

## **Environmental Rights as a Substantive Area of the Zimbabwean Constitutional Debate: Implications for Policy and Action**

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### **Abstract**

*This article seeks to provide a historical narrative on the issue of environmental rights in Zimbabwe and their ultimate inclusion in the current New Constitution of 2013. By way of a historical analysis, based on writings of various scholars, it examines the interplay of factors that have influenced this inclusion. It is noted that the environmental rights clause was first included in the 2002 Environmental Management Act of Zimbabwe before it became a constitutional clause. The paper argues that the historical imbalances in natural resources as well as outside pressure (persuasive and sanction-based) plus a general need for promoting a healthy environment have stirred the environmental rights debate. And pointing out that including environmental rights in the constitution is not enough, it argues that effort must be made to create legal, economic and social instruments that clearly mandate the state, civil society and individual citizens to be informed and responsible stewards of the environment.*

**Key Words:** environmental rights, actor-oriented approach, Constitutionalism

### **Introduction**

The New Constitution of Zimbabwe (gazetted on 22 May 2013), through its section 73, provides for environmental rights. These rights were absent from the previous constitution but were outlined in the Environmental Management Act (Chapter 20:27) of 2002. Constitutionalising the rights is no doubt a major stride in the history of environmental governance and natural resources management in the country and beyond. Nevertheless a gap in knowledge exists regarding the construct and the narrative of environmental rights generally in the Global South, which has been the ground of colonialism by Europeans in the late nineteenth century. Overall, colonialism was a de-humanising process that stripped various local peoples in Africa, Asia and Latin America of their basic human rights including access to and control of environmental assets in their immediate vicinities. Acknowledgement and codification of environmental rights among others in the New Constitution should not only be seen as ‘victory’ in the broader human rights debate but a platform for empowerment of local communities.

Nevertheless, rights do not necessarily mean just access and control but stewardship, which is the obligation and ethic to protect and sustain, in this case the environment and its endowments and assets. The draft constitution drawn by the 1999 Constitution Commission appointed by the president did not define environmental rights as fundamental rights (Maponga and Ngorima, 2003). Thirteen years lapsed in which a number of development-related issues including local governance, housing, disability, to name but a few were forwarded as possible inclusions into the Constitution.

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Based on a historical analytical review, this article discusses environmental rights and their role as they have emerged beyond the contested constitution-making process in which political parties (ZANU PF and the MDC-formations), communities and their representatives debated on various issues from the 2009 to early 2013. The Constitution Parliamentary Select Committee (COPAC) was a body-select comprising politicians and interest/pressure groups. Crosscutting as the environmental issue, there is no doubt that it touched on a cross-section of the wider population as possible. Besides, the issue has had longitudinal overtones given that it has gone through epochs of history – pre-colonial, colonial and post-colonial. The article identifies and describes some critical concerns by different actors (communities, organisations and state) behind setting the environmental rights agenda. It puts the notion of context into the constitution making debate basing on the fact that environmental issues have historical overtones. Lastly, it provides policy implications of the environmental sustainability debate and practice in a fast-changing global and regional environment.

### **Context of the Debate**

Globally, the relationship between natural resources management, democracy, governance as well as environmental rights has achieved enormous attention from policy-makers and citizens at large. In most developing countries, economies are built on the extractive industry; natural-resource-dependent rural communities constitute up to 70% of national populations. Yet, environmental rights are little articulated in discourse. Perhaps, one of the major contemporary challenges for legislators and policy makers is to address democratic and sustainable resource management (Mohamed-Katerere and Chenje, 2002; Mtisi, 2004). Environmental rights depict participatory approaches to environmental management by the local citizens and environmental stakeholders (Boyle, 2007).

Section 73 of the New Constitution of Zimbabwe provides for environmental rights. These rights were absent from the previous constitution but were outlined in the Environmental Management Act (Chapter 20:27) of 2002. Health or well-being of the individual person is stressed as part of the assertion in the section more specifically, the section argues against harm to health due to environmental induced toxicity. It advocates for sustainable development in which the rights of the present and future generations are safeguarded. The promotion of the rights is to be achieved through legislative and other measures which aim to prevent pollution and ecological degradation and promote conservation. The State is mandate to ensure that the supportive legislation is put in place (Government of Zimbabwe, 2013). It provides a platform for advocacy promoting conservation, secure ecologically sustainable development and use of natural resources, while promoting economic and social development. The state has the primary responsibility for the enforcement of these environmental rights. But due to resource limitations due to prevailing economic conditions, its capacity to enforce these and protect the environment is limited.

