ENVIRONMENTAL LAW AND POLICY IN ZIMBABWE

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DRC
ZAMBIA
MOZAMBIQUE
Zambe
Hunyan
ZAM-
Kariba
Lake
Kariba
Ruy
Mazo
Sanya
Um
Sengw
HARARE
Zambe
Victoria
Hwange
Gwai
Kana
Shanga
Mutare
ZIMBAB-
Sa
Odz
Gweru
Gwai
Nata
BULAWAYO
Masvingo
Lake
Mutirikwi
Plumtr
Umzingwa
Lun
Tokw
Sab
Bubi
Tu
Lun
BOTSWAN
Nuanet
Beitbrid
ge
Limpop
MOZAMBIQUE
SOUTH

ACRONYMS and Abbreviations

AGRITEX	Department of Agricultural, Technical and Extension Services
AMCEN	African Ministerial Conference on the Environment
AZTRE	Association of Zimbabwe Traditional Environmental Conservationists
CAMPFIRE	Communal Areas Management Programme for Indigenous Resources
CBD	Convention on Biological Diversity
CCL	Cabinet Committee on Legislation
CCO	Convention to Combat Desertification
CEP	Communicating the Environment Programme
CFCs	Chlorofluorocarbons
CFU	Commercial Farmers Union
CGIAR	Consultative Group for International Agricultural Research
CH_4	Methane
CIDA	Canadian International Development Agency
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CIFOR	Centre for Forest Research
CO_2	Carbon Dioxide
DDF	District Development Fund
DEAP	District Environmental Action Plan
DNPWLM	Department of National Parks and Wildlife Management
EIA	Environmental Impact Assessment
FAO	Food and Agricultural Organisation
ICRAF	International Centre for Research in Agroforestry
IKS	Indigenous Knowledge Systems
IMERCSA	Musokotwane Environment Resource Centre for Southern Africa
ISO	International Organisation for Standardisation
IUCN	The World Conservation Union
MEAs	Multilateral Environmental Agreements
N_2O	Nitrous Oxide
NAP	National Action Programme
NCA	National Constitutional Assembly
NCS	National Conservation Strategy
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
PAAC	Public Agreements Advisory Committee
PDC	Provincial Development Committee
RDC	Rural District Council
SADC	Southern African Development Community
SARDC	Southern African Research and Documentation Centre
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UV	Ultra Violet
VIDCO	Village Development Committee
WADCO	Ward Development Committee
WCED	World Commission on Environment and Development
ZIMEAs	Project to Assess the Impact of Multilateral Environmental Agreements in Zimbabwe
ZERO	A Regional Environmental Organisation
ZFU	Zimbabwe Farmers' Union
ZIMPREST	Zimbabwe Programme for Economic and Social Transformation
ZINWA	Zimbabwe National Water Authority

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Munyaradzi Chenje
Director SARDC IMERCSA
(September 2000)

INTRODUCTION

By Jennifer Mohamed-Katerere and Munyaradzi Chenje

The Project to Assess the Impact of Multilateral Environmental Agreements in Zimbabwe (ZIMEAs) is a comprehensive attempt to review environmental law in the country and the influence of international agreements on laws and regulations.

The period leading up to and following the 1992 United Nations Conference on Environment and Development (UNCED), which was popularly known as the Earth Summit, has seen the adoption of many binding and non-binding environmental agreements. The agreements include international ones, mostly negotiated under the United Nations, and regional ones, which have been negotiated under the Southern African Development Community (SADC). Zimbabwe is a member of the UN and SADC, as well as the Organisation of African Unity (African Union) under which a number of environmental initiatives have been adopted. Among these initiatives are the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, and the African Ministerial Conference on the Environment (AMCEN).

The most notable international environmental agreements that have been adopted and to which Zimbabwe is a party include the:

- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.
- Convention concerning the Protection of the World Cultural and Natural Heritage, 1982.
- United Nations Convention on the Law of the Sea, 1982.
  Ozone instruments:
- Vienna Convention for the Protection of the Ozone Layer, 1985.
- Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (as amended at London in 1990 and at Copenhagen in 1992).
- Convention on Biological Diversity, 1992.
- Framework Convention on Climate Change, 1992.
- Agenda 21 and the Forests Principles, 1992.
- Convention to Combat Desertification, 1994.

At the SADC level, Zimbabwe has signed and ratified the following protocols, which have a bearing on the environment:

- Protocol on Shared Watercourse Systems, 1995.
- Protocol on Trade, 1996.

- Protocol on Energy, 1996.
- Protocol on Transport, Communications and Meteorology, 1996.
- Protocol on Mining, 1997.
- Protocol on the Development of Tourism, 1998.
- Protocol on Wildlife Conservation and Law Enforcement, 1999.
- Revised Protocol on Shared Watercourses, 2000.

In 2002, SADC approved the final text of a protocol on forests.

The negotiation, signature and ratification of these different multilateral agreements may be an indication that environmental problems are on the increase worldwide, and the international community is now more committed to resolving such problems cooperatively. The role of law in trying to deal with environmental problems has been long recognized. For example, the Stockholm Declaration, adopted at the 1972 Stockholm Conference on the Human Environment (which defined modern environmentalism), states in Principle 22:
"States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction."

Principle 24 further states:
"International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states."

Since independence in 1980, Zimbabwe has played its part in cooperating with other countries in trying to find solutions to the many environmental problems facing the world today. Such a role has a bearing on how policymakers and citizens view the environment today and the extent to which they are consulted or otherwise on multilateral environmental agreements. The impact of multilateral environmental agreements on national environmental law and policy making is the basis of this book. The book is a culmination of many other activities, which have been carried out over the past 18 months as part of the project to Assess the Impact of Multilateral Environmental Agreements in Zimbabwe (ZIMEAs).

Format

This book examines the law in this context – the content of the law is not just what is gleaned from statutes but how those statutes are implemented in practice. It begins with a an overview of the development of environmental law and policies.

Chapter 1 presents general information about environmental law and locates environmental law and policy within the context of its social, political and economic policies and objectives.

Chapter 2, Legal and Policy Framework for Environmental Management, considers 28 environmental statutes, examining environmental law's historical development. The legislation, particularly that concerned with land husbandry and the management of natural resources, reflects the unequal divide between commercial and communal interests and the effective relegation of the latter.

It notes that although there is a plethora of legislation dealing with the environment, little of this is motivated by a conservation ethic. Instead much of it was motivated by the desire of the colonial regime to establish control over natural resources and ensure that the benefits thereof accrue to itself and the settler population.

Chapter 3 on the Institutional Framework for Environmental management demonstrates how an ineffective institutional system undermines resource management. This Chapter considers problems of fragmentation, overlap and conflicting mandates, representativeness and accountability, skills and capacity, in evaluating the institutional system.

Chapter 4, Customary Environmental Management Systems, explores customary law as it pertains to environmental management in Zimbabwe. As a starting point, it addresses the issue of what is customary law and then considers the legal status of customary law rules applicable to the environment. This sets the basis for exploring customary law and then for making recommendations on how customary law maybe incorporated within the legal framework. It concludes that the recognition of customary law is important from a rights perspective.

Chapter 5, Environmental Rights and Justice, discusses the value of an environmental rights approach for creating sustainable management systems and its realisation. It locates this within a justice and fairness framework and accordingly, discusses the pre-colonial experience and how that was affected by the colonial experience. It argues that the conception of a human right must take account of the social and cultural values as well

as the priorities and interests of the people to whom such a right is to be accorded. The chapter argues that environmental rights must address both historical wrongs and deficiencies within the national legal system.

This chapter considers statutes pertaining to legal and administrative process as well as other common law areas such as civil law and administrative law. The statutes considered include those regulating the use of biological diversity, mining, pollution, hazardous substances, waste management, customary law and traditional institutions and planning.

