

The utility of environmental rights to sustainable development in Zimbabwe: A contribution to the constitutional reform debate

*Tumai Murombo**

Senior Lecturer, School of Law, University of the Witwatersrand, South Africa

Summary

The current economic situation in Zimbabwe was caused by a number of factors, including legitimate attempts to redress historical imbalances in the ownership of land. 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 human rights. By now, Zimbabwe could have been almost out of its economic whirlpool if only it was able to sustainably manage its natural resources, in spirit of the state's trusteeship over natural resources. The constitutional reform process in Zimbabwe presents a timely opportunity to lobby for the inclusion of environmental rights in the new Constitution. It is crucial to understand why such rights should be included and what benefit they may bring to the people of Zimbabwe. Environmental rights are crucial to sustainable development and the fulfilment of other human rights, especially socio-economic rights, that depend on the availability of resources. All human rights are therefore interdependent and complementary. Nevertheless, environmental rights will only thrive in an environment where the rule of law and good governance are respected. By incorporating environmental rights in the new Constitution, Zimbabwe will be following not only developments in South Africa, but also trends in international environmental law and the regional protection of human rights, especially in Africa.

* LLB (Hons) (Zimbabwe), LLM (Cape Town), LLM (Pace NY); Tumai.Murombo@wits.ac.za. An earlier draft of this paper was presented at the 7th Annual Colloquium of the IUCN Academy on Environmental Law, 1-5 November 2009, held in Wuhan, China. Comments and feedback from conference participants are gratefully acknowledged.

1 Introduction

The constitutional protection of environmental rights is one of the key strategies towards achieving sustainable development and environmental protection in developing countries. However, the conceptual and legal foundations of this strategy are not always clearly understood. The constitutional reform debate in Zimbabwe must include discourse on the constitutional protection of environmental rights, among other human rights, especially social, economic and cultural rights, given developments in South Africa and other jurisdictions. Ultimately, however, the efficacy of constitutional environmental rights depends on a number of other variables, including the social, economic, cultural and political context, good governance, the rule of law as well as the effective implementation and enforcement of environmental laws.

Evidently, the entrenchment of environmental rights¹ in national constitutions is the norm worldwide as nations become conscious of the need to protect the environment through effective legal methods. This ideological shift² is further pushed by, and interacts with, the international environmental movement which has seen the propagation of several international conventions and declarations. These instruments have shaped and given impetus to domestic environmental law.³

Developments in environmental law and policy place the environment in a proper legal framework to enable a country's citizens to effectively participate in the sustainable and equitable exploitation of natural resources, as well as their conservation. At the root of all this is a set of emerging norms and values that have materialised from the policy fermentation that shaped the direction of environmental law. Sustainable development is one such emerging concept, the essential elements of which can arguably be said to contain the justification for the heightened awareness to protect the environment without stifling reasonable socio-economic development. The perceived antithetical relationship between development and the environment has seen the environment being trumped by developmental interests. Sustain-

¹ An environmental right is a working term which has been devised for the purposes of this research. It does not reflect on the nature of the right advocated for, that is, it does not reflect on whether the right argued for should be a right to the environment or a *duty* to protect the environment imposed on human beings.

² *Director: Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 2 SA 709 (SCA) para 20; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Dept of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 57.

³ These include the Stockholm Declaration of 1972; the World Conservation Strategy (WCS) prepared by the International Union for the Conservation of Nature (IUCN) in 1980; the Brundtland Report 1987; the Rio Declaration and Agenda 21 produced by the Rio Summit in 1992. See P Sands *Principles of international environmental law* (2003) generally; and J Glazewski *Environmental law in South Africa* (2005) 29.

able development is thus seen as the tool to integrate these uneasy bedfellows.

In this article, I critically discuss the extent to which the constitutional protection of environmental rights in Zimbabwe, in the context of developments in South Africa and the region, may promote sustainable development.⁴ Zimbabwe still has a 'cease-fire'⁵ Constitution, the Bill of Rights of which is ineffective, shallow, and is honoured in the breach rather than in the observance. Zimbabweans are arguing for the constitutional reform process to be prioritised and it is therefore a good time to put the plight of environmental rights within the framework of this process.

I begin by hypothesising that, for environmental law to achieve its objective of environmental protection and sustainable development, it is necessary to constitutionally protect environmental rights.⁶ Secondly, I argue that, given the centrality of access to, and management of, natural resources to the Zimbabwean economic debacle, environmental law and policy become crucial to a successful economic resuscitation process. While the focus has been directed towards gross civil and political human rights violations, little attention has been paid to the role of natural resources management, including land, in resolving the Zimbabwean economic situation. I therefore seek to analyse the extent to which sustainable economic development and economic recovery are a result of the way in which the government manages the country's natural resources.

Next, I proffer a justification for environmental rights generally and in Zimbabwe, and then focus on the synergies between sustainable

⁴ And enjoyment of other human rights: D Shelton 'Human rights and the environment: Substantive rights' in M Fitzmaurice *et al* (eds) *Research handbook on international environmental law* (2010) 265.

⁵ By this it is meant that the 1979 Lancaster House Constitution was a document produced out of negotiations to end the liberation war, hence it contains many unfortunate compromises as Britain gave its former colonies constitutions which had little by way of human rights protection. The Zimbabwean Constitution has a Declaration of Rights which was effectively used by the Supreme Court in the late 1980s and early 1990s to advance human rights generally. See eg its application in *Catholic Commission for Justice and Peace v Attorney-General & Others* 1993 1 ZLR 242 (SC); *In re Munhumeso & Others* 1994 1 ZLR 49 (S); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS); *Commissioner of Police v CFU* 2000 1 ZLR 503 (H); 2000 9 BCLR 956 (ZH); *Nyambirai v NSSA* 1995 2 ZLR 1 (S); 1996 1 SA 636 (ZS); 1995 9 BCLR 1221 (ZS), to name but a few. It does not have any provisions expressly guaranteeing the right to a decent environment.

⁶ First, the hypothesis is limited to developing countries because this article focuses on Southern Africa. Note, however, the still unsettled definitions of the notion of 'developed' and 'developing'. Secondly, it has been argued that most developed countries have established traditions of environmental management and may not need constitutionally-guaranteed environmental rights. This applies to countries like the United Kingdom and the United States of America. Note, however, that even in those countries there has been agitation for constitutional protection of environmental rights; see C Juma 'Private property, environment and constitutional change' in C Juma & JB Ojwang (eds) *In land we trust* (1996) 369.

use of natural resources and the protection of other human rights. By 'synergies' I emphasise that all human rights are interdependent and complementary.⁷ Environmental protection and the sustainable use of natural resources through the rights paradigm are illusions if other crucial human rights⁸ are not promoted and guaranteed. Similarly, these rights, central to healing and peace in Zimbabwe, remain moot without the proper management of natural resources to sustain better livelihoods. In the last section I discuss the constitutional *lacunae* and propose the current constitutional reform process as an opportunity to include environmental rights in Zimbabwean law.

2 Why environmental rights?

2.1 Justifying the constitutional protection of environmental rights

The problems highlighted above regarding the underestimation of the role of natural resources in the promotion and fulfilment of human rights are compounded if one looks at whether we should have environmental rights in the first place. Many arguments have been advanced against the inclusion of environmental rights in constitutions. These arguments have been varied and diverse.⁹ In brief, it has been argued that the concept of 'third generation' human rights *per se* brings confusion to the whole field of human rights.¹⁰ Its vagueness and indeterminacy are difficult to cure, so it is argued. Would such rights be justiciable?¹¹ Who would be

⁷ A Sachs *Protecting human rights in a new South Africa* (1991) 141, where he correctly writes that '[h]uman rights in the broadest sense are indivisible. When we breathe the air of freedom, we do not want to choke on fumes.' See also *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) 1184; HJ Steiner & P Alston *International human rights in context: Law, politics and morals. Text and materials* (2000) 247.