While the embracing of rights in the new constitution has been a landmark achievement, loopholes still need to be dealt with. Ordinarily environmental issues involve conflict of interest between private entities, citizens, civil society organisations, state and the outside forces. There is a clear gap between the theoretical underpinnings and the process of advocating for environmental rights. Nyamu-Musembi (2005) argues that rights “...are shaped through actual struggles informed by people’s own understandings of what they are justly entitled.” This means that the recognition and coding of rights comes through debate and advocacy. In light of this, this paper contextualises the constitution-making debate in Zimbabwe and attempts to map the likely future of the environmental sustainability debate and practice in a fast-changing global and regional environment.

## Theoretical and Analytical Framework

Environmental issues, concerns and problems have received attention in recent times. Consequently the articulation and of environmental rights is a relatively new phenomenon in both the legal and developmental discourse (Gellers, 2012; Mohamed-Katerere and Chenje, 2002). Globally old constitutions such as that of the United States of America, France and the Scandinavian countries do not have any specific and direct provisions dealing with or relating to environmental rights. However, in the recent past, various countries have adopted new constitutions which now provide for environmental rights (Mohamed-Katerere and Chenje, 2002). Most such countries are no doubt in the Global South, being chiefly developing countries. The whole essence of incorporating the environmental rights into constitutionalism is about keeping pace with the global agenda environmental governance and sustainability.

Broad as they are, environmental rights can be categorised into three: procedural, substantive and solidarity. According to Bruch, Coker, and VanArsdale(2001:135), procedural environmental rights have the role to“... promote transparency, participation, and accountability that form the cornerstones of environmental governance”. These generally fall into four categories which are: freedom of association, access to information, public participation and access to the justice” (Bruch *et al*, 2001:176). On the other hand, substantive environmental rights are the active rights located within the broader framework of international human rights law and that may be applied where environmental problems animate human rights concerns. Such rights include “the right to life, the right to health, the right to an adequate standard of living, and the right to privacy” (Atapattu, 2002:96). Lastly, solidarity rights centre upon a specific right in relation to the environment. Unlike other rights secured by the state alone, solidarity rights call for global participation for successful implementation. For Hassan (1983) they represent a broader community, hence universal cooperation is required towards a liveable world. Thus, solidarity environmental rights are pillared on the philosophies of self-determination and non-discrimination such as the right to development.

To futher characterise environmental rights Mohamed-Katerere and Chenje (2002) proffer eight approaches to environmental rights. Taken together, the approaches seem to emphasize citizen participation in the environment and the responsibility of the state to enforce environmental legal tools for the protection of the natural environment. Overall, it should be stressed that environmental rights have gained recognition in international law and they have been decreed in national legislations. Indeed, the right to a sustainable environment is rooted in the right to an acceptable quality of life, which back steps to the right to life itself (Boyle, 2007; Mohamed-Katerere and Chenje, 2002; Shelton, 1991). Since, the individual person matter and citizens form themselves into civil society associations or pressure groups, it behoves analysts to critically apply the actor-oriented approach.

The actor-oriented approach places emphasis on mapping relationships and flows of information from policy makers to policy implementers (for example, farmers having instructions from their parent ministry in government) to provide a basis for reflection and action (Biggs and Matsuert, 2004). The approach is premised on the idea that a healthy and effective innovative system of relationships comprises a strong flow of information as well as useful partnerships between key actors over time (Matsuert *et al*, 2005). Accordingly, the approach fosters a participatory platform, bringing actors’ values and beliefs into the process while keeping pace with global, regional and local shifts in environmental management practices. It is transformative in that it seeks to mould the behaviour of the members into a

better community, and is oriented around actors adjusting to any structural circumstance. This augurs very well with Norman Long's constructionist perspective that stipulates that the actor-oriented approach entails: "... remaking of society through the ongoing self-transforming actions and perceptions of a diverse and interlocked world of actors" (Long, 2001:5).