Chapter 6, Implementation of Multilateral Agreements, examines the state of implementation of key multilateral environmental agreements in Zimbabwe. It describes the processes of treaty making and the internalising of such international legal obligations. Additionally the role of public participation in treaty making is considered.

The chapter also surveys the current status of the domestic law of Zimbabwe and analyses the extent to which that law gives effect to major international environmental instruments. It identifies and recommends the most appropriate means of incorporating the obligations assumed under those instruments.

Chapter 7, Future Directions, considers possible future directions for the development of environmental law in Zimbabwe. It asserts that law development must take place in the context of Zimbabwe's national priorities and in particular in that of sustainable development. Additionally, it argues that law development must take place within the context of developments in international environmental law. It considers the recognition of three important environmental law principles – the precautionary principle, the originator principle and the principle of cooperation.

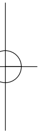
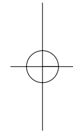
It further argues that environmental law development needs to take place within a human rights context and it must consider key aspects of multilateral environmental agreements and also the predominant directions within environmental management.

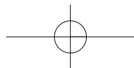
All of the chapters consider how the law may be reformed to better incorporate a conservation ethic and promote the realisation of conservation objectives within the framework of sustainable development. Additionally law reform is approached from a human perspective and focuses strongly on the recognition of rights.

Process

The preparation of this publication started in early 1999 after the launch of ZIMEAs, followed by the convening of a national workshop in March of that year, with the following objectives:

- Publicise the process of environmental law-making in Zimbabwe, paying particular attention to the input of international environmental laws.
- Promote the judicious use and management of transboundary resources by drawing lessons from case studies such as the Matabeleland Zambezi Water Project.
- Facilitate the integration of Zimbabwe's environmental laws with those of its neighbours by identifying areas of common ground and counteractions in the countries' national laws.
- Explore the extent to which the Environmental Management Bill incorporates local, regional and global environmental laws as well as suggest the way forward in harmonizing such laws.
- Provide a framework and overview for a proposed publication to review the legal framework for environmental management in Zimbabwe.



CHAPTER 1

UNDERSTANDING EVIRONMENTAL LAW

By Jennifer Mohamed-Katerere

WHAT IS ENVIRONMENTAL LAW?

Environmental law is often held to be that law which embodies a conservation ethic. Okidi, for example, argues that, "Environmental law is the ensemble of norms… statutes, treaties and administrative regulations to ensure or to facilitate the rational management of natural resources and human intervention into the management of such resources for sustainable development." This approach requires that a distinction be made between environmental law norms and other legal norms that may have affect the environment on the basis of whether the underlying norm of such law is aimed at or used for environmental conservation. Two kinds of laws that embody a conservation ethic may be discerned.[1] Firstly, laws that *ensure* environmental conservation and, secondly, laws that *facilitate* the realisation of conservation objectives. Law that facilitates may include incentive type laws – such as tax relief provisions – and law that creates the institutional setting for effective implementation of environmental law – such as the creation of environmental monitoring agencies. Within this realm one could also possibly include laws that have a direct bearing on the realisation of environmental objectives, such as rights of access to information and rules of administrative justice and fairness.

From this perspective much law that impacts upon the environment would not be considered as environmental law. For example the primary focus of forest law in Zimbabwe has been commercial exploitation rather than conservation. Indeed as a field this would mean that environmental law is relatively new. The approach adopted in this book is considerably wider. Environmental law is understood to be law that has a direct impact on the environment, whether positively in that it contains a conservation ethic or negatively in that it is totally exploitative. Environmental law embodies another crucial aspect - the legal relationship between people. As Patel[2] notes law as an instrument of social control is principally concerned with the relationships and resolution of conflicts between legal persons inter se. The allocation of entitlements, rights and duty are thus a fundamental aspect of environmental law. The approach adopted in this book to environmental analysis and law development is based on this understanding. Accordingly a wide range of laws that impact

directly on environmental are considered. The statutes considered include those regulating the use of biological diversity, mining, pollution, hazardous substances, waste management, customary law and traditional institutions and planning. In describing the overall legal framework Chapter 2, Legal and Policy Framework for Environmental Management considers a total of 28 statutes. The chapter, Customary Environmental Management Systems considers several additional Statutes concerned with the status of customary law and thus have a direct impact on local environmental management practices. The chapter on Human Rights considers statutes pertaining to legal and administrative process as well as other common law areas such as civil law and administrative law.

"…increasing environmental consciousness over the last 20 years should not blind us to the fact that there have been laws governing the environment for centuries." Such laws had a multiplicity of motivations, including exploitation, freedom of movement… and have found expression as criminal law, administrative law, and the law of torts. This multiplicity of origins is not unique to environmental law.

Law that impacts on the environment may be divided into the following categories:[3]

- Exclusive Environmental Legislation – legislation that aims exclusively at environmental management
- Legislation predominantly containing environmentally specific norms
- Legislation with direct environmental relevance
- Legislation with potential environmental relevance
- Legislation regulating environmental exploitation
- Common law norms.

This approach directs us to a historical understanding of law and the evolving human-environment relationship. Indeed from this perspective environmental law is not a new body of law. Hughes, for example, argues "increasing environmental consciousness over the last twenty years should not blind us to the fact that there have been laws governing the environment for centuries."[4] Such laws had a multiplicity of motivations, including exploitation, freedom of movement … and have found expression as criminal law, administrative law, and the law of delict (torts). This multiplicity of origins is not unique to environmental law. Also in many of the traditional areas of law there are few distinctive principles. However this does not preclude us from identifying Environmental Law as branch of law. Although it is sometimes argued that until such time that the founding principles/general principles are discernible, environmental law will lack coherence and logical structure. From this perspective, environmental law like all law systems, maybe contradictory and reflect a contestation of views, values, priorities or objectives. Additionally environmental law from this perspective is cross-divisional – in that it contains norms belonging to other fields of law that are not designed to protect the environment but that have an impact upon the environment, whether positive or negative.

JUDGING ENVIRONMENTAL LAW'S SUCCESS

The book describes the status of environmental law in Zimbabwe and considers its success and in so doing sets the basis for further development. Successful environmental law is not just law that incorporates all the latest trends but law that is appropriate and responsive to social, political and economic policies and objectives and law that is based on the recognition of actual ecological realities. This requires a clear understanding of the history of the law, policy objectives and the ecological and environmental context. The book demonstrates that the challenge for environmental law making in Zimbabwe today is to break with the legacy of the past and to create a legal system that supports environmental and ecological conservation and integrity while simultaneously addressing the relationship between people, environment and prosperity.

A most central political and social policy in Zimbabwe is to provide a legal and policy framework that contributes to the alleviation of poverty. The government of Zimbabwe seeks to achieve this through the diversification of the economic base, the promotion of growth with equity and through land redistribution. Environmental policy recognises that human prosperity and environmental sustainability need to go hand in hand. To this end policy focuses on "sustainable development". This was first enunciated in the National Conservation Strategy and has often been repeated, since then, in policy statements and programmes. Environmental law needs to address this.

PERSISTENT CONFLICTS

Despite this clarity about objectives the law has lagged behind; by-and-large there has been a failure to develop an effective implementation strategy for sustainable development. Specific lacuna in the law include the failure to adequately recognise and bring civil society, including communities and corporates, into the fold as actors, partners and stakeholders. This is represented in a legal regime that still has too few incentives for good management and over relies on command and control strategies, has governance systems that continue to alienate people and in particular the rural poor and that has not as yet addressed the fundamental issues of rights and justice. The difficulties of this journey are compounded by the fact that in a country like Zimbabwe where the divide between black and white, rich and poor, urban and rural remains so prominent - law continues to be contested terrain. This is not always manifested as highly visible struggles – nevertheless the divide between the old and new remains. This is evident in lack of coherence between policy objectives, actual practice and its laws. There is incongruence between the stated objectives of environmental management and the legal instru-

ments that provide for it. In many respects environmental law represents the conflict between colonial versions of environmental management that focused on control and command strategies and management on behalf of the people with the new environmental policy thrusts towards environmental management by the people.[5] This theme is picked up throughout the book. More specifically Chapter 2, "The Legal and Policy framework of Environmental Management", Chapter 4, "Customary Environmental Management Systems" and Chapter 5, "Human Rights and Justice" examine the historical development of the law and the implications for its current form.

