, <https://zela.org/public-interest-litigationthe-pain-of-litigating-environmental-issues-in-zimbabwe/>.

¹⁶² ZELA, (n.156 above).

fee in line with reasonable standards that consider the right to access to information.

ZELA views this as a remarkable judgment in respect of environmental justice. It asserts this judgement as “progressive and vindicates fundamental rights that are provided for in the Constitution in particular section 62 of the Constitution”. ZELA notes that the judgment is key, especially for mineral host communities where EIA documents before this judgment information was held in secrecy, and the public could not access the documents. Even public interest litigation organisations ZELA have faced resistance from responsible authorities to reproduce the document for litigation. The increased access to the EIA documents enhances community monitoring of compliance and asserting their rights in case of non-compliance and violation of rights.

The obligation of the Minister of Environment to review the prescribed fee for EIA inspection in line with reasonable standards and the right to access information as, in most cases, the interested and affected people could not afford to pay the fee.

There are cases such as the *ZELA v Chitungwiza Municipality*¹⁶³ case, where the court had the opportunity to expand on environmental rights and the right to a healthy environment by linking it to other rights, such as the right to life and human dignity. The judgment established a crucial precedent for the progressive realisation of the rights to a healthy environment and clean water. In this case, ZELA brought a challenge in relation to the discharge of sewerage into Lake Chivero. ZELA demonstrated that the municipality was negligently discharging raw sewage into a public stream and a residential area in contravention of the then-recently enacted EMA and its right to a healthy environment. The court granted the order, interdicting

¹⁶³ HC 2778/20.

Chitungwiza Municipality from releasing sewerage into water bodies or any part of the environment. The order directed the Municipality to repair, within three months of the order, or otherwise upgrade its water treatment plants and sewer systems to ensure proper effluent treatment before discharge into the environment and water bodies. The EMA was also directed to conduct compliance assessments within three months and submit a report to the Registrar of the High Court.

The municipality admitted to the pollution but pleaded that it did not have the resources to rehabilitate the contaminated land or build proper sewage structures. This is typical of many other water pollution cases brought before the courts. The respondents are found guilty, but they evoke the restrictive clause which states that “reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization”¹⁶⁴ of rights in the environmental rights provision. Considering how environmental rights are human rights, the concept of progressive realisation is not meant to inordinate delay by the government in taking steps.¹⁶⁵ As Tsabora explains:

It requires the state to take steps expeditiously and such steps must be appropriate. These could either be legislative, provision of judicial remedies, policy and other administrative measures to make sure that the rights are implemented. The obligation to progressively realise does also not mean discretion on the state to defer indefinitely the full realisation of the rights. In fact, the state must set time limits and benchmarks, targets and indicators on the progressive implementation of the protected rights.

Water pollution cases are a violation of the right of life which is shown by how there end up being many cholera outbreaks which have claimed lives. The progressive realisation clause militates against the effective realisation of environmental rights and other fundamental rights if they are left to the discretion of government.”¹⁶⁶ Courts have

¹⁶⁴ Section 73 (2) Constitution of Zimbabwe.

¹⁶⁵ Tsabora (n.37 above).

¹⁶⁶ Ndlovu (n.118 above).

made orders in cases such as *ZELA v Anjin Investments (Pvt) Ltd*,¹⁶⁷ *Dora Community v Mutare City Council*, and many others but these orders have not been enforced or followed through. As Ndlovu explains:

The implication is that even if the court makes an order to the effect that there has been a violation of environmental rights, as long as the State maintains that it does not have sufficient resources to remedy the violation, then the order remains a *brutum fulmen* (a noise).

In the cases, nothing was done, but “there seems to be no record of a return to court in an attempt to have the judgment enforced.”¹⁶⁸ This means that “the court orders are impotent”,¹⁶⁹ in Soyapi’s words. This demonstrates how fulfilling the right to a healthy environment entirely relies on the executives playing their part. Clearly, the courts have not hesitated to order government environmental agencies to take action, but the government and its agencies have been found wanting. This points to an uncomfortable disregard for EROL and the respect that should be given to the judiciary.