Nevertheless, the actors handle situations differently including multiple realities of social life, heterogeneity of society, cultural or power struggles within the society as well as additional factors emanating from cognitive, emotional and organisational skills (Bosman, 2004). Constitution-making is about re-ordering of society and finding what works within a given society and discarding the disproved. The local people who are citizens and members of the society have the capacity to shape systems that influence their community. Therefore, the actor-oriented approach becomes the best way to go in regard to environmental rights through facilitation of citizen participation in environmental management.

Good environmental management is one of the key elements of sustainable development (Chigwenya and Chirisa, 2007; Mtisi, 2004). The inclusion of environmental sustainability in the constitution has been influenced by various socio-economic, political and institutional factors. Environmental sustainability views the earth as a common good hence its protection, preservation and enhancement is critical. Present generations ought to guard against overstepping their mandate; all states should accordingly endeavour to establish their own environmental and development policies (Sachs, 2003:43). Such a global concern has no doubt, calls for more practical implementation at a more localised level in keeping with the adage, 'Think Globally, Act Locally'. This is environmental stewardship that cascades from assessing the common environmental goods like climate, oceans and land resources and persuading localised entities to implement sustainable practices including of farming, mining and industrialisation. In this current debate, it can be noted that constitutionalising the environment and environmental rights has been a critical tool towards attaining sustainable development.

## **History and Context of Environmental Rights and Constitutionalism in Zimbabwe**

Zimbabwe's political terrain is characterised by little attention being accorded to the sustainable environmental management practices. Debate on environmental and natural resources issues has been sector-based, focusing on individual elements and not on the integrated elements (Mtisi, 2004). From pre-colonial, through colonial to post-colonial epoch legislative reform on the subject of the environment has been a key developmental issue of concern. Specifically, in the pre-colonial era, traditional practices existed for purposes of fostering environmental rights. In Mohamed Katerere (2001)'s assessment, there were mechanisms to ensure sound exploitation of mineral resources as checks and balances were in place to guard against overexploitation (Mohamed-Katerere and Chenje, 2002). Management of natural resources was centrally vested in the chiefs and village heads. Through customary beliefs and metaphysics, concepts of the sacred forest and totems which regulated the consumption of wildlife products, citizens conserved the environment. Thus, the utilisation of environmental resources was achieved in a sustainable way.

In the nineteenth-century, the scramble and partition of Africa began. The colonialists were guided by philosophies of dispossessing the indigenous black populations of their resources while exploiting these resources for selfish ends. In what is Zimbabwe today, the Rudd Concession of October 1888 signed by King Lobengula gave Charles Rudd sweeping

rights over the entire country leaving the black majority powerless over their environment. This colonial domination was institutionalised through legislations like the 1931 Land Apportionment Act, the 1951 Land Husbandry Act and the 1969 Land Tenure Act. Africans were 'squashed' in communal areas called 'native reserves' in which overpopulation beyond area capacities saw increased deforestation, erosion and dwindling water and related resources. There was a direct shift from the pre-colonial environmental conservation to the neglect and 'criminalisation' of the African seeking to derive livelihoods from the natural environment (Pikirayi, 2005). New and exotic-style settlements, mining and agricultural practices emerged. And a number of restrictions on the use of local and natural resources were instituted leading to a situation of 'environmental colonialism'. For example hunting became a restricted practice.

Under colonialism, as already pointed out, local people lost title to natural resources, had their indigenous knowledge suppressed and the traditional leadership undermined. Representation in the legislature served the interests of the white minority rather than the black majority as the Africans were regarded as lower class people. The Parks and Wildlife Act of 1979 prohibited hunting of wildlife and fish resources for the majority of black Zimbabweans (Mtisi, 2004). During a debate on the said act Bhebe, then representative for Ntshonalanga, argued in protest:

I think it is commonly known that the African is or has a practice of hunting from early in his life...what is said in this legislation will make it an offence to catch animals. What I am worried about is the fact that wild animals like wild pigs, jackals and kudu are quite a nuisance to the crops of the people not only in the Tribal Trust Lands but also to the residents of the farms. It will be an offence to trap and kill these animals should they be encroaching on your fields....we are creating criminals out of Africans by this type of blind legislation which is European biased, which has absolutely no consideration for Africans (Bhebe, 1975).