Legal and policy development at the international level has been marked with a similar shift away from a strictly conservation approach to one that focuses on sustainable development. Zimbabwe has become party to many international conventions, declarations and pronouncements. Here too a tension is evident: there is considerable discord between international and national law notwithstanding the fact that there have been numerous initiatives to incorporate international law in law, policy and programmes. Chapter 6, "The Implementation of Multi-lateral Environmental Agreements" explores this.

The discord between national policy and law as well as that between national and international law is not unusual, as law is a product of struggle, negotiation, compromise and power dynamics. Consequently law is seldom internally coherent as it is a result of the historical process and a reflection of the various struggles and contradictions in society. The challenge for law in Zimbabwe is to bring these things together so that law may emerge as a policy tool. As the Chapter on Institutional Frameworks illustrates there is a wide spectrum of environmental expertise, both within the public and private sectors that may be drawn on in developing the law.

THE OPERATIONAL CONTEXT

Law does not operate in a vacuum;[6] instead it operates in the context of other forms of organization including the economic, cultural, social, political and informal rule systems. In practice the fundamentals of law, and environmental law, needs to be understood in terms of this relationship. Similarly in considering how law should be developed this lived reality forms the starting point. Its lived content is derived from three aspects:[7]

- The Structural Component: The courts, administration, Enforcement agencies;
- The Cultural, Social and Economic Component: Attitudes and values about the law or affecting the law, poverty, education etc.; and
- The Substantive Component: The legal rules.

The impact of environmental law and its impact on the environment will be to some extent shaped by its appropriateness to the ecological context. It is important to have a broad understanding of this and also of the environmental context.

Ecological and environmental context

It is widely accepted that at the core of environmental degradation in Zimbabwe today is the inequitable access to land and natural resources and consequently resource use conflicts that lead to unsustainable practices. Population density in communal areas is generally five times higher than on commercially held farming land. This high population density in the communal areas has contributed to deforestation and soil erosion.[8] This is compounded in the northern and north-western parts of Zimbabwe due to the high natural vulnerability of soils. A historical overview of tenure regimes is provided in Chapter 5, Human Rights and Justice. Currently (2002) major reforms in land are under foot and it remains to be seen how this will impact upon environmental and conservation decisions at the local level.

Despite the growing problems of ecosystem degradation and conversion of wild land to agriculture biodiversity remains high. Traditionally state sponsored wildlife management has focussed on mega-fauna although there is a well-established system of national parks that ensures maintenance of representative biodiversity.

Zimbabwe is moderately forested with around 22 percent forest cover and an additional 44 percent of other wooded land.[9] Areas of closed natural forest are rare, with the predominant vegetation being "miombo" woodland, an association of *Brachystegia spiciformis* and *Julbernardia spp*. Mopane (*Colophospermum mopane*) woodland occurs on the northern Zambezi depression and the Limpopo Valley on the southern border.[10] Small remnants of subtropical high forest remain in the Eastern Highlands. Localised shortages are experienced particularly in the communal areas. At least one fifth of such areas experience shortages. According to Moyo this is being reduced at a rate of 1.5% per annum.

Zimbabwe has 7 water catchment systems. Most rivers in Zimbabwe are perennial. The national mean annual rainfall of 685 yields an average annual increment of 266, 666 million cubic metres of water – of which only about 7.5% reaches the rivers.[11] The average rainfall encompasses areas of high regional variations with over 2000mm in the eastern highlands to less than 600mm in over a quarter of the land area in the south and south-

Box 1.1: Natural regions

Zimbabwe is divided into five natural regions based on soil types, rainfall and other physical characteristics. Only about one-quarter of the total land area has fertile soils. About 50 percent of the country is underlain by granite rocks which rise to acidic sandy soils for poor fertility. The region which is considered to have the soils and water resources capable of supporting intensive crop production on a sustainable basis covers an area of only six million ha, another eight million ha have moderate agricultural potential which can support certain perennial and tolerant crops. The remaining two-thirds of the country has rainfall level too low and erratic for reliable crop production and in this area livestock production and wildlife is the most viable form of agriculture.

Source: Moyo, G., 2000

west.[12] Water shortages are more localised than national. Repeated drought and deforestation worsen existing water stress.

In global terms air pollution is not a major problem at the national level. The negative impacts of toxic emissions into air have a disproportional impact on poor communities, which in many cases are located close to industrial sites. Water pollution is a growing problem. In particular mining activities appear to be a problem as waste is often poorly managed. Residues of arsenic, cadmium, copper, lead and manganese are increasingly identified in fish populations. Sewerage discharge and run off carrying agricultural fertilizers are also problems. Access to clean water is a problem for much of the rural population.

Structural framework

The effective implementation and administration of law is the backbone of its success. Key considerations include the managerial framework and the judicial framework. Also of importance though are the educational and social support systems.

Chapter 3, "The Institutional Framework for Environmental Management", focuses specifically on the system for administration of the law and environmental management. It identifies some key features and problems including legal fragmentation, overlapping and conflicting mandates, representativeness and accountability, inadequate public participation as well as the lack of adequate skills and capacity. Several other chapters also consider how the structural framework impacts upon sustainable management and legal rights. Chapter 4, "Customary Environmental Management Systems" discusses the incorporation of traditional institutions into the centralized legal system.

Similarly the judicial structure is significant. While the law defines environmental rights and wrongs the court structure affects the ability to implement and enforce such rights. Twenty odd years after independence Zimbabwe continues to have a dual legal system that abrogates environmental issues to the general law arena and denies the operation of customary law. The implications of this for local people are discussed in Chapter 4, "Customary Environmental Management Systems" and Chapter 5, "Human Rights and Justice" picks up on the theme and explores how access to rights may be undermined as a result of distance from courts, alien and cumbersome procedures and so on.

Social, economic and political context

The social, economic and political context is key to understanding the law and its impact on environmental management. Taken as a whole this book examines these different aspects and how they impact upon the interpretation, implementation and ultimately the success of the law. Key factors that impact upon the implementation of the law include:

- The inequitable access to natural resources;
- Poverty;
- Natural resource dependence;
- An economic system dependent on natural resource exploitation;
- Social inequity;
- Poor infrastructure;
- Low skills levels – monitoring & implementing agencies;
- Education and technical expertise (ability to use the law);
- Lack of access to information;
- Lack of institutional capacity – monitoring & implementing agencies;
- Nature of decision-making bodies;
- Multiple values and interests – status of local people/ value attributed to traditional knowledge; and
- Inadequate systems for the enforcement of rights and the resolution of conflict.

Box 1.2: Centrality of natural resources to the economy

The Zimbabwean economy is highly dependent upon agriculture although the share of agriculture in GDP is 16 percent. The economy is nonetheless highly dependent upon agriculture with this sector providing over 70 percent of total employment and 40 percent of merchandise experts. Approximately 60 percent of manufacturing value-added is either related to agro-industry or to the provision of inputs into agriculture. Many services including a sizeable proportion of domestic trade are closely associated with agriculture. Contribution of the various sectors of the economy to gross domestic product is shown in the table.