⁸ Sachs (n 7 above).

⁹ See S Attapatu 'The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 65 113 (arguments against environmental rights); see also MR Anderson 'Human rights approaches to environmental protection: An overview' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) 14; see also W Ncube *et al* 'Towards the constitutional protection of environmental rights in Zimbabwe' 1996 (13) *Zimbabwe Law Review* 97 101-102.

¹⁰ A Boyle 'The role of international human rights law in the protection of the environment' in Boyle & Anderson (n 9 above) 46.

¹¹ On the justiciability of socio-economic rights, see UN Committee on Economic, Social and Cultural Rights General Comment 9 (1998) UN Doc E/1999/22, Annex IV in Steiner & Alston (n 7 above) 276-277; see also *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744; 1996 10 BCLR 1253 (CC) para 78; and the *Grootboom* case (n 7 above). It is submitted that the *ratio* of these cases applies with equal force to the justiciability of environmental rights.

the right bearers and the duty bearers?¹² Some have argued that first and second generation rights¹³ can be extended to protect the environment without creating a new distinct environmental right. Indeed, this has been done in some jurisdictions,¹⁴ but we should not put the judiciary in this unenviable position of constitutional interpretation (or rather activism) when we can do better by expressly including environmental rights in a constitution. This has been done in many countries, including South Africa, without any particular constitutional legal disharmony.¹⁵

The basis upon which various scholars have rested their dislike of environmental rights cannot clearly be reduced to a single issue. The major problems, however, are essentially substantive as well as definitional and contextual. Should the right be substantive or procedural?¹⁶ Should it be a right given to inanimate objects or to human beings only, that is, should it be informed by an anthropocentric or ecological ideological outlook?¹⁷ Ultimately the question is: Why should the environment be constitutionally protected anyway? Are they really human rights?

¹² JG Merrills 'Environmental protection and human rights: Conceptual aspects' in Boyle & Anderson (n 9 above) 31-33.

¹³ Most of these arguments have been debunked and the focus is now on how to implement and enforce socio-economic and environmental rights.

¹⁴ Indian courts are well known for their activism in this regard: See the case of *Indian Council for Enviro-Legal Action v Union of India* 3 SC C 212 (1996) and many others. In Southern Africa, the Tanzanian High Court used the right to life to protect people from pollution arising from a dump site in the case of *Joseph D Kessy v Dar es Salaam City Council* Civil Case 29 of 1988. For a detailed analysis of these and other cases, see 'Constitutional environmental law: Giving force to fundamental principles in Africa' Environmental Law Institute (ELI) *Research Report* May 2000 16-17, especially 29 http://www.elistore.org/reports_detail.asp?ID=527 (accessed 31 March 2011). See also MR Anderson 'Individual rights to environmental protection in India' in Boyle & Anderson (n 9 above) 214-216; Shelton (n 4 above) 267.

¹⁵ Sec 24 of the South African Constitution, 1996.

¹⁶ Attapatu (n 9 above) who breaks environmental rights into 'substantive' and procedural environmental rights. Similarly, J Razzaque 'Human rights to a clean environment: Procedural rights' in Fitzmaurice (n 4 above) 284 discusses the right to participation, the right to formation and the right of access to justice as procedural environmental rights, when arguably these are established civil and political rights. This may be unhelpful and I argue that the better view is to look at the so-called procedural environmental rights as merely instances where existing civil and political rights can be used to advance, defend or vindicate substantive environmental rights.

¹⁷ Sec 24 of the South African Constitution Act. It, eg, grants the right to every person; however, it also places a *duty* on every person to protect the environment, that is, the right has horizontal application as between ordinary citizens or legal persons. Art 39 of the Constitution of the Republic of Madagascar provides that everyone has a duty to respect the environment. Can another person or an environmental NGO enforce this right to respect on behalf of the environment? Art 72 of the Mozambican Constitution of 1992 provides that all citizens have a duty to defend a balanced environment. The Mozambican provision, art 72, could arguably be an exception in this respect.

This brief historical overview serves to put this analysis in context. In many democracies the constitution is the supreme law of the land; it contains and outlines the identity and ethos of a people and provides for the essential aspects of a people's government and administrative systems and forms the basis for the whole legal system. The inclusion of environmental rights places the environment within its proper legal framework and shows a commitment to sustainable development.¹⁸ The old idea of viewing conservation as a peripheral luxury has given way to sustainable development and, as rightly pointed out:¹⁹

The aim [of environmental rights] is not to limit or stifle development but to ensure that development projects incorporate environmental criteria or environmental impact assessment with a view to ensuring that development is carried out within the framework which stresses the importance of environmental factors.

It has also been argued that constitutional inclusion not only ensures protection at the highest level of the law, but also that it places environmental issues at the same level of concern as other human rights. This submission is made on the basis of the acknowledged inter-dependence of rights generally.²⁰ It can be argued that the ranking of rights into a hierarchy should be avoided as it can serve as a stumbling block to a holistic approach to human rights protection, as has been acknowledged globally.²¹ Attapatu contends that, despite the Vienna Declaration's call to treat human rights as indivisible and interdependent:²²

Economic, social, and cultural rights are often seen by states as being subordinate to civil and political rights despite the fact that deprivation of socio-economic rights can and does give rise to a violation of civil and political rights. For people in developing countries, in particular, socio-economic rights have assumed a much greater significance than civil and political rights.

I argue that in the constitutional reform process in Zimbabwe, a hierarchical approach to human rights, with an overemphasis on civil and political rights, must be resisted.

¹⁸ Juma (n 6 above) 366-367.

¹⁹ Ncube (n 9 above) 102; see also *Fuel Retailers* case (n 2 above) para 59.

²⁰ On the indivisibility of rights, see art I(5) of the Vienna Declaration and Programme of Action, UN Conference on Human Rights, 14-25 July 1993 <http://www.unhchr.ch/html/menu5/wchr.htm> (accessed 15 August 2010); see to the contrary F du Bois 'Social justice and the judicial enforcement of environmental rights and duties' in Boyle & Anderson (n 9 above) 152 157, who argues that whatever their formulation, the implementation of environmental rights is fraught with conceptual difficulties.

²¹ JG Merrils 'Environmental rights' in D Bodansky *et al* (eds) *The Oxford handbook of international environmental law* (2007) 664 675: 'Nevertheless, the tendency for rights to be discussed, as it were, in separate compartments, which is encouraged by the practice already noted of formulating certain rights in rather vague terms, is to be deplored.'

²² Attapatu (n 9 above) 109.

While helpful, existing rights, such as the right to life, can never sufficiently ensure the full protection of the environment. The environment is not merely a matter of life and death; it is also a matter of justice and sustainability. A claim for a fair share in the resources of a country or a push towards sustainable development does not fit within the paradigm of life rights, as equally a claim to save a wetland like the Isimangaliso or the Vaal²³ cannot be premised on a right to life. To sum up:²⁴

Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required.

The tangential applicability of existing human rights clearly makes them unsuitable, on their own, for environmental protection and sustainable development.²⁵ On the contrary, environmental protection is necessary for the achievement of all human rights.²⁶ It is submitted that the foundational character of environmental protection makes it necessary to have a specific environmental right.²⁷

In many countries, rights enshrined in the constitution have special enforcement procedures that are streamlined and stand clear of the traditional procedural hurdles present in many legal systems.²⁸ In the case of Zimbabwe, section 24(1) of the Constitution provides that any person complaining of a violation of any of his rights can use the special enforcement procedure provided therein. The procedure provides for quick redress. In the case of a detained person, it does away with the traditional problems associated with legal standing, although it leaves this snag intact in respect of persons not in detention. The procedural advantage of having an environmental right in the bill of rights is invaluable. In South Africa, sections 38 and 39 of the Constitution

²³ The Vaal is a South African wetland subject matter of litigation in *The Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment & Others* 1999 2 SA 709 (SCA).