By interpreting and applying environmental rights, the courts contribute to safeguarding the environment for present and future generations. Since the 2013 constitutional dispensation, there has been an increase in environmental litigation as the issues on *locus standi* and environmental rights have been expanded. Courts should increasingly embrace and enforce constitutional environmental rights to promote protection and sustainability. Even without explicit constitutional environmental rights, the judiciary’s proactive stance underscores its importance in advancing environmental causes. The judiciary has the potential to be a powerful advocate for environmental rights, ensuring that sustainable development aligns with environmental preservation. Striking a balance between sustainable development and

¹⁶⁷ (HC 9451/12).

¹⁶⁸ Soyapi (n.17 above).

¹⁶⁹ *Ibid.*

environmental protection remains challenging. We have yet to see the courts marrying the essential principles of environmental rights and expanding on sustainable development and environmental protection as fundamental human rights, such as the right to life, in their adjudication. There are currently very limited precedents on the right to a healthy environment and environmental jurisprudence in Zimbabwe. Notwithstanding the difficulties mentioned above, the many favourable decisions in the cases under discussion demonstrate that environmental jurisprudence is gradually evolving.

CHAPTER 5: CONCLUSION

This study examined how the judiciary in Zimbabwe has expanded environmental rights as provided for in the Constitution. While the Constitution includes environmental rights in the Bill of Rights and is in line with international and regional trends, the problem remains that there is no solid environmental jurisprudence that can assist in the interpretation, application, implementation and enforcement of existing laws. The judiciary plays a critical role in interpreting and enforcing environmental rights. The role of the courts is especially important in the context of the protection of the environment, and giving effect to the principle of sustainable development.

This research is based on the problem of a lack of clear, comprehensive and concise understanding of the scope, content and extent of environmental rights as enshrined in the Constitution and supposedly given effect by subsidiary legislation such as the EMA. A corollary of the lack of a clear knowledge base on environmental rights is that environmental problems remain unaddressed. The main problems include environmental degradation, water and air pollution, deforestation, poor waste management and resource exploitation, wetland degradation and others. With a clear understanding of the scope, nature and meaning of environmental rights, problems, including even the socio-economic meltdown characterising the nation can be tackled, confronted or addressed. Sustainable development integrates environmental, social and economic in advancing development. Zimbabwe's socio-economic meltdown requires a holistic approach that integrates environmental rights, and sustainable practices that ensure the environment and resources are protected for the benefit of present and future generations. By prioritising environmental well-being, Zimbabwe can build resilience, improve livelihoods, and create a path toward socio-economic recovery.

Consequently, the constitutional recognition may not translate into Zimbabweans fully enjoying and realising their environmental rights as envisaged by the Constitution. This is because there is no guidance to the judiciary, the executive, the legislature and other critically important organs of state and government on how to apply, use and make reliance on current environmental rights provisions for purposes of enhancing environmental protection. In light of this, the judiciary is essential in managing this intersection because it is both the protector of the Constitution and the arbiter of justice. This study examined how Zimbabwean courts reconcile the frequently conflicting objectives of environmental stewardship and development by critically analysing the discourse within the country's judicial decisions.

This research highlighted that discourse is vital for understanding the judiciary's effectiveness in safeguarding the environment. It can provide insights into inherent challenges within environmental rights discourse and potential areas for legal reform and capacity building within the judicial system. Conducting a CDA of Zimbabwe's judiciary in balancing sustainable development and environmental protection involves examining how legal texts, judicial decisions, and the broader legal discourse contribute to the understanding and implementation of these two often competing interests.

Of importance to note in this research is the indivisibility of rights. It was emphasised that environmental rights are interconnected to all other fundamental human rights. Recognising this interdependence promotes a holistic approach to human well-being and socio-economic development. This outcome must be sought in multiple ways, including via the principles guiding environmental decision-making and how authorities decide on priorities in judicial adjudication. Thus, there may be situations in which a choice made or action done in accordance with a law that applies to everyone violates someone's right to the environment while still being reasonable and justified.

The first chapter introduced the study, providing the background which contextualises this research. It spelt out the aims of the research that delineated the thesis statement, rationale, theoretical framework, methodology, and chapter outline.

Chapter 2 illuminated the historical context and legal frameworks that form the basis of judicial decisions for sustainable development and environmental protection in Zimbabwe. Zimbabwe's natural resources have historically been the backbone of its economy. However, the exploitation of these resources has often come at the expense of environmental health and sustainability. The 2013 Constitution of Zimbabwe marked a significant shift by incorporating environmental rights, thus mandating the state and all institutions to respect, protect, promote, and fulfil these rights.