Table 1.1: Sectors of the Economy and Their Contribution to GDP

%	1991	1994	1997
Agriculture, Hunting, Fishing and Forestry	16.1	16.6	19.9
Mining and Quarrying	4.2	4.4	4.0
Manufacturing	22.7	20.7	18.2
Electricity and Water	2.6	2.4	2.1
Construction	3.1	3.1	2.7
Finance, Insurance and Real Estate	6.9	8.2	8.4
Distribution	17.5	17.3	19.0
Transport and Communication	6.2	6.8	7.9
Public Services	18.3	17.6	17.6

Source: Adapted from Moyo G (2000)

Box 1.3: Population and environment

Seventy percent of the country`s inhabitants, mainly indigenous people, live in rural areas mainly as peasant farmers. Indigenous peasant farmers constitute 56 percent of the country`s population and the rural land on which the indigenous people live is communally owned. Rights of usage and not rights of ownership govern access to resource in these areas. Limited resources and opportunities in the rural areas have resulted in rapid rural to urban migration. The majority of the Zimbabwean people depend upon natural resources for their livelihood the distribution of and access to natural resources is the major environmental challenge. In its 1987 report, our Common Future, the World Commission on Environment and Development identified poverty as both a cause and an outcome of environmental degradation:

> Those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far reaching as to make poverty itself a major global scourge.

Although poverty contributes to environmental degradation, this is exacerbated by inequitable distribution of resources and the exclusion of local people from environmental management.

The urban population currently amounting to almost thirty percent of the total population in concentrated in two cities, namely Harare, the capital city of Zimbabwe, and Bulawayo. Harare is the primary urban center with its population forming almost 11 percent of the total Zimbabwean and being almost three times the size of that of Bulawayo, Zimbabwe`s second largest urban center. Altogether there are about thirty centers that could be classified as urban although some of them have population as small as 2500 inhabitants. In recent years , Zimbabwe`s urban population annual growth rate has averaged 5,9 percent and urban areas accounted for 30 percent of the total population as at March 1998. This rapid urban population growth rate has not only exerted a lot of pressure on urban social service and infrastructure but has also exacerbated problems of waste management, sanitation and pollution.

Source: Adapted from Moyo, G (2000)

LAW DEVELOPMENT

Throughout the book issues of law development are considered and in particular how the law may be reformed to better incorporate a conservation ethic and promote the realisation of conservation objectives with in the framework of sustainable development. In Zimbabwe Environmental law development needs to be based on the environmental realities. In particular the centrality of natural resources to the economy, livelihoods and social systems must be considered in determining appropriate law reform.

Importantly the issue of law reform is broached from the perspective that the ultimate objective of environmental law must be to establish a system of environmental management that not only addresses conservation objectives but also social and development objective. The focus is on creating integrated environmental management system that addresses the whole and not simply tries to control use. This focus tallies with environmental management systems emerging at international law. The chapter on the implementation of multi-lateral environmental agreements considers the extent to which Zimbabwe's statute law incorporates these systems.

Additionally law reform is approached from a human perspective and focuses strongly on the recognition of rights. Chapter 3, The Institutional Framework considers rights of public participation in defining institutional systems. Chapter 4 considers the rights of local people to participate in environmental management and to have their value and social systems acknowledged. Chapters 2, 4 and 6 all consider the need to establish system that recognise various aspects of human rights including procedural rights, such as a right of access to information and the right to fair administrative processes. Additional the right to a remedy is also considered.

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1 Okidi cited in Ojwang
2 Patel, 2000
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4 Hughes
5 This description of periods of environmental practice is derived from Murphree
6 Dengu-Zvogbo et al, 1994
7 Schuler, 1986
8 Moyo, O'Keefe and Sill
9 http://www.fao.org/forestry/fo/country/index
10 ibid
11 Moyo et al 305
12 ibid

CHAPTER 2

THE LEGAL AND POLICY FRAMEWORK OF ENVIRONMENTAL MANAGEMENT

By Bharat Patel

Until relatively recently, environmental law was generally not recognised as a distinct and separate body of the law. Its development in most legal systems has tended to be piecemeal and reactive rather than comprehensive and proactive. More often than not, it has lagged behind social, economic and technological developments. Its evolution has also been hampered by traditional legal concepts and devices, which are ill-equipped to contend with environmental concerns and often, particularly in the classical conception of unbridled proprietary rights, contradictory to those concerns. Moreover, in many developing countries, environmental law is generally perceived as being diametrically opposed to socio-economic development, with the result that environmental factors have, in most instances, been subordinated to social and economic exigencies.

The origins and subsequent development of environmental statutes in Zimbabwe have taken a similarly haphazard and reactive pattern in response to changing economic and social circumstances. Apart from the occasional eco-inspired aberration, the decisions of policymakers and legislators, from the period of colonial occupation until today, have been primarily motivated by material and developmental considerations with only secondary and sporadic regard to their environmental effects.

HISTORICAL PERSPECTIVE

The Charter of the British South Africa Company[1] constituted, the official Crown fiat for colonial expansion into the territory later called Southern Rhodesia. It epitomised the driving tenets of a flourishing imperialism engineered and implemented by aggressive private enterprise. The Charter's declared objectives were to exploit existing concessions and agreements "with the view of promoting trade, commerce, civilisation and good government…in the territories". To that end, the company was empowered to acquire, clear and cultivate land, to make grants of land as well as mining and forestry rights, and to undertake trade, commerce, and industry. As might be expected in an instrument of this nature, the Charter was almost entirely devoid of environmental interest – with the exception of a singular pro-

vision enabling the Company to make regulations and impose licences for the preservation of elephants and other game.[2]

Colonialism displaced customary environmental law and practice.[3] Colonial legislation relevant to the environment was adopted in areas, municipal laws, pollution laws, and laws for the control of natural resources.

Municipal laws

The gradual occupation of the territory in the wake of the Charter was accompanied by the enactment of various ordinances and regulations governing the multifarious facets of colonial settlement. They applied not only to towns and municipalities but also to villages and other settler communities as well as adjacent commonages and outspans. These laws,[4] enacted from 1894 onwards in order to regulate the mushrooming activities and incidents of urbanisation, controlled a wide range of environmentally harmful conduct. These included the disposal of refuse, industrial effluent and sewage, water pollution, overcrowding, offensive trades and businesses, overgrazing, burning of grass, and hazardous nuisances, generally. They also provided, albeit indirectly, for the regulated distribution of water, and the protection and preservation of trees and shrubs, common pastures, public reserves and commonages.

These laws, enacted from 1894 onwards in order to regulate the mushrooming activities and incidents of urbanisation, controlled a wide range of environmentally harmful conduct. These included the disposal of refuse, industrial effluent and sewage, water pollution, overcrowding, offensive trades and businesses, overgrazing, burning of grass, and hazardous nuisances, generally.

Land husbandry

The statutory regulation of agricultural land usage began in 1900,[5] as part of the process of colonial settlement, with conditions of occupation being attached to title deeds for rural land. These conditions were designed to induce grantees of land to clear and cultivate their holdings and to erect specified improvements. Although these conditions were not entirely incompatible with environmental security, their principal objective was to accelerate the exploitation and productivity of land rather than promote any notion of sustainable development.

The concept of land husbandry features more prominently in subsequent laws, which provided for the settlement of agricultural land in rural areas. These included the 1944 Land Settlement Act,[6] the 1963 Rural Land Act,[7] and the 1969 Agricultural Land Settlement Act.[8] The imposition of land husbandry was designed to displace traditional practices, which were seen as backward, and to give the state full control over land and its use. It was, therefore, a key aspect of the overall land strategy. (See Box 2.1.)

In considering applications for land, the administrative authorities were required to take into account, *inter alia*, whether the applicant possessed the qualifications and the capital necessary to

ensure the beneficial or proper use and occupation of the property. The relevant criteria included the practice of sound methods of husbandry and the observance of other laws[9] relating to farming practice and land management. Compliance with these conditions was essential to enable the landholder to acquire title deeds to the property after the prescribed leasehold period.