²⁴ Anderson (n 9 above) 8-9.

²⁵ Eg, a number of cases have been brought before the European Court of Human Rights claiming a violation of the right to privacy and home life (art 8 European Convention on Human Rights) to achieve environmental objectives. See *Lopez-Ostra v Spain* (1994) EHRR 20, 227; *Guerra & 39 Others v Italy* (1998) EHRR 26, 357; and *Powell & Raynor v United Kingdom* (1990), EHRR 12, 335.

²⁶ Attapatu (n 9 above) 103.

²⁷ See PE Taylor 'From environmental to ecological human rights: A new dynamic in international law?' (1998) 10 *Georgetown International Environmental Law Review* 309.

²⁸ See sec 39 of the South African Constitution; see also T Murombo 'Strengthening *locus standi* in public interest environmental litigation: Has leadership moved from the United States to South Africa?' (2010) 6 *Law, Environment and Development Journal* 165; T Humby 'Reflections on the Biowatch dispute: Reviewing the fundamental rules of costs in the light of the needs of constitutional and/or public interest litigation' (2009) 12 *Potchefstroom Electronic Law Journal* 95 166.

provide for a category of persons who have legal standing to enforce rights in the bill of rights. These include:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

In the context of environmental law, this is augmented by section 32 of the National Environmental Management Act 107 of 1998 (NEMA) which, among others, gives standing to a person seeking to sue in the interests of protecting the environment. Undoubtedly, one is unlikely to find such wide provisions opening the doors of the courts to almost everyone with a cause of action premised on a violation of human rights in the whole of Southern Africa. The South African Constitution in this regard sounded the death knell of the common law *locus standi* doctrine as far as human rights are concerned. One can imagine the consequences if the environmental right in section 24 of the South African Constitution had been excluded from the Bill and put in an ordinary statute without special enforcement provisions.

At the international level, the trend towards the globalisation of human rights theory and the nature of national and global environmental problems make it imperative to look at environmental protection from a broader perspective than that of national politics.²⁹ The sequel of adopting a human rights approach to environmental protection is that global enforcement becomes relevant, especially in the case of Zimbabwe where allegations of gross human rights violations abound.³⁰ Enshrining environmental rights in the Constitution will enhance the level of protection afforded to the environment by opening the possibility of using international human rights systems against violations of such rights,³¹ an opportunity lacking in the arena of international environmental law.

²⁹ In this context, to effectively combat global warming and climate change, concerted and harmonised regional approaches are more effective than sporadic national initiatives. See W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1.

³⁰ Human Rights Watch *Diamonds in the rough: Human rights abuses in the Marange diamond fields of Zimbabwe* (2009) 28.

³¹ D Hunter *et al* *International environmental law and policy* (2002) 1284-1285. See also D Takacs 'The public trust doctrine, environmental human rights, and the future of private property' (2008) 16 *New York University Environmental Law Journal* 711 733, arguing that '[e]nvironmental human rights create more duties of each individual and the sovereigns who serve them not only not to usurp resources that are the object of these rights, but to affirmatively protect the natural objects and processes that form the basis of the rights'.

Finally, regional environmental trends have moved towards recognising environmental rights to promote sustainable development.³² At the regional level, the revised African Convention on the Conservation of Nature and Natural Resources recognises in article III the principle of peoples' environmental rights. The Southern African Development Community (SADC) treaty also provides that '[i]n accordance with the provisions of this treaty, member states agree to co-operate in the areas of ... natural resources and the environment'.³³ The relevance of these provisions is that member states' co-operation in environmental endeavours presupposes some degree of legal harmonisation, if not uniformity, in the ideologies and laws in the areas of co-operation. For instance, member states cannot effectively co-operate on trans-frontier conservation projects when other states do not have the necessary environmental laws, including environmental constitutional provisions.³⁴ The SADC treaty and the African Convention provisions echo and are complemented by the African Charter of Human and Peoples' Rights (African Charter) adopted at Banjul in 1981. Article 24 provides that '[a]ll peoples shall have a right to a *general satisfactory environment* favourable to their *development*'.³⁵ The African Union Constitutive Act further states as one of the objectives of the Union, the 'promot[ion] [of] sustainable development at the economic, social and cultural levels as well as the integration of African economies'.³⁶ Similarly, article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights provides that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services'.

These regional developments are noted here as they are important in rallying states towards embedding environmental rights in constitutions with a view to promoting sustainable development and combating global environmental problems that transcend political and

³² See generally Glazewski (n 3 above) 71.

³³ Art 24. The revised African Convention on the Conservation of Nature and Natural Resources was adopted the 11 July 2003 at the Assembly of the African Union; see also Draft Declaration on Human Rights and the Environment produced by the United Nations Human Rights Commission in 1994 <http://fletcher.tufts.edu/multi/www/1994-decl.html> (accessed 31 March 2011); and the Ksentini Report *Review of further developments in fields with which the sub-commission has been concerned human rights and the environment* E/CN.4/Sub.2/1994/9 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcca18025675c005779c3?OpenDocument> (accessed 28 March 2011).

³⁴ Scholtz (n 29 above).

³⁵ My emphasis. This right was, among other rights, at issue in the communication of *Social and Economic Rights Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), where the African Commission ruled that the activities of the Nigerian government were violating, among other rights, the environmental and developmental rights of the people of Ogoniland.

³⁶ Art 3(j) African Union Constitutive Act http://www.africa-union.org/root/au/about/constitutive_act_en.htm (accessed 28 March 2011).

geographical demarcations. They are also crucial for the management of shared resources like shared water courses, wildlife and straddling species. I argue that the regional trend towards the harmonisation of environmental laws and rights is a cogent reason why the environment should be protected in Zimbabwe's future Constitution.

One cannot overemphasise the legal advantages of including environmental rights in a constitution. This introductory discussion illustrates that it would be remiss for Zimbabweans not to include environmental rights in the new Constitution. But how will environmental rights assist Zimbabwe to pull out of its economic quagmire in the long term?

3 Environmental rights as a precondition for sustainable development

At this stage Zimbabwe needs laws and policies that support expedited economic recovery in a sustainable development framework. The preceding section generally deliberated on the advantages of having constitutionally-protected environmental rights. In this section, I look at whether environmental rights can underpin sustainable economic development in Zimbabwe.

Arguably, in international law the concept of sustainable development is still a norm of soft law³⁷ and has not attained the status of customary international law. Some have discounted the utility of the concept in international law discourse altogether.³⁸ They argue that the concept is only a 'soft law'³⁹ norm and state practice has not rendered it widely accepted and uniformly deployed.⁴⁰ It has also, in the extreme, been argued that the concept remains problematic, nebulous

³⁷ DB Magraw & LD Hawke 'Sustainable development' in Bodansky *et al* (n 21 above) 624: 'Sustainable development is "soft law" – that is, a normative statement supported by a political or other commitment and, thus, something more than policy even though it is not legally binding (though it may become binding in the future).' V Lowe 'Sustainable development and unsustainable arguments' in A Boyle & D Freestone (eds) *International law and sustainable development: Past achievements and future challenges* (1999) 19 31: 'Sustainable development is a "metaprinciple, acting upon other legal rules and principles".'

³⁸ K Bosselman 'Losing the forest for the trees: Environmental reductionism in the law' (2010) 2 *Sustainability* 2424 2438: 'Soft law represents a consensus of the international community of states that is considered legally relevant, although not binding' <http://www.mdpi.com/2071-1050/2/8/2424/pdf> (accessed 31 March 2011).