Chapter 3 integrated the variables and theoretical perspectives underpinning this research to allow for a comprehensive analysis of how the judiciary interprets and applies laws related to sustainable development and environmental protection. The functional and compulsive nature of legally balancing environmental protection and ensuring an environment that caters for health and well-being remains partially veiled. Environmental principles are omnipresent but often nebulous. Their content remains abstract until clearly unpacked and contextualised within specific legal cultures which makes the judiciary role indispensable in this endeavour. The interpretation and expansion of environmental law principles by the judiciary are pivotal in shaping legal frameworks that safeguard the planet. Failure to interpret and expand principles of environmental law and environmental rights can represent a breach in the legal fabric. The chapter also comprehensively delineated the judiciary's exercise of functions, especially in light of environmental rights. The judiciary's roles, authority and guiding principles as provided by the Constitution were all captured. The chapter generally unpacked environmental rights,

sustainable development and why critical discourse is critical in exploring these issues and how the judiciary balances inherent trade-offs.

Chapter 4 critically engaged with selected cases and explored how the judiciary has contributed to environmental protection and sustainable development discourse through its judgments. It mainly looked at how the judges have dealt with balancing well-established legal rules and principles with the evolving environmental rights as provided for by the Constitution. The discussion highlighted how the courts have easily embraced the relaxing of the *locus standi* because it is a well-established principle in law. From the judgements, the chapter sheds light on how law can evolve, but as long as it remains committed to stability and the rule of law, constitutionality and justice are guaranteed. The analysis in this chapter illuminated the importance of developing a body of environmental case law and legal practice grounded in robust legal reasoning and a commitment to ideals of environmental protection and sustainable development.

The norm is that environmental cases rarely reach the courts, and judges have limited opportunities to dissect environmental protection laws in relation to the right to a healthy environment. However, understanding the judiciary's role in advancing environmental protection remains crucial. The judiciary can play a pivotal role in interpreting and enforcing environmental laws, ensuring they align with constitutional provisions. By doing so, they contribute to safeguarding Zimbabwe's natural resource base and promoting sustainable development¹⁷⁰

Environmental problems do not fit easily into these existing legal frameworks. There are many interconnected parties. Around an environmental statute develops a complex body of law and practice

¹⁷⁰ Soyapi (n.17 above).

concerning how to apply it legitimately. While environmental legislation can disrupt the legal order by creating new legal obligations, the legal order develops to adapt to such disruption and to create a new stable legal equilibrium. Many contemporary environmental laws, like other areas of regulation, regulate activities before they become serious problems. This is in contrast to other areas of law that are concerned with the legal implications of past behaviour. As environmental problems are dynamic, laws in relation to them often need to be revised.

In the context of Zimbabwe, it is evident that courts have not had the chance to do such balancing, as proven by the lack of significant jurisprudence on environmental rights. What is clear, though, is that socio-economic development has for the most part been occurring at the expense of the environment. Much of this has been tied to various neo-colonial-type deals, mostly involving China.

All arms of the state must play their part to ensure that environmental rights become a reality. The legislative, executive, judicial, and other state organs are all required to abide by the rule of law and abide by the environmental rights guaranteed by the Constitution and the EMA. There has been a rise in lawsuits opposing governmental action and inaction that have an adverse effect on the environment and the alarming rates of non-compliance with environmental laws that affect various communities across the nation. Most of the elite leaders are behind mining and private property deals which greatly compromises the judiciary in its execution of judiciary duties. This explains why private property judgments in wetland cases are brief and hesitant.

Despite a comprehensive legal framework, Zimbabwe still faces challenges in implementing environmental protection measures. These challenges include inadequate funding, limited public awareness, and weak enforcement mechanisms. To address these challenges,

Zimbabwe could consider increasing funding for environmental protection measures, raising public awareness through education and outreach programs, and strengthening enforcement mechanisms.

The Constitution is the ultimate law of the land. Any legislation that conflicts with Zimbabwe's Constitution is invalid to the degree of the discrepancy. Therefore, every law must be interpreted so that, to the greatest extent feasible, it complies with the Constitution. Environmental rights and sustainable development are essential concepts that are critical to the health and well-being of individuals and communities. In interpreting these constitutional rights, the courts must also take into account global best practices. Zimbabwe is party to several international treaties for the protection of the environment, as such constitutional rights must be interpreted and applied in conformity with these conventions and treaties. Measures should be taken to establish legal, economic, and social frameworks that unequivocally require the government, civic organisations, and private individuals to act as knowledgeable and accountable guardians of the environment.