Good farming practice was more vigorously enforced in the context of native land occupation through the 1951 Native Land Husbandry Act.[10] The law detailed the framing of regulations prescribing appropriate farming systems and methods for cultivation and stock grazing. It also provided for the compulsory engagement of "natives" to provide labour for the conservation of natural resources and the promotion of good husbandry. Inevitably, the markedly oppressive tenor of this law led to its being perceived as a restrictive measure imposed by a repressive government rather than a strategy for the proper management and conservation of resources.[11] In later years, its efficacy was further diminished by the rapidly growing pressure on relatively infertile communal land and the attendant inability of the communal management tradition to cope with the increasing scarcity of land and natural resources.[12]

Box 2.1: Inequitable land distribution

The adoption of land husbandry practices happened alongside a process of land alienation. As a result of land appropriation, the traditional land management practice of shifting cultivation was seriously undermined. Appropriation by white settlers led to the first *Chimurenga* (war of liberation). Consequently, the British government evoked an Order in Council requiring the establishment of native reserves. These were developed primarily on land considered unsuitable for white settlement and formed the basis of the communal lands, as they exist today. By 1911, "native reserves" constituted about 25 percent of the land while the holdings of the British South Africa Company (BSAC) amounted to a massive 55 percent (Rukuni, 2000). As part of this process, native commissioners were appointed and communities effectively lost control over their resources.

The 1930 Land Apportionment Act set aside 11,7 million ha for African people; this amounted to nearly 30 percent of the land. By this time the BSAC holdings were transferred to white settlers who held 50 percent of the land under private title; a further 20 percent was set aside for forest exploitation. Between 1935-56, white farmers got a 50 percent subsidy and free technical support to allow them to develop water and conservation works. It was not until 1961 that the land allocated for African people was increased to 45 percent. This remained fairly constant until after the implementation of the land resettlement programme adopted after independence – areas for communal lands, small scale commercial farming and resettlement now stands at just over 50 percent. (Rukuni, 2000, pages15-23)

Although communal areas account for over 40 percent of total land and large-scale commercial farms approximately 28 percent, only 25 percent of communal land is in the high agricultural potential zones (I, II and III) whereas 56 percent of commercial farms are in these high potential zones. Land reform in 2002 seeks to change this through acquiring 5 million hectares of land for resettlement.

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Pollution

The 1913 Water Ordinance[13] provided for the protection of public streams and punishment for water polluters.

The statutory control of air pollution was conceived considerably later, with the enactment of the 1971 Atmospheric Pollution Prevention Act.[14] It provided for the relatively wide control of air pollution from offensive gases, smoke, dust and internal combustion engines. The overall framework of this legislation has remained substantially unaltered.

Natural resources

The protection of game has been the subject of statutory provision from the outset of colonial occupation, beginning with the 1899 Game Preservation Ordinance. Seven years later, the 1906 Game Law Consolidation Ordinance[15] amended and consolidated the existing laws into a fairly comprehensive game regime. It provided for protection notices, game licences and permits, closed seasons, as well as prohibitions against the taking of eggs and young creatures and the exportation of game. As regards enforcement, the Ordinance stipulated the usual penalties of fines and imprisonment for offences. Interestingly, it expressly conferred upon "any person" the capacity to prosecute offences "as a private prosecutor".

> The 1902 Ancient Monuments Protection Ordinance catered for these interests. The Ordinance provided for the preservation and notification of all indigenous monuments, relics and paintings that had been erected, constructed or made before 1800.

The interests of archaeology appear to have seized the lawmakers' attention soon after the turn of 20th century. The 1902 Ancient Monuments Protection Ordinance catered for these interests.[16] The Ordinance provided for the preservation and notification of all indigenous monuments, relics and paintings that had been erected, constructed or made before 1800.

The 1913 Water Ordinance[17] provided for the systematic control of the ownership and use of public water. This statute provided, among other things, for the establishment of combined irrigation schemes and the adjudication of disputes by water courts. The provisions of the 1913 Ordinance, together with earlier laws regulating the use of water for mining, railway and urban purposes, were later consolidated and re-enacted by the 1927 Water Act.[18]

At the time of its enactment, the 1941 Natural Resources Act[19] was hailed as a milestone in the statutory conservation and improvement of natural resources. As is the case under the current act,[20] the 1941 act provided for the establishment of the Natural Resources Board and conservation areas, and prescribed the respective functions of local conservation committees and conservation councils. Again, as at present, it also differentiated between the institutionalised conservation of resources in com-

mercial farming areas and the more peremptory and *ad hoc* forms of conservation carried out in the so-called native reserves. The 1941 Act and its successors have been consistently criticised as being of limited utility in communal lands, which are the very areas where environmental degradation is most acute.[21]

The domestic and transboundary movement of flora and fauna have also been statutorily regulated from a very early stage. The laws in question covered, *inter alia*, the importation of diseased plants,[22] the exportation of Angora goats and ostriches,[23] the importation of injurious substances and animals,[24] and the regulation of plants and trees cultivated and traded by nurseries.[25]

Conversely and somewhat inexplicably in view of the manifold laws governing flora and fauna, the establishment of national parks and reserves was only provided for almost 50 years later through the 1949 National Parks Act.[26] At its inception, the act constituted a grand total of four national parks and provided for the establishment of other parks thereafter.[27] It also conferred a wide range of powers on the administration for the protection of park areas and the preservation of all animate and inanimate matter therein. Not surprisingly, given the predominance of mining interests in the country, pre-existing mining rights were specifically saved and perpetuated by the Act.

CONTEMPORARY STATUTES AND REGULATIONS ON THE ENVIRONMENT

A cursory perusal of the legislation in force shows that the statute books of Zimbabwe are littered with a proliferation of environmental laws. A large number of ministries, departments, local authorities and other bodies are presently engaged in environmental protection and resource conservation.[28]

A total of 28 statutes and their subsidiary instruments which, in one way or another, impinge on the regulation and preservation of the environment in Zimbabwe fall under three broad categories:

- conservation and utilisation of resources;
- land use planning and regulation; and
- pollution control and waste management.

Conservation and utilisation of resources

Natural resources

The Natural Resources Act [*Chapter 20:13*] was intended to be the principal piece of legislation for the conservation and improvement of natural resources in Zimbabwe, under the general supervision of the Natural Resources Board. The Act provides, among other things, for the construction of works to prevent soil

Box 2.2: Natural resource laws restrictive

Legislation regarding natural resource management in communal areas tends to be highly restrictive, and provides inadequate incentives for increased local participation in management. It concentrates control over resources at the district level, or with technical or regulatory departments. ... A body of legislation is required which creates an enabling environment for sustainable management, rather than one that seeks to restrict or to penalise those who are most capable of management, and whose livelihoods are most dependent upon woodlands and trees.

Source: McNamara, 1993

erosion and promote the conservation of soil and water resources. The scope of the Natural Resources Act does not extend to the air and, with reference to water development and usage, it reflects several potential conflicts of an administrative nature vis-à-vis the provisions of the Water Act.

Parts IV and VII of the act draw a marked divide between commercial areas and communal lands insofar as they concern policy initiatives and the modalities for financing the costs of such works. Part V of the Act also enables the declaration of intensive conservation areas, responsibilities for the preservation of which are devolved to locally established conservation committees.

The enforcement of the act is assigned to ministerially appointed inspectors who are empowered to issue specific orders for the conservation of or prevention of injury to natural resources.[29] The act also vests the responsible minister with wide regulation making powers,[30] but these have been somewhat sparingly utilised over the years.[31] More significantly, the act entrenches a fundamental dichotomy between the voluntary institutional and conservation measures available in the commercial areas and the conversely patriarchal and authoritarian regime administered in communal lands.

Parks and wildlife

The Parks and Wild Life Act [*Chapter 20:14*] constitutes the primary legal framework for the preservation and protection of the country's flora and fauna and their natural habitat as well as the natural landscape and scenery of Zimbabwe.

The administration of the act is vested in the minister responsible for the environment, acting through the Department of National Parks and Wildlife Management. The powers and duties of the department are variously prescribed in Parts XV-XVII of the act. Insofar as it concerns policy matters, the relevant advisory functions are vested in the Parks and Wildlife Board established under Part II of the act. Additionally wildlife management is based on the concept of appropriate authority, which places rights akin to ownership in the landholder. (See Box 2.3.)

Part III defines and delineates the total extent of parks and wildlife land. It further provides that this area shall not be

Box 2.3: Skewed benefits of appropriate authority

Appropriate authority is vested in the landholder on private land, on the state management agency on state land other than communal land and in the Rural District Council in communal areas. The rights of appropriate authority are essentially rights of ownership, giving the holder the right to determine what management regime to adopt and to reap all the benefits. This has made wildlife management an attractive option for private landholders as it has allowed them to engage in hunting, tourism and manufacturing based on wildlife. In the communal areas, this right has been placed with the rural district councils. Although communities have obtained some benefit from this under the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE), it has not given them the same opportunity to diversify their economic activities.

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reduced by more than one percent of the total area comprising such land as at 2 February 1979.[32] Broadly defined, parks and wildlife land consists of all national parks, botanical gardens and reserves, sanctuaries, safari areas and recreational parks falling within the purview of the act. Parts IV-VIII of the act deal respectively with the above-mentioned categories of parkland. These parts elaborate the broad purposes for which such areas are to be used, the manner in which they may be constituted and the attendant powers of the executive. They also specify and regulate the activities that are proscribed or conditionally permitted within these areas.[33]

Parts IX-XIV are concerned specifically with the protection of wildlife, fish and plants. These parts prescribe the species that are specially protected and the terms and conditions under which other species may be hunted, picked or otherwise exploited.[34] With specific reference to hunting, the provisions of the Parks and Wildlife Act are supplemented by the Trapping of Animals (Control) Act [*Chapter 20:21*], which restricts and regulates the making, possession and use of certain traps.

Water resources

Until very recently, the Water Act [*Chapter 20:22*] the development and allocation of water resources was governed. Broadly speaking, this act was designed in the context of a relatively small and stable commercial agricultural sector, with water usage being apportioned in the form of real rights attached to riparian land. This act did not adequately address the growing demands for water resources in the new agrarian reality that began to take shape after Independence in 1980. At the same time, the provisions of the act for the control of water pollution were insufficiently formulated and developed. From a larger perspective, the act did not embody any concept of sustainable water usage and management based on a holistic approach embracing all water and river systems as parts of a unitary whole.

Box 2.4: New criteria for water allocation

The new Water Act takes an important step forward by redressing the criteria for water allocation. Previously the primary consideration for the allocation of water rights was the objective of "optimal utilisation," which was interpreted to favour the development of big business. Catchment councils now undertake water allocation. Although these are ministerially appointed bodies they include representation of key water users.

Section 23 of the act establishes principles that must be observed by catchment councils in considering applications for permits for use of water. Additionally, the principles set out in section 26 need to be addressed in the context of the overall objectives for water management.

The principles to be observed by catchment councils, in the case of more than one application for the use of the same water, are the:

- need to achieve, as far as possible, an equitable distribution of the available water resources;
- needs of each applicant; and
- the likely economic and social benefits of the proposed use.

It remains to be seen how equitably these will be interpreted. In law equitable does not mean equal – it is more akin to each according to his needs. Consequently, established business may have a greater right than emerging business.

When a permit for the use of water for agricultural purposes is to be issued, the catchment councils shall have regard to the:

- extent and nature of all land, wherever situated, irrigable by the water concerned;
- suitability for irrigation of the land concerned; and
- efficiency of the proposed method or possible methods of using the water concerned.

Additionally, catchment councils must have regard to the economic aspects of the proposed scheme, undertaking or work and whether it will result in effluent requiring treatment and disposal. If so, the council must order the applicant to ensure that the proposed method of treatment and disposal of the effluent complies with Part VI.

The minister, after consultation with the Zimbabwe National Water Authority and any catchment council concerned,may prescribe the matters, which shall be taken into account in considering the respective priority of different uses of water; the manner of allocating water between consumers who have competing needs for water; and the methods of allocating water.

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The new Water Act [*Chapter 20:24*],[35] which came into operation on 1 January 2000, seeks to remedy many of its precursor's deficiencies. Part II of the Act provides the broad framework for water resources and planning through the declaration of river systems and the preparation of water development plans.[36] Part III enables the establishment of river catchment and subcatchment councils.[37] The functions of these bodies include the preparation of plans, the granting of water usage permits and the overall regulation of water rights in respect of the river systems for which they are established.

Part IV of the Act governs the allocation and usage of water within a given area under the authority of water permits issued by the relevant catchment council. See Box 2.4. As was the case under the old Act, such permits pass with the piece of land to which they relate upon the transfer of that land.[38] However,

unlike the previous position, such permits are of fixed duration (normally 20 years)[39], albeit with the possibility of extension, and are subject to revision and equitable reallocation at times of high demand.[40] Water rights are also subject to suspension, amendment or revision and re-appropriation within any water shortage area declared in terms of Part V of the act.[41]

Part VI of the act provides for water quality and pollution control, part VIII deals with the approval and implementation of combined water schemes, and part IX regulates the safety of dams.

Since 1 January 2000, the implementation of the Water Act has been intimately connected with the functions exercisable by the new authority established under the Zimbabwe National Water Authority Act [*Chapter 20:25*],[42] which also came into operation on that date. This authority is endowed with wide-ranging policy and advisory functions pertaining to, *inter alia*, the planning, management and development of water resources, the equitable and sustainable distribution of water, pollution control, the operations of catchment councils, hydrological research, and the cooperative management of international water resources.

Part V of this act establishes a new fiscal entity called the Water Fund which will consist, apart from Parliamentary appropriations, of moneys accruing from water levies imposed upon permit holders under the Water Act. In addition to meeting the non-commercial expenditure of the authority, the fund is to be utilised for the general development of the water resources of Zimbabwe.

> The authority is endowed with wide-ranging policy and advisory functions pertaining to the planning, management and development of water resources, the equitable and sustainable distribution of water, pollution control, the operations of catchment councils, hydrological research, and the cooperative management of international water resources.

Forests

The Forest Act [*Chapter 19:05*] and the Communal Land Forest Produce Act [*Chapter 19:04*] establish the general framework for forest management.

The Forest Act establishes the Forestry Commission to administer, control and manage state forests and gives it responsibility for the protection of forest resources. Part IV of the Act provides for the setting aside of state forests and the declaration of protected private forests. The essential purpose of such demarcation is to prohibit the taking or destruction of forest produce in those areas. Part IV also provides for the protection of trees and forests in other designated areas and the expropriation of land for forestry purposes. A 1999 amendment to the act makes provision for the Forestry Commission to delegate its commercial activities to a private company constituted for these purposes. Pursuant to this the Forest Company of Zimbabwe has been formed and is now responsible for the exploitation of forest produce in state forests.

Part V of the act establishes the Mining Timber Permit Board to issue timber permits for mining purposes in non-demarcated or unprotected forests. Generally, timber rights are not exercisable in demarcated or protected forests and trees may not be felled or removed in such areas unless they interfere with mining operations. Part VI provides for the conservation of timber resources generally, while part VII enables the regulation of trade in forest produce. Finally, part VIII provides for the control of fires and the burning of vegetation on any land.

Box 2.5: Mining timber rights

Mining timber rights cut across different land tenure categories. The Forest Act and the Mines and Minerals Act establish a system of mining timber rights. Holders of mining or prospecting permits have rights to harvest timber on the land to which their mining right applies. Section 178 of the Mines and Minerals Act provides for the surface rights of miners. Sections 44 and 45 of the Forest Act restrict these rights.

Section 178(2) of the Mines and Minerals Act provides, *inter alia*, that every miner of a registered mining location shall have and possess the right, subject to any existing rights, to the use of any surface area for all necessary mining activities. Paragraph (e) specifically sets out the right to harvest timber. It provides that subject to this section, the Forest Act [Chapter 19:05], to such conditions as may be prescribed and on payment to the occupier (or the owner) of the land in advance of such tariff rate as may be prescribed, a miner has:

> the right to take and use firewood or ... any indigenous wood or timber from land open to prospecting which is neither Communal Land nor land in regard to which a reservation has been made under section 36 or 37.

This right is restricted to his mining location.

Further, provision is made for a miner-prospector to exploit reserved trees or remove trees in a demarcated forest on application to the mining commissioner. Under the Forest Act (Section 44(4) - the mining commissioner may authorise such exploitation, where the said trees interfere with mining operations. Similarly, under Section 45 of the Forest Act, a miner requires a permit to remove forest produce from state land or any indigenous trees from private land. This restriction does not apply to site clearance or the construction of roads, unless the Mining Timber Board has withdrawn this exemption.

Section 45 creates an obligation to stack or pile any timber felled for site or road clearance. Sub-section 3, thereof, specifically provides that these provisions do not affect the rights of a concession holder (the holder of an exclusive prospecting reservation). Such holder may in terms of the Mines and Minerals Act, reach an agreement with the owner-occupier of land to remove timber (s 103(8)). These rights include the right to take timber from private land on agreement with the landowner or occupier. This includes a right to take indigenous timber.

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The regulation of forests in communal lands falls under an entirely separate statute: the Communal Land Forest Produce Act [Chapter 19:04]. In general, this act regulates the public and private exploitation of forest produce and the establishment of plantations in communal lands. The act also provides for the declaration of protected forest areas wherein the exploitation of forest produce is generally prohibited in the absence of specific contractual arrangements.[43]

As is evident from the foregoing, the predominant purpose of both acts, taken as a whole, is to protect forests from the stand-

point of their economic utility as opposed to their general environmental value. This developmental bias is accentuated by the adoption of different regimes for different categories of land and is further aggravated by the preferential treatment accorded to mining rights.

Box 2.6: Rights of communal people to forest resources

In forests in communal land, all rights are vested in the minister. However, the legislation provides in Section 19 for the devolution of authority. This is done in order to promote sustainable management by creating opportunities for the actual managers and users to benefit from the resource. However, this authority has to be exercised in consultation with the Forestry Commission. The reason for this is to ensure that the issuing of licenses is not just driven by the potential financial benefit but is environmentally responsible. This is especially important since the rural district councils (RDCs) are under pressure to generate revenue locally.

All managerial rights are vested in the RDC and the Forestry Commission. The legislation excludes individuals and communities from management. Rights of management and rights of use are effectively separated. However, there is currently an attempt to extend Communal Area Management Programme for Indigenous Resources (CAMPFIRE) principles to forest management in the communal areas.

Individuals and groups resident in communal areas only have a right to utilise woodland resources in accordance with the Communal Lands Forest Produce Act. The Act restricts the use of forest products in the communal areas by the local people to "own use". Section 4 provides that no forest produce exploited in the exercise of such right shall be sold to anyone or supplied to anyone who is not an inhabitant of that communal land.

In communal lands, RDCs have a right to grant concessions to outsiders to use forest products in natural forests, for commercial purposes, by virtue of Communal Land Forest Produce Act Delegation (Minister's Rights and Functions Notice) SI 9 of 1989. The minister's right in respect of plantations is delegated to the Forestry Commission. The exercise of these rights can be done with minimal consultation with the inhabitants of communal areas. The council's right to issue concessions must, however, be exercised in conjunction with the Forestry Commission, as provided for under SI 9 of 1989. This, however, does not take into account a community's relationship with the concession area. Indeed the commercial value of these areas is as a result of good management practices by the community. The Commission is responsible for preparing the appropriate agreement for the local authority concerned and its administration. No local authority is entitled to authorise the exploitation of timber from areas protected under Section 15.

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Pests and diseases

The control of various pests and diseases that bedevil the agricultural sector is the subject of a number of different statutes, each dealing specifically with a particular form of mischief. These statutes and their objectives include the following:

- Animal Health Act [Chapter 19:01] – for the eradication and prevention of the spread and introduction of animal pests and diseases in Zimbabwe.
- Bees Act [Chapter 19:02] – for the control of disease in bees and the conservation of bees found in the wild.
- Locust Control Act [Chapter 19:06] – for the control and destruction of locusts.

- Noxious Weeds Act [Chapter 19:07] – for the control and eradication of noxious weeds.
- Plant Pests and Diseases Act [Chapter 19:08] – for the eradication and prevention of the spread and introduction of plant pests and diseases in Zimbabwe.
- Quelea Control Act [Chapter 19:10] – for the control and destruction of quelea birds.

Minerals

The Mines and Minerals Act [*Chapter 21:05*] is unabashedly concerned with the exploitation of minerals, mineral oils and natural gases. Regarded as a whole, the diverse prospecting and mining rights conferred under this act enjoy an almost unqualified and ordinarily deleterious precedence over other competing rights and interests. Moreover, the act contains no provision for environmental planning generally and, as a rule, its approach to environmental restrictions on mining operations is essentially minimalist. A striking exception to this general rule is to be found in the Mining (Alluvial Gold) (Public Streams) Regulations 1991 (S.I. 275/1991), which seek to protect the banks of public streams from the ravages of unrestricted gold panning. Thus, it requires environmental impact assessment only in respect of one type of mining activity, namely, special mining leases under part IX of the Act, and its restoration requirements are somewhat perfunctory and applicable to mining sites only.

Natural and cultural heritage

The function of preserving the cultural heritage of Zimbabwe is vested in the Board of Trustees established under Part II of the National Museums and Monuments Act [*Chapter 25:11*]. This board is also enjoined to keep a comprehensive register of all monuments and relics that are acquired or brought to its notice.

The scope of the act encompasses ancient, historical and natural monuments. It also extends to relics and other objects of anthropological, archaeological, historical or scientific value or interest.

Part III of the act governs the administration of museums, and Part IV is specifically concerned with the preservation of monuments and relics. Section 21 requires notification of the discovery of any ancient monument or relic by the discoverer, the owner or occupier of the land concerned. Section 23 empowers the board to compulsorily acquire any national monument or relic or any land on which such monument or relic is sited. Section 24 prohibits the excavation of any monument without official consent, while Section 25 prevents the alteration, destruction or removal *ex situ* of any monument or relic.

Finally, Part VI of the Act confers various executive powers on the board, including powers of entry and search and the power to make bylaws regulating public access to monuments and the general safeguarding of monuments and relics.[44]

Land use planning and regulation

Regional and local planning

The general planning of regions, districts and local areas is regulated in terms of the Regional, Town and Country Planning Act [*Chapter 29:12*]. As stated in the preamble to the act, this planning has the overall object of:

> "conserving and improving the physical environment and in particular promoting health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications".

Pursuant to this broad objective, parts II-IV of the act provide for the formulation and preparation of regional, master and local plans. The actual process of development within the framework of these plans is generally controlled under part V, subject to the grant of planning permission and particular powers of executive intervention. Apart from the general power to make enforcement and prohibition orders,[45] the act specifically enables the issuing of preservation orders in respect of historical buildings as well as trees and woodlands.[46] Part VI of the act prohibits any subdivision or consolidation of property without the authority of a permit. Finally, part VII empowers the expropriation of land for development purposes subject to the payment of compensation, while part IX provides for the vesting and transfer of ownership of roads.[47]

The expropriatory provisions of the act must be read in conjunction with the general powers of expropriation vested in the State in terms of the Land Acquisition Act [*Chapter 20:10*]. These powers, which are generally exercisable in the public interest, apply to any acquisition of land, which is reasonably necessary in the interests of town and country planning. They also apply to acquisitions "for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wildlife or other natural resources".

These powers, which are generally exercisable in the public interest, apply to any acquisition of land, which is reasonably necessary in the interests of town and country planning. They also apply to acquisitions "for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wildlife or other natural resources".

From an environmental perspective, the Regional, Town and Country Planning Act is subject to criticism on several counts. First, it does not require the planning authorities to consult with relevant environmental policymakers, administrators and the public. Second, its provisions governing the preparation of regional plans lack sufficient guidance as to the manner in

which physical assets and resources of environmental significance should be inventoried.[48] Finally, the act is entirely devoid of any environmental impact assessment requirement, whether as part of the general planning process or at the stage of particular development proposals.

Local authorities

The provisions of the Regional, Town and Country Planning Act are obviously not exhaustive in terms of the functions conferred upon planning authorities.[49] Insofar as local authorities are concerned, one must look to the Urban Councils Act [*Chapter 29:15*] and the Rural District Councils Act [*Chapter 29:13*] for additional provisions, supplementing those contained in the Regional, Town and Country Planning Act.

Part X of the Urban Councils Act deals with various aspects of immovable property and, among other things, authorises the acquisition of land in order to enable councils to carry out their functions.[50] Part XV of the act vests all municipal and town councils with a number of specific powers relative to land use and development. Thus, councils are empowered to enforce conditions of title generally as well as those governing the establishment of townships.[51] They are also entitled to undertake the development of estates within their respective areas of jurisdiction.[52]

Additionally, in terms of section 198 as read with the Second Schedule to the act, urban councils enjoy a variety of general powers. These include powers to take developmental and conservation measures in relation to the following:[53]

- providing open spaces and recreational facilities;
- planting and cultivating trees;
- conserving and improving natural resources; and
- providing and maintaining roads, bridges, canals and dams.

Complementing the executive powers of urban councils is their legislative authority to frame bylaws in terms of Section 227 as read with the Third Schedule to the act. This schedule authorises the enactment of bylaws providing for, inter alia, the following matters:[54]

- controls over property, including the conservation of trees and natural resources and the occupation and use of land and buildings;
- planning, construction and use of buildings and structures;
- roads, traffic and public places and amenities;
- the supply of electricity and water, including measures for pollution control; and
- regulation of sewerage and control of effluents and wastes.

The Rural District Councils Act is a legal framework similar to that described above. Under Part X of the Act, RDCs are empowered to enforce conditions of title[55] and to undertake the development of estates.[56] They are further empowered to formulate developmental policies and prepare annual development plans[57] and to compulsorily acquire land for planning purposes.[58]

As regards executive functions, section 71 enables the exercise of various general powers as prescribed in the First Schedule to the act. These powers are akin to those conferred upon urban councils with respect to developmental and conservation measures.[59] Similarly, section 88 authorises RDCs to frame bylaws for the matters enumerated in the Second Schedule to the act. These include controls over property, the planning and use of buildings, roads and traffic, public amenities and facilities, and the regulation of water supplies, sewerage and effluent.[60]

As is the case with all other environmental legislation in Zimbabwe, neither the Urban Councils Act nor the Rural District Councils Act contains any provision for environmental impact assessment. A council may authorise any developmental activity or project without requiring any prior assessment of its impact. By the same token, every council is at liberty to carry out any development work without having to carry out an assessment.

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Factories and industrial works

The Factories and Works Act [*Chapter 14:08*] provides, *inter alia*, for the registration and control of factories and the regulation of conditions of work in factories.

Section 8 of the Act proscribes the occupation or use of a factory without a valid registration certificate issued in respect of that factory. Applications for the registration of factories are governed by the provisions of section 10, which enjoins the submission of prescribed particulars and plans, and any additional information or drawings which may be required by factory inspectors.

The grant or refusal of registration certificates is determined by a variety of criteria. Of direct relevance to environmental planning is the requirement that the activity to be carried on in the factory concerned or the siting of the factory must not be in contravention of any approved scheme or plan under the Regional, Town and Country Planning Act. This requirement is of singular importance in safeguarding the public against factory-based pollution.

Registration may also be refused if the applicant has failed to obtain any licence or permit required under any other relevant enactment or where the premises are unsuitable for use as a factory in terms of any regulations made under the Act. In this respect, Section 34 of the Act enables the making of regulations for various purposes, including structural soundness, precautions against fire and measures to secure health, safety and sanitation.

Agricultural and rural land

The leasing, occupation and alienation of agricultural land in Zimbabwe is governed by a number of statutes. With specific reference to land settlement, the Agricultural Land Settlement Act [*Chapter 20:01*] empowers the minister responsible to establish schemes for settlement as well as for farmer training and the development of the farming industry.[61] The manner of settlement under such schemes normally involves the grant of leases to successful applicants, with options to purchase their holdings upon fulfilment of their leasehold conditions.[62] The principal criterion to be applied in the selection process is "whether the applicant possesses the qualifications and capital necessary to make proper use of the holding".[63] (In past practice, the application of the act has been confined to the commercial farming sector). Part III of the act enables the minister to institute investigations to ensure that "agricultural land is not being occupied adversely in regard to the land or the neighbouring community" and, thereafter, to issue such remedial orders as may be appropriate.[64]

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Part II of the Rural Land Act [*Chapter 20:18*] provides generally for the acquisition of rural land by the State and authorises the disposal of State land by lease, sale or other means.[65] Part III of the Act applies to all rural land and is specially designed to control the subdivision and leasing of land for farming purposes. The power to make regulations under the Act specifically extends to regulations "limiting the size of any piece of land that may be owned by any person for farming or other purposes", having regard, *inter alia*, to "the natural region in which such land is located".[66] Such regulations have recently been promulgated as the Rural Land (Farm Sizes) Regulations, 1999.[67]

As regards conditions governing the use and occupation of land, Section 3 of the Alienated Land (Information) Act [*Chapter 20:02*] enables the framing of regulations "for the purpose of ascertaining the nature and extent of the occupation or use of any alienated land".[68] Regulations for this purpose are presently contained in the Alienated Land (Information) Regulations, 1983.[69] Conversely, the provisions of the Land Occupation Conditions Act [*Chapter 20:11*] entitle the owners of land to eliminate any

conditions of occupation from their title deeds upon the satisfaction of the developmental requirements prescribed in the act.[70]

Finally, the Agricultural and Rural Development Authority Act [*Chapter 18:01*] establishes a body responsible for various developmental and agricultural functions in the rural sector.[71] On the developmental front, the authority is required "to plan, co-ordinate, implement, promote and assist agricultural development in Zimbabwe". The agricultural operations of the authority are carried out in relation to the State land listed and demarcated in the Third Schedule.

Pollution control and waste management

There is no comprehensive statute or policy dealing with pollution control and management of waste.

Air

The Atmospheric Pollution Prevention Act [*Chapter 20:03*] constitutes the principal statutory framework for the control of air pollution from gas, smoke, dust and other pollutants.

Part III provides for the control of noxious and offensive gases by enabling the declaration of gas control areas within which certain specified processes are prohibited without the requisite authority.[72]

Part IV seeks to control the pollution of the atmosphere by smoke within declared smoke control areas.[73] This part empowers the framing of regulations for the purpose of, *inter alia*, regulating, restricting or prohibiting various emissions and prescribing the permissible emission standards to be applied in the regulatory process.[74]

Part V regulates atmospheric pollution by dust within declared dust control areas.[75] Regulations may be made for the measures to be adopted and applied against various nuisances originating from dust.

Part VI provides for the control of air pollution by fumes from internal combustion engines. Broadly speaking, the use of such engines is prohibited unless they are fitted with prescribed emission control devices and they comply with prescribed emission standards.

Finally, section 38 of the act empowers the making of regulations generally, including regulations prescribing ambient or quality standards or controlling the emission of air contaminants from any source of pollution.[76]

The regime created by the Atmospheric Pollution Prevention Act is open to criticism for a number of compelling reasons:

- the act lacks a clearly defined regulatory approach and is generally biased towards safeguarding human health as opposed to the protection of ecosystems generally;
- there is no provision for conducting an inventory of all industrial emission sources in order to enable the planned regulation of pollution;
- the grant of registration certificates and other authorisations is not subject to any environmental impact assessment or audit;
- the act is totally silent on the question of incentives to utilise pollution abatement technology