³⁹ D Bodansky *The art and craft of international environmental law* (2010) 14: 'The very term *soft law* betrays some confusion about the definition of law ... Difficulty of law from politics particularly acute in international environmental law, which often addresses issues in a pragmatic, non-legalistic way.'

⁴⁰ Magraw & Hawke (n 37 above) 624; Lowe (n 37 above).

and merely an 'emergent legal principle'.⁴¹ Despite this, one may, however, argue that the concept of sustainable development is the single most important emerging norm of international environmental law that has attained widespread recognition, finding its way into regional environmental conventions and national constitutions and shaping domestic environmental laws and policies.⁴² Without overburdening the reader with the semantics of the concept and its origins and future, it suffices to note that much has been written on it, particularly regarding its legal content and status under international environmental law.⁴³ However, much less has been written about this concept in the context of environmental rights protection in Zimbabwe, especially the role that environmental rights can play in promoting sustainable development. Authorities agree that the concept has certain components, some of which may assist us in unravelling the interface between environmental rights, sustainable development and other complementing environmental principles. Sands argues that the recurring elements of sustainable development are:⁴⁴

⁴¹ I Brownlie *Principles of public international law* (2008) 278; PW Bernie & AE Boyle *International law and the environment* (2002) 47 also doubt the legal status of the concept. Contrast Sands (n 3 above) 208, who suggests that the concept is now recognised at international law and notes that the principle of 'sustainability' can be said to have featured in international relations as far back as 1893, 199.

⁴² Most post-Stockholm international environmental declarations and conventions in one way or another refer to sustainable management or utilisation of resources; see the 1992 Convention of Biological Diversity which talks of 'sustainable use'; art XIV of the African Convention on the Conservation of Nature and Natural resources deals with sustainable development and natural resources; see Weeramantry J in the *Case Concerning the Construction of the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (1998) 37 *International Legal Materials* 162 204 ; South Africa's NEMA and Zimbabwe's Environmental Management Act (ch 20:27) all treat sustainable development as a fundamental principle of environmental management.

⁴³ The internationally-accepted definition is 'development that meets the needs of present without compromising the ability of future generations to meet their own needs', coined by the World Commission of Environment and Development (WCED)'s report *Our common future* (1989); see also D French 'Sustainable development' in Fitzmaurice *et al* (n 4 above) 55: 'Similar uncertainties arise if one suggests sustainable development is a putative rule of customary international law. There is not only the *factual* question whether sustainable development has, as yet, become such a rule, but more fundamentally, the legal question, whether it is possible for sustainable development to develop into such a rule.' Magraw & Hawke (n 37 above) 613; see also Glazewski (n 3 above) 13; R Callway 'Introduction: Setting the scene' in G Ayre & R Callway *Governance for sustainable development: A foundation for the future* (2005) 13: 'Sustainable development continues to be thought of as 'an issue' – a passing catchphrase something that one addresses among a whole plethora of other global concerns and priorities. This totally misses the point. It is sustainable development that *defines* how we *do* good governance' (emphasis in original).

⁴⁴ Sands (n 3 above) 252.

- (1) the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);
- (2) the aim of exploiting natural resources in a manner which is 'sustainable', or 'prudent', or 'rational', or 'wise', or 'appropriate' (the principle of sustainable use);
- (3) the 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intra-generational equity); and
- (4) the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration).

Brown Weiss goes further to dissect the concept of intergenerational equity, interrogating if and whether current generations have any moral or legal obligations towards future generations, concluding that we hold the earth in trust for future generations.⁴⁵ It is in this sense that I submit that the public trust doctrine informs and complements sustainable development. This doctrine, while having its origins in American law,⁴⁶ could arguably be said to have been part of the Roman-Dutch law concept of public property.⁴⁷ This incorporates the idea of trusteeship over natural resources by current generations.⁴⁸ Brown Weiss argues that 'each generation is both a trustee for the earth with obligations to care for it and a beneficiary with rights to use it'.⁴⁹

⁴⁵ E Brown Weiss 'Implementing intergenerational equity' in Fitzmaurice *et al* (n 4 above) 102.

⁴⁶ *Illinois Central Railroad v Illinois* 146 US 387 (1892); JL Sax 'Liberating the public trust doctrine from its historical shackles' (1980) 14 *UC Davis Law Review* 185 189.

⁴⁷ P Kameri-Mbote 'The use of the public trust doctrine in environmental law' (2007) 3 *Law, Environment and Development Journal* (2007) 195 197 <http://www.lead-journal.org/content/07195.pdf> (accessed 28 March 2011).

⁴⁸ While initially limited to public resources such as water and the air, the public trust doctrine has since been expanded to include other natural resources such as minerals and biological resources. See eg the South African National Environmental Management: Biodiversity Act 10 of 2004 (sec 3 headed 'State's trusteeship of biological diversity'); the Minerals and Petroleum Resources Development Act 28 of 2002 (sec 3 headed 'Custodianship of nation's mineral and petroleum resources'); the National Water Act 1998 (sec 3 provides, among other things, that '[a]s the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate').

⁴⁹ Brown Weiss (n 45 above) 102. In some jurisdictions, this principle has been applied in practical cases to defend the rights of future generations; see *Juan Oposal & Others v the Honourable Fulgencio Factoran Jr, Secretary of the Department of the Environment and Natural Resources & Others (Oposa v Factoran)* (1993) Supreme Court of the Philippines, SCRA 224, 1792; *ILM* 33 173.

Similarly, the element of equitable use⁵⁰ in sustainable development makes the notion of environmental justice relevant to sustainable development as this notion has at its core the pursuit of equity in terms of the distribution of environmental burdens and benefits within the current generations.⁵¹ I argue that protecting environmental rights without concomitantly alerting the state that, as sovereign 'owner' of natural resources within its jurisdiction, it is bound by duties of trusteeship towards its present and future citizens, may ultimately prove ineffective. This is particularly so given the tendency of many states in Africa to treat natural resources as proprietary owners to the exclusion of their people who remain perpetually impoverished in the midst of plenty.

Most of the modern instruments of environmental protection in domestic environmental laws are derived from the substance of sustainable development.⁵² In South Africa, for instance, NEMA has given legal content to most of these principles.⁵³ Principles such as inter- and intra-generational equity, environmental impact assessment (EIA), environmental justice, integrated environmental management, polluter pays, the public trust doctrine, and public participation are the essence of the concept of sustainable development.⁵⁴ Sustainable development contains the foundations of environmental law and regulation.⁵⁵ It permeates environmental law from international instruments, regional instruments, and national laws and policies.

3.1 Complementing principles and concepts

Two further principles of environmental law that complement sustainable development merit special mention in the context of Zimbabwe. These are the public trust doctrine and environmental justice. Comparatively, the South African framework environmental legislation, NEMA,

⁵⁰ French (n 43 above) 60, arguing that working towards intra-generational equity (between the north and the south) is pivotal for sustainable development. This argument can very well be applied to the need to promote equity between rich and poor within states. French argues elsewhere that intra-generational equity concerns itself with the need for fairness in international law both in terms of social and *environmental justice*; D French 'International environmental law and the achievement of intra-generational equity' *Environmental Law Reporter* 10469-10485.

⁵¹ C Rechtschaffen *et al* *Environmental justice: Law, policy and regulation* (2009) 3-21.

⁵² Magraw & Hawke (n 37 above) 627.

⁵³ Sec 2 of the National Environmental Management Act 108 of 1998; sec 24 of the Constitution of South Africa is predicated on the concept of sustainable development.

⁵⁴ Sec 2(4) NEMA.

⁵⁵ Glazewski (n 3 above) 9-10; similarly, international environmental law is built upon international conventions and custom, which are now either substantively informed or related to sustainable development or the use of natural resources and the control of environmental problems. See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Environment and Land Affairs* 2004 5 SA 124 (W) 144B-C; *Fuel Retailers* case (n 2 above) paras 45 & 57.

provides for and defines these principles in relation to sustainable development as follows:⁵⁶

4 (a) Sustainable development requires the consideration of all relevant factors including the following:

...
 (c) Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.
 ...
 (o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

These principles are important in the context of environmental rights discourse in Zimbabwe. If properly applied in an environmental law framework that is premised on a constitutionally-guaranteed environmental right, they can effectively provide an avenue to control the way in which a state manages natural resources and the role of citizens with regard to those resources.⁵⁷ Takacs thus correctly argues:⁵⁸

The public trust doctrine is both an appealing idea that lays the groundwork for environmental human rights, and a venerable legal doctrine that has historically managed to protect certain resources for public use, and may still be called upon to protect those resources in the name of environmental human rights.

I argue that sustainable development, bolstered by the public trust doctrine and the concept of environmental justice,⁵⁹ should be the theoretical basis for enshrining environmental rights in the proposed Zimbabwean Constitution. Furthermore, thinking within the spirit of sustainable development and its components of intergenerational⁶⁰ and intra-generational equity, which is important for developing states, can help current political leaders view themselves as dispensable. The leaders are only trustees not only of the country, but also of natural resources which are the backbone of Zimbabwe's economy. Even if the proposed Constitution contains civil, political and socio-economic rights, these, especially the latter, would be difficult to fulfil

⁵⁶ Secs 4(a), (c), & (o) NEMA.

⁵⁷ Kameri-Mbote (n 47 above) 199 (explaining the nature of the obligations of the state as trustee over natural resources). These concepts can be used to control access to and sustainable use of diamonds in Chiadzwa, public land resources, and other natural resources in partnership with local communities, the government merely being a trustee for present and future generations.

⁵⁸ Takacs (n 31 above) 733.

⁵⁹ The Preamble to NEMA, eg, correctly links environmental injustice to the violation of environmental rights. It provides that '*inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices*' (my emphasis).

⁶⁰ Fully elaborated on by Brown Weiss (n 45 above) 100 102-104.

and promote without sustainable management and the use of natural resources anchored by environmental rights provisions.⁶¹

When constitutions provide that the rights to housing, access to sufficient water,⁶² food and health must be fulfilled progressively '*subject to available resources*', they refer, among other resources, to a country's natural resource capital. Natural resources are converted into the capital that sustains economic growth and development, which in turn can raise the quality of life in a country.⁶³ Countries that manage their natural resources in unsustainable ways invariably have poor human rights records, not only in relation to civil and political rights but, more importantly, socio-economic rights.⁶⁴ Hunter *et al* assert that⁶⁵

[t]he failure 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. Moreover, with enormous wealth at stake in many of these conflicts, environmental and human rights activists are being targeted, sometimes directly by government or at least with its tacit approval.

Zimbabwe's poor human rights record since 1998 is not coincidental given how, from that time, exemplary natural resource managed programmes and agriculture started to collapse.⁶⁶ These collapsed much faster given, among other causes, the absence of effective constitutional protection of the environment in the Lancaster House Constitution. Unfortunately, this happened in a context where the government of Zimbabwe attempted to play the role of public trustee of the country's natural resources, addressing intra-generational issues regarding land ownership. While this end was and remains noble,⁶⁷ the means used and the process followed bordered on the outrageous.

⁶¹ Shelton (n 4 above) 265 279 ('Human rights cannot be enjoyed in a degraded environment'). The rights to life, health, food, water, even privacy are all compromised by the absence of environmental protection.

⁶² See L Stewart & D Horsten 'The role of sustainability in the adjudication of the right of access to adequate water' (2009) 24 SA Public Law 486; *Mazibuko & Others v City of Johannesburg & Others* 2010 3 BCLR 239 (CC); 2010 4 SA 1 (CC) (at the core this case was about how South Africa can manage its water resources to promote the right of access to sufficient water provided for in the Constitution).

⁶³ See eg secs 24, 26, 27 and 28 of the South African Constitution and United Nations Economic and Social Council, General Comment 12 'The right to adequate food' (art 11) 1999/05/12. E/C.12/1999/5.

⁶⁴ Hunter *et al* (n 31 above) 1281.

⁶⁵ As above (my emphasis).

⁶⁶ Chaotic land invasions left productive land barren and fallow while national park fences were torn down in a wave of uncontrolled settlements, while even before 1998 illegal mining had become a common sight, the recent being the diamond saga in Chiadzwa.

⁶⁷ See generally Ministry of Lands, Agriculture, and Rural Resettlement 'Land Reform and Resettlement Programme: Revised Phase II' (Harare: Government of Zimbabwe, April 2001).

The presence of widespread poverty is one of the key indicators of a state's failure to fulfil socio-economic rights, and the best way to eliminate poverty is by promoting sustainable economic growth (creating jobs, wealth, and uplifting the standard of living).⁶⁸ A generally-overlooked consideration is the role that constitutionally-guaranteed environmental rights can play in poverty alleviation. However, as pointed out by the South African Constitutional Court in the *Fuel Retailers* case:⁶⁹

Economic and social development is essential to the wellbeing of human beings ... socio-economic rights that are set out in the [South African] Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. *Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.* Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed ... [e]nvironmental stresses and patterns of economic development are linked to one to another. Thus, agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuel wood in many developing nations. These stresses all threaten economic development.

If the new Zimbabwean Constitution is going to assist the country's future growth, it is vital for it to contain environmental rights among the usual civil, political and socio-economic rights. Environmental rights play a complementary role in ensuring that other rights are enjoyed, promoted, protected and fulfilled.

A major pitfall that some developing countries face is the supposition that economic development means the creation of private wealth at the expense of the welfare of the larger public.⁷⁰ For instance, one could surmise that the potential for Zimbabwe to move towards sustainable economic development through the proper management of landed and mineral resources is exponential, but a private wealth mentality in the

⁶⁸ K Bosselmann *et al* 'Governance for sustainability issues, challenges, successes' *IUCN Environmental Policy and Law Paper* 70 (2008) 7. See generally the UNDP Human Development Report 'Beyond scarcity: Power, poverty and the global water crisis' 2006 <http://hdr.undp.org/en/reports/global/hdr2006> (accessed 16 August 2010).

⁶⁹ *Fuel Retailers* (n 2 above) para 44. The court continues to state in para 45 that '[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development.' See further T Murombo 'From crude environmentalism to sustainable development: *Fuel Retailers*' (2008) 3 *South African Law Journal* 488.

⁷⁰ A good example is how affirmative action programmes, such as the indigenisation policy in Zimbabwe or the BEE policy in South Africa, eventually enrich a few of the elite while the greater majority of people languish in abject poverty.

country hampers any large-scale focused economic development.⁷¹ The economies of South Africa and Botswana, for instance, get most of their resilience from the proper sustainable management of mineral resources that are harnessed to drive social and economic upliftment (socio-economic rights).

The utility of natural resources as anchoring resources for the fulfilment of socio-economic rights also depends on good political and environmental governance and the rule of law.⁷² In this respect, Attapatu notes:⁷³

The procedural components of sustainable development — the right to information and the right to participate in decision-making processes — coincide with environmental procedural rights. These procedural rights are principles of *good governance* — transparency and accountability and *upholding the rule of law*, indicating that in order to achieve good governance, sustainable development is necessary.

Environmental rights can play an even larger role where the rule of law and good governance exist,⁷⁴ issues that are broader and beyond the scope of this paper. As pointed out by authorities, '[t]here is a political consensus that the rule of law and good governance are a necessary foundation for efforts to achieve sustainable development'.⁷⁵ Hope concurs, defining good governance as⁷⁶

⁷¹ See B Cousins 'Time to ditch the "disaster" scenarios' *Mail & Guardian* 21 May 2010 <http://www.mg.co.za/article/2010-05-20-time-to-ditch-the-disaster-scenarios> (accessed 15 August 2010), arguing that the land reform did benefit quite a number of people in Zimbabwe despite the flagrant poor implementation of the programme. 'Clearly, agriculture in Zimbabwe has indeed experienced significant problems in the years following radical land reform, but the notion of "total failure" is inaccurate. A new agrarian structure has come into being, with a much wider range of farm sizes and farming systems than in the past, replacing a highly unequal and dualistic structure.'

⁷² LA Feris 'The role of good environmental governance in the sustainable development of South Africa' (2010) 13 *Potchefstroom Electronic Law Journal* 73; M Sachiko & D Zaelke 'Rule of law, good governance, and sustainable development' http://www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf (accessed 16 August 2010).

⁷³ Attapatu (n 9 above) 126.

⁷⁴ Shelton (n 4 above) 279; defined by the United Nations Development Programmes (UNDP) as 'the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.' The UNDP elaborates the concept further, adding that '[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the *rule of law*. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of development resources' (my emphasis) <http://mirror.undp.org/magnet/policy/chapter1.htm> (accessed 28 March 2011).

⁷⁵ M Sachiko & Z Durwood 'Rule of law, good governance and sustainable development' 7th International Conference on Environmental Compliance and Enforcement http://www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf (accessed 28 March 2011).

⁷⁶ KR Hope 'Toward good governance and sustainable development: The African Peer Review Mechanism' (2005) 18 *Governance* 283 285 (my emphasis).

entail[ing] the existence of efficient and accountable institutions — political, judicial, administrative, economic, corporate — and entrenched rules that *promote development, protect human rights, respect the rule of law*, and ensure that people are free to participate in, and be heard on, decisions that affect their lives.

It is only now that the government of Zimbabwe is realising the need to promote good natural resource governance with regard to land, mineral and other natural resources that could, with proper management, already have taken the country out of its economic difficulties. The inextricable relationship between environmental and socio-economic rights and therefore economic development cannot be overemphasised.

4 Environmental rights in the current legal environment of Zimbabwe

In terms of human rights, the government of Zimbabwe has a varied record. In the first decade of independence, the judiciary handed down relatively progressive decisions, but this impressive record has since been destroyed.⁷⁷ One should note that even in the presence of a proactive judiciary, parliament was undoing the progress by continually amending the Constitution to reverse progressive human rights decisions.⁷⁸ This happened on several occasions in the life of the current Constitution which contains a declaration of rights (with only civil and political rights).

One wonders therefore if it is possible for Zimbabwe to have a progressive constitution with a bill of rights, with a constitutional system of parliamentary supremacy where the legislature can, and has previously shown itself to, be antagonistic to progressive human rights protection. Will it be any different with socio-economic and environmental rights? The judiciary in Zimbabwe was very active up until the end of the late 1990s.⁷⁹ Without constitutional environmental rights, a proactive judiciary can be invaluable in promoting environmental protection and sustainable development. Thus, if one looks at Indian constitutional jurisprudence, the right to life and the right to health,

⁷⁷ This is a contentious issue with some viewing the current judiciary as simply pan-African as opposed to the largely white bench of the 1980s and 1990s whose allegiances were put into doubt with their avid protection of white commercial farmers on land cases.

⁷⁸ See J Dugard 'The role of human rights treaty standards in domestic law: The Southern African experience' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 269.

⁷⁹ This was so with the predominantly white Supreme Court bench. Perceptions of that Court being packed started soon after land invasions and war veterans, acting in cohorts with the Justice Ministry, openly invited most of the white judges to resign as they were perceived to be serving the interests of white commercial farmers and presented obstacles in the land reform programme.

among other rights, are also environmentally relevant but require a proactive judiciary.⁸⁰ Nevertheless, the absence of constitutional environmental rights does not imply that there is no legislative activity on environmental issues. In fact, in Zimbabwe, environmental legislation is as old as colonialism.⁸¹

There are many statutes regulating the exploitation of natural resources and some sector-specific instruments controlling certain environmentally harmful activities. However, most of these laws were premised on the inveterate penchant of the colonialists to extract wealth from nature with no regard to sustainability. This body of laws has received its fair share of criticism⁸² and I shall not deal with it in this article.

A key piece of environmental legislation in Zimbabwe is the Environment Management Act (EMA).⁸³ It may be argued that there is already provision for environmental rights in EMA; therefore there is no need for specific constitutional environmental rights. This framework environmental statute seeks to introduce an integrated approach to environmental management. It repeals some of the major colonial natural resource exploitation legislation noted above⁸⁴ and purports to cover as much scope as possible, ranging from environmental management, pollution control, waste management, public participation, access to information, biodiversity issues and institutional arrangements. EMA doubles as framework environmental legislation while

⁸⁰ I do not intend to make any detailed analysis of Indian jurisprudence here, just a comparative reference; for a detailed analysis, see J Razzaque *Public interest environmental litigation in India, Pakistan and Bangladesh* (2008); MC Mehta v Kamal Nath 1997 1 SCC 388; and MC Mehta & Others v Shriram Food and Fertilizer Industries and Union of India (Oleum Gas Leak case – III) AIR 1987 SC 1026.

⁸¹ See eg the Land Husbandry Act (Chapter); Natural Resources Act (ch 20:13) recently repealed by EMA, and the old Water Act (ch 20:22). A common feature of these environmental statutes is that they regulated the exploitation of natural resources and were not about conservation or sustainable utilisation. See J Murombedzi 'The evolving context of community-based natural resource management in sub-Saharan Africa in historical perspective' 2-4, Plenary Presentation, International CBNRM Workshop, Washington DC, USA, 10-14 May 1998 http://www.cbnrm.net/pdf/murombedzi_001.pdf (accessed 16 August 2010).

⁸² W Chinamhora 'Towards environmental impact assessment in Zimbabwe: Making developers and project proponents ecologically conscious' (1995) 7 *Legal Forum* 41; W Chinamhora 'Zimbabwe's Environmental Impact Assessment Policy of 1994: Can it achieve sound environmental management' (1995) 7 *Legal Forum* 37; W Ncube 'Land tenure systems, natural resources and environmental protection in Zimbabwe: The legal regulatory framework' 1996 (8) *Legal Forum* 26; W Chinamhora & D Ruhukwa 'Towards an Environmental Management Act: Review and revision of Zimbabwe's environmental legislation' Report for the Ministry of Environment and Tourism, 1995.

⁸³ Act 13 of 2002 or ch 20:27.

⁸⁴ Sec 143 repeals the Natural Resources Act (ch 20:13), but preserves regulations and by-laws made under that Act. Sec 144 repeals the Atmospheric Pollution Prevention Act (ch 20:03), the Hazardous Substances and Articles Act (ch 15:05) and the Noxious Weeds Act (ch 19:07).

providing for some sector specific regulatory aspects. Important for this paper, EMA contains a part (Part II) on General Principles of Environmental Management and Functions of the Minister,⁸⁵ which creates an environmental right. The question that arises in connection with Part II is whether it creates a fully justiciable environmental right or whether it only provides for general principles of environmental management *stricto sensu*. It is submitted that the latter interpretation is consistent with the objectives behind Part II of EMA. The majority of the provisions in Part II provide for well-known principles of environmental law, such as integrated environmental management,⁸⁶ the precautionary principle,⁸⁷ polluter pays⁸⁸ and sustainable development.⁸⁹ Towards the end there is a clear caution that⁹⁰

[t]he environmental rights and principles of environmental management set out in subsections (1) and (2) shall serve as the general framework within which plans for the management of the environment shall be formulated; and (a) serve as the guidelines for the exercise of any function concerning the protection or management of the environment in terms of this Act or any other enactment; and (b) guide the interpretation, administration and implementation of any other law concerning the protection or management of the environment.

This provision undoubtedly confirms my contention that the right *purported* to be created by EMA and which was applauded during debates on the green paper is impotent as an environmental human right.⁹¹ In fact, since EMA was enacted in 2002, the management of natural resources in Zimbabwe, especially land and mineral resources, has gone from bad to worse, only slightly recovering under the inclusive government.⁹² A clear example is the current debacle in the exploitation of the newly-discovered diamond deposits in Chiadzwa that has allegedly been characterised by uncontrolled mining with extensive environmental damage, corruption and a disregard for human rights.⁹³ This is clear evidence that any *purported* protection of environmental rights in some ordinary statute is ineffective and strengthens the

⁸⁵ Part II, especially secs 4 & 5.

⁸⁶ Sec 4(2)(a).

⁸⁷ Sec 4(2)(f).

⁸⁸ Sec 4(2)(g).

⁸⁹ Sec 4(2)(e).

⁹⁰ Sec 4(3).

⁹¹ This is in clear contrast to the approach taken in the Constitution of the Republic of South Africa, 1996 and subsequent decisions by South African courts that have largely upheld the right to an environment not harmful to health or wellbeing. See *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W).

⁹² Before the inclusive government, no one could account for the revenue from diamond mining then taking place under a free-for-all situation. The inclusive government brought some order in the area, reducing the chaos there, and involving the Kimberly Process, even though the situation is far from ideal.

⁹³ Human Rights Watch (n 30 above), in general.

argument advanced here that only constitutional entrenchment can deliver sustainable development. All things being equal, constitutional protection will only be effective in an environment where the rule of law and good governance prevail.

While a number of legal strategies used in EMA could be more potent if deriving their authority from an environmental right enshrined in a constitution, such a constitutional provision does not currently exist. The constitutional inclusion of environmental rights can, firstly, bolster environmental protection and sustainable development,⁹⁴ while the inclusion of other complementing social, economic and cultural rights will create a conducive environment for the rule of law and good governance. This is especially true, given the interdependence of the various categories of human rights as argued above. There is no basis to claim the equitable sharing of land resources or other natural resources when one has no guarantee of freedom of expression, movement, the right to liberty or access to and equality before the courts. Equally, without the protection of property rights, ownership rights are rendered nugatory. A conceptual understanding of contemporary human rights as interdependent and complementary is therefore a commendable development to the extent that it puts all rights in a proper conceptual framework. It is within this context that one considers civil and political rights to promote the enjoyment of socio-economic and environmental rights. With the exception of EMA, the rest of Zimbabwe's environmental laws remain technical and regulatory in focus, without any sustainability foundation.

It was in the context of an absence of constitutional environmental provisions that the political protagonists in the Global Political Agreement⁹⁵ agreed to the making of a new Constitution in Zimbabwe.⁹⁶ The constitutional reform process begun with the appointment of a Select Committee of Parliament of Zimbabwe on the Constitution Organisation Profile (COPAC) in 2009.⁹⁷ COPAC has since begun public outreach consultations. During the outreach process, a Land, Environment and Natural Resources Civil Society Cluster on Constitutional Reform (a coalition of environmental civic organisations) was tasked with developing a position paper on environmental rights. This was because a narrow focus on land resources had nearly overshadowed

⁹⁴ As discussed above.

⁹⁵ 'Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe' <http://www.copac.org.zw/downloads/category/7-government-of-national-unity.html#> (accessed 28 March 2011).

⁹⁶ Art VI (6.1 of the Agreement) – The constitutional reform process was supposed to be completed within 18 months of the formation of the inclusive unity government. These timeframes have since been abandoned given hitches in funding and political obstacles put in the way of COPAC.

⁹⁷ COPAC <http://www.copac.org.zw/home/copac-organisation-profile.html> (accessed 28 March 2011).

consideration of the environment in its broad sense.⁹⁸ The coalition has since submitted its recommendations to COPAC. The parameters of environmental rights were clearly laid out in the Constitutional Rights Card prepared by a leading civic organisation.⁹⁹

At the core, the proposed right is embedded in sustainable development, equitable access to natural resources and procedural rights to ensure that the right can be exercised. To be effective, the environmental right must be complemented by civil and political rights such as freedom of association, expression and assembly. But what precisely is the relevance of these other rights to the promotion of environmental rights and sustainable development?

5 Relevance of civil and political rights

Civil and political rights underpin the enjoyment of freedoms that are crucial in any democratic society. While natural resources can support a better quality of life, civil and political rights guarantee both substantive and procedural freedoms without which all other rights cannot be enforced. A further important dimension is that the rule of law is necessary for any rights to be enforced and enjoyed. In this respect, a far greater challenge to the fulfilment of environmental rights is a failure to appreciate the causal relationship between good (environmental, political, economic and cultural) governance, the rule of law on the one hand, and sustainable natural resources management on the other. Sustainable management or the use of natural resources is an approach premised on the existence of appropriate institutions, procedural guarantees, and public participation in natural resources management. Without doubt, the absence of legal mechanisms to control how responsible state institutions manage natural resources is a recipe for disastrous policies exploited by those seeking self-aggrandisement through political office and patronage.

Zimbabwe is a case in point while, as argued elsewhere above, natural resources could sustain sustainable socio-economic development, and there are not yet effective legal and policy frameworks to ensure the sustainable use of natural resources, especially with reference to

⁹⁸ S Mtisi 'Environment cluster CSOs engage Zimbabwean constitutional reform body' 29 April 2010 <http://www.accessinitiative.org/blog/2010/04/environment-cluster-csos-engage-zimbabwean-constitutional-reform-body> (accessed 27 March 2011); S Mtisi 'Constitutional talking points revised: Includes environment and natural resources' <http://www.accessinitiative.org/blog/2010/06/constitutional-talking-points-revised-includes-environment-and-natural-resources-questi> 3 June 2010 (accessed 27 March 2011).

⁹⁹ Zimbabwe Environmental Law Association (ZELA) 'Constitutional rights card: Environment, natural resources and land' <http://www.zela.org/news/Press%20Statements/Constitutional%20Campaign%20Card%20on%20Environment.pdf> (accessed 27 March 2011).

mineral and landed resources. Yet, in the midst of this legal and policy vacuum, mineral resources are being extracted and exported, with little to no benefit to the fiscus, let alone to the communities that live in areas endowed with these resources.¹⁰⁰

A failure to manage political governance properly often results in chaos and creates 'second governments' that are perpetually in conflict with the ruling governments, creating good conditions for wanton destruction of the environment and unsustainable extraction bordering on the plundering of mineral resources. Examples include the DRC and Sierra Leone. This has been avoided in Zimbabwe on the whole, but reports of continued human rights violations in Chiadzwa, Marange, and the failure to account for diamond sales proceeds and renewed land grabs are ominous.¹⁰¹ What is urgently required is the cleaning up of institutions responsible for the collection of state revenue from the use of natural resources. Poor governance in this regard remains a huge challenge to the inclusive government.

Given the above, it is an understatement that environmental rights, like socio-economic rights, can only be respected, protected and fulfilled in a free society ruled by law and not by man. More often than not, the rule of law is easily promoted where civil and political rights are respected, and more so where there is an active civic society sector playing the role of watchdog. Civic society organisations, specifically public interest human rights and environmental organisations, must play an important role in bringing government to account for their protection and fulfilment of environmental rights. Procedural civil and political rights, which some have called procedural environmental rights, are crucial in this regard.¹⁰² Civic society organisations, in addition to building the community's capacity to participate, can also effectively help by setting high thresholds for policy makers and implementers.

It is in this light that one sees an opportunity for civic society environmental organisations to play their role in the current constitutional reform process in Zimbabwe and beyond. The centrality of the rule of law and good governance to the fulfilment and protection of environmental and other socio-economic rights highlights the role that civil and political rights may play in a constitutional system of government.

¹⁰⁰ Very recently the government department responsible for mineral resources had to stop an unauthorised auctioning of 600 000 carats of diamonds by the private companies that are currently mining diamonds in Chiadzwa. See 'Zim stops diamond auction' *Southern Times* 12 October 2009; 'Government of Zimbabwe stops auction of 300 000 carats of rough diamonds' *Diamond World News Service* 11 January 2010 <http://www.diamondworld.net/contentview.aspx?item=4537> (accessed 15 August 2010); and 'Ministers fight over diamonds' *Zimbabwe Independent* 10 June 2010 <http://www.theindependent.co.zw/local/26877-ministers-fight-over-diamonds.html> (accessed 15 August 2010).

¹⁰¹ Human Rights Watch (n 30 above).

¹⁰² Razzaque (n 16 above) 285.

As noted above, environmental rights will be difficult to implement and protect in an environment where there is no freedom of association, assembly, access to the courts and administrative justice, as well as access to information. These civil and political freedoms guarantee that civic society and environmental organisations can effectively play the role advocated above as watchdogs to promote sustainable development through the proper use of natural resources and promoting accountability in access to, and distribution of, natural resources.

6 Future of environmental rights in Zimbabwe in the constitutional legal reform process

As public trustee of national resources, the state is overall accountable for how resources and the environment are protected. However, the need to protect the environment in the new Constitution should be premised on a recognition that citizens have rights as well as duties. An environmental right without a correlative duty on the state and its citizens to protect the environment may achieve little by way of sustainable development and economic growth. It is essential that the constitutional provisions impose positive duties both on the state and its citizens to protect the environment. Environmental protection is not a matter for the state alone, especially if one takes into account the fact that citizens interact more with the environment than do state organs and further that, in the case of Zimbabwe, the ordinary citizens have been at the forefront of unsustainable exploitation of natural resources.¹⁰³

If environmental rights are coupled with correlative duties, it implies the horizontal applicability of the right as between private entities. Unlike civil and political rights, a unique requirement of environmental rights is that they should apply to all persons and the state, equally binding all against all and each. Individuals should be able to enforce the environmental rights against a private individual or a company the activities of which may be violating the right.

There is a need to ensure procedural integrity and efficiency by making provision for other rights that enable the effective enforcement of environmental rights.¹⁰⁴ These rights are fundamental, not only on their own, but also as instruments with which to enforce the environmental rights. One would therefore not want to portray them purely as complementary rights. Their effect is to give an assurance of the efficacy of remedies for genuine breaches of the rights. Within the framework of this paper, these rights are treated, in addition to their individual substantive aspects, as important complementary

¹⁰³ Gold and diamond artisanal mining has caused extensive environmental damage all over the country.

¹⁰⁴ See Glazewski (n 3 above); Boyle & Anderson (n 9 above) 182 195.

rights for the enforcement of environmental rights. These include the right of access to information. Environmental enforcement particularly depends on the availability of information which, more often than not, is held by state departments and functionaries and big companies. For the ordinary person to enforce the right, they need access to that information, some of which may require expert interpretation.¹⁰⁵ Public participation must form the basis for the constitutional enactment process. It is crucial for the Constitution to guarantee these procedural aspects if the environmental right is to make any sense and achieve its objectives.

A survey of developments in South Africa¹⁰⁶ illustrates that a necessary corollary of these is the right to just administrative action¹⁰⁷ and access to justice and the courts,¹⁰⁸ which means that people should be entitled to be treated in a just and rational way by administrative functionaries when making decisions that affect them and the environment. Environmental issues involve a lot of administrative work, for instance the granting of permits, authorisations, orders and licences. Environmental impact assessment reports need to be approved, and so on. One has no doubt that to eschew human frailty in these bureaucratic procedures, people should have the right to have reasons for administrative decisions and have the right to seek review of those decisions and policies where they are perceived to be (or are) unfair. One can see the interrelated nature of these rights and their complementary nature from experiences in South Africa.¹⁰⁹ The nature and scope of the right will largely depend on how it is worded in the constitution. Ideally, the constitution's language should focus on a balanced environment in the context of integrated environmental management and the ecosystems approach to environmental management. The provision should not be too narrow in focus and neither should it be too wide or vague; a balance therefore has to be achieved in the phraseology of the provision.

¹⁰⁵ W du Plessis 'Access to information' in A Paterson & LJ Kotzé (eds) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) 199; sec 32 South African Constitution.

¹⁰⁶ A detailed comparative survey is beyond the scope of this paper. However, throughout the paper I have made reference to relevant South African jurisprudence as South Africa is at the forefront of advancing sustainable development through the constitutional right to an environment not harmful to health and wellbeing. See generally authorities in nn 2 & 3 above.

¹⁰⁷ Sec 33 South African Constitution.

¹⁰⁸ Sec 34 South African Constitution.

¹⁰⁹ See *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* 2005 4 SA 111 (T) for the importance of access to information and administrative justice to environmental rights generally.

7 Conclusion and recommendations

The constitutional reform debate in Zimbabwe should focus on formulating a new constitution that will cure the misdeeds of the past constitutional dispensation. It has been argued above that such a new constitution should have an environmental right motivated and informed by the factors dealt with in this paper. Global and regional developments call for Zimbabwe to harmonise its environmental laws with those of other SADC countries, in this case by including environmental rights in the Constitution. Whilst it is prudent to take one's cue from regional and international developments, it should not be forgotten that the adoption of foreign legal principles or systems is a process which must be based on an objective and prudent consideration of the local context and eventual assimilation.¹¹⁰ In the field of environmental management, this caution should be tempered by the fact that environmental regulation invariably involves the management of shared resources and the control of problems that transcend national boundaries, hence the need for a degree of harmonisation in terms of transplanted laws and policies if the regional system is to be effective.¹¹¹

Taking into account the ecological context of Zimbabwe as well as its social, economic and cultural context, I recommend that the new constitution should contain a provision in its preamble acknowledging the importance of an ecologically-balanced environment and sustainable development. Then, in the bill of rights, a specific clause enshrining these rights must be included based on regional and international developments, and the inputs of Zimbabweans in the consultative hearings currently underway. In addition to these clauses, the constitution should contain a clause expanding the right of standing to enforce environmental rights and other human rights. This is to dislodge the historical limitations placed on *locus standi* under the common law still applying in Zimbabwe.¹¹² These recommendations presuppose a consciousness or awareness of the right of access to information.

As noted above, environmental regulation depends on co-operation at the international and regional levels. The constitution should therefore have a clause providing for the recognition of customary international principles of environmental law, indirect incorporation of international environmental conventions, and progressive principles in declarations. However, to have good and meticulous constitutional legal provisions is one thing; compliance and enforcement another. A detailed study of this aspect is beyond the scope of this article, but

¹¹⁰ M Faure *et al* 'Bucking the Kuznets Curve: Designing effective environmental regulation in developing countries' (2010) 51 *Virginia Journal of International Law* 95 134-135 147.

¹¹¹ As above.

¹¹² The existing Class Actions Act (ch 8:17) is not useful in this regard.

one would recommend that EMA be given strong teeth to ensure effective compliance and enforcement. This is especially so if a future constitution enshrines environmental rights, as EMA would need to be amended to become an implementing statute for these rights, as is the case with NEMA in South Africa which implements section 24 of the South African Constitution.