Just as environmental rights have expanded to address environmental problems, so too needs legal imagination. Section 73 shows that environmental rights involve the deliberate stretching of legal systems to respond to the protection of the environment and the complexity of fundamental rights while ensuring the stability of legal systems. The creation and operation of environmental rights need the judiciary to reflect upon and develop legal concepts, rules, and principles that embrace all aspects of environmental rights. Legal imagination is needed to develop law to respond to a world of multiple interconnected parties, rights, scientific uncertainty, and socio-politico-economic interests.

It is contended that specialised courts would be able to develop superior procedural norms and develop a better quality of jurisprudence through the developed expertise of judges who have greater exposure. They could develop uniformity, consistency and predictability in their decision-making that would enhance public confidence and help develop a rich body of jurisprudence.¹⁷¹ This would save time and cost, making litigation easier and quicker. Jurisdictions with specialised environmental courts seem to be doing well in terms of environmental justice, and it is hoped that the establishment of such courts in Zimbabwe could strengthen the provision of environmental justice in Zimbabwe too.

As highlighted before, mining issues and cases deserve a comprehensive, deeper analysis. It illuminates the politics, ideologies and power dynamics which cannot just be addressed by focusing on discourse.

The environmental clause calls for higher standards and accountability from the legislature and the executive to public interest in the environment. As a result, environmental protection and the legacy of the environment must be safeguarded under a new national drive. Having the protection of the environment in mind guides the judiciary in the interpretation of laws so that they reflect the spirit of a nation which has become conscious of the need to protect its environmental heritage. Courts have the task of balancing the competing interests of development and environmental protection.

The efficacy of environmental rights often depends on broader political variables, including the presence or absence of the rule of law. In summary, while Zimbabwe faces environmental challenges, the judiciary's role in adjudicating environmental protection cases remains essential. Scholars and practitioners should continue to explore this

¹⁷¹ Ndlovu (n. 118 above).

area to enhance our understanding of how the courts navigate environmental rights within the country's governance context.

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Synopsis

Zimbabwe's judiciary is pivotal in shaping the country's approach to sustainable development and environmental protection. This study employs critical discourse analysis to examine how the courts have adjudicated the right to a healthy environment within Zimbabwe's governance setting. Specifically, it explores the hindrances faced by the judiciary in upholding environmental rights and reviews the development (or lack thereof) of these rights in relation to court decisions. Zimbabwe's colonial period was marked by an economic development model often prioritising economic growth over environmental conservation. However, after gaining independence in 1980, Zimbabwe was recognised as a regional agricultural powerhouse. Despite subsequent challenges in the postcolonial era, the country still relies heavily on its extensive natural resource base, including minerals, agriculture, water resources, and wildlife. The 2013 Constitution recognises environmental rights as part of the Bill of Rights, binding the executive, legislature, and judiciary to uphold and protect these rights. This research employs a critical discourse analysis, examining court decisions, legal frameworks, and ideologies shaping the judiciary's environmental protection approach. By analysing judgments, legal texts, and scholarly commentary, the research illuminates underlying discourses and power dynamics that impact the adjudication of environmental rights in Zimbabwe. Understanding the judiciary's role in balancing sustainable development and environmental protection is crucial for effective policy formulation, legal reform, and environmental justice. By shedding light on the challenges faced by the courts, this research contributes to broader discussions on environmental governance and human rights in Zimbabwe.

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Tsiidzai Matsika is a distinguished academic, renowned for her contributions to literature, gender studies and sustainable development. She holds a PhD in English from the University of the Free State, where her research focused on the politics of sustainability as reflected in Zimbabwean political texts. She is currently a lecturer in the Languages, Literature, and Culture Department at the University of Zimbabwe and a Research Fellow at the University of the Free State. A deep commitment to advocacy in policy, gender and sustainable development issues characterises Matsika's scholarly work. Her academic pursuits are complemented by her passion for teaching, where she imparts knowledge on literature, governance, and development to both undergraduate and postgraduate students. She has co-authored a book titled *Angel Hope: Sustainable Development Interventions* that documents and critiques Zimbabwe's First Lady's philanthropic work.