Although it created modern environmental administration and legislative structures, the colonial regime brought about environmental suppression upon the black majority who consequently lost control over the environment and their natural resources which they had been using for their survival. For example, the 1927 Water Act excluded the local people from participating in the decisions of the Water Court since only registered voters could do so (Pikirayi, 2005). The majority of Africans were prevented from registering as voters through a myriad of impediments placed in their way such as land ownership and salaried incomes. In essence, environmental representation during the colonial period was based on racial grounds, always aimed at making sure that only the Europeans benefited from the use of natural resources.

After independence in 1980, the early post-colonial era witnessed remarkable corrective measures and reforms of environmental legislative framework towards the empowerment of the black majority in environmental management. The reforms sought to enhance local environmental protection through the empowerment of local citizens while allowing the people to meet their current needs sustainably. Yet these environmental needs were still not being regarded as part of rights (Mtisi, 2004); emphasis remained on redressing colonial problems in legislative provisions. For example, the adoption of a National Environmental Action Plan by Government in 1987 comprehensively provided a cross-sectoral approach to the conservation and resources management (UNEP-DTIE, 2000). The Environmental Management Bill of 1998 sought to address the legislative loopholes of the

colonial era. Although there were over 18 pieces of legislation (including the Natural Resources Act, the Water Act, and the Forestry Act) that governed the management of natural resources in the country. These pieces of statutes were administered by seven different ministries making compliance almost impossible. In 1992, the Ministry of Environment and Tourism initiated the environmental law reform process in light of the Rio Earth Summit at which Zimbabwe participated in that year. This process culminated in the passage of the Environmental Management Act (Chapter 20:27, No. 13 of 2002).

The Environmental Management Act of 2002 streamlined all environmental management, monitoring and compliance issues, and tightened regulations regarding Environmental Impact Assessments (EIAs) for all old and new projects (Maponga and Ngorima, 2003). In addition, the statute provides that every person the right to live in a clean environment. In addition, it provides that the people have access to environmental information. It is also stipulates that they have a mandate and role to protect the environment for the benefit of present and future generations, to participate in the implementation of legislation and policies in pollution prevention, fight against environmental degradation through deforestation and erosion. Thus, the local people are expected to use of natural resources wisely (Mtisi, 2004; ZELA, 2003). The National Environmental Policy mainly seeks to control irreversible environmental damage, maintain essential environmental processes, and preserves the broad spectrum of biological diversity and to improve the standard of living of Zimbabweans (Maseva, 2005).

### **Actors and Their Role in Environmental Rights Advocacy**

A number of actors - the state and civic groups included - have participated in lobbying for environmental rights into the new constitution in relation to their interests in the environmental realm. As environmental issues have a global concern, there have been several international institutions including the several United Nations environmental organisations which have been participating in the quest for environmental rights. These outside forces promoted the notion of empowering the citizens to govern their local environment in a sustainable way. At regional level, the South African Constitution provides for environmental justice. This concept has already been incorporated in the Environmental Management Act of Zimbabwe. This shows the extent to which outside forces may influence the drafting of legislation, constitutions and national policies. In the environmental rights lobbying platform the outside forces have been acting as watchdogs assessing transparency and equality of participation in comparison to global practice. Local participation in debates and fora has been facilitated by members of parliament, state bureaucrats and councillors, at least from the side of modern institutions. Village Development Committees and Ward Development Committees as grassroots structures have organised their communities in participating in the constitution making process that ultimately saw the inclusion of environmental rights. With respect to traditional institutions, the traditional leadership – village heads, headman and chiefs have played a vital role especially in rural areas. Ideally, the chief's are overseers of resource management at local level.

Besides the state bureaucratic structures, there is a sphere called civil society. Civil society has been broadly defined as "... the realm between the household/ family and the state, populated by voluntary groups and associations, formed on the basis of shared interests, and are separate and/or largely but not necessarily completely autonomous from the state" (Mtisi, 2004: 2). Zimbabwe has diverse civil society groups (Zigomo, 2012) that include faith-based organisations, women's groups; students and youth groups; human rights and governance groups; civic education groups; professional and media organisations as well as

community based organisations (CBOs). The civic society groups act as the voice of the voiceless, representing the underrepresented communities. In the constitution-making process and the ultimate inclusion of environmental rights in the new constitution, civil society has been the source of 'specialised' knowledge and experiences regarding aspirations and frustrations to do with the environment.

Like any other country, Zimbabwe comprises whose aspirations and conditions of living are affected by spatial qualities of any area (availability or non-availability resources such as water, forests, minerals, arable soils, to mention but a few) (see Marongwe, 2002). For example some areas like Chivi, parts of Mwenezi, Chiredzi, Beitbridge, are dry regions. In recent times, the 'discovery' of diamonds in such areas as Chiadzwa in Marange, Bikita and Murowa, has seen local people being relocated to other areas to pave way for mineral exploitation. It must also not be forgotten that one of the cradles of the land invasions in 1998 was Svosve communal lands in Marondera District. The people in Svosve could not come to terms with the fact their livelihoods were at such a risk relative to the white farms surrounding them who enjoyed abundant farming land (Moyo, 2000; 2011). The people organised themselves, invaded and grabbed the farms in indignation and frustration of dwindling resources. One can argue that such a move was, in a way, a constitutional protest. Critical to stress is that the bulk of the population in rural communities thrive on the natural endowments in their vicinities. Even the old constitution upheld the notion that local people could meaningfully exploit local resources without having to sell them on a commercial basis.

In urban areas, the 2008/9 cholera outbreak can be noted as emanating from a situation of desperation. The state has argued that the international community gullibly imposed 'illegal sanctions' on it because of 'human rights abuse' by spearheading land reform through a fast-track land reform programme and advocating for the restoration of order in cities and towns through its controversial Operation Murambatsvina, a clean-up campaign against squalor, in 2005 (Chipungu, 2011). A hyperinflationary environment resulted in which basic ability of the state and business to function set in. According to ZANU PF, in such a state of besiege and attack, there was little it could do to protect the rights of its people. Faced with water shortages, thus, urban residents in many suburbs embarked on self-water sourcing which included getting water from open wetlands, some of which had contaminated water. Beginning with a high-density settlement called Budiriro in Harare, cholera spread to many parts of the country and some 4000 cases of mortality were recorded. Service delivery failure has been cited as one condition that led to the violation of environmental rights of the local people in Zimbabwe in the post-colonial times. There is no doubt, that the eventualities of outbreaks of cholera and related diarrhoeal diseases (typhoid, dysentery and diarrhoea) created a serious awareness among citizens for inclusion of the agenda in the constitution-making.

## **CONCLUSION AND POLICY IMPLICATIONS**

The foregoing paragraphs show that the interplay of global and local factors and conditions has been instrumental in the inclusion of environmental rights in the new constitution. Rights imply obligation by a number of actors to do their best in having a given aspiration bring fruit on the ground. Zimbabwe faces a number of environmental problems and mechanisms for ensuring are critical. For example, from a technical viewpoint, human and technical resources (like Geographic Information Systems) are necessary to the successful protection of the environmental rights. This requires a critical mass of personnel, budgetary support, and discretion into investigating environmental problems. It also requires capacity and integrity in

the legal and judiciary system to adjudicate cases involving environmental harms committed by state and private actors.

The inclusion of environmental rights has not just addressed the colonial and historical wrongs but is an attempted to deal with the lacuna of the participation and stewardship of natural resources in the current regime. Environmental management is critical in placing the needs of the local communities at the forefront of concern. Such is an aspect of environmental governance whose thrust is democratic environmental management in which all people have an opportunity to develop the understanding, skills and capacity to contribute to the soundness of the environment while sustainably tapping on the resources located within the environment. This involves provision adequate environmental education, and sharing of knowledge and experiences. While environmental rights are crucial to foster environmental governance the article has highlighted the need for the strengthening the position of environmental rights beyond constitutionalism. This means promoting further equality and fair representation and participation in environmental management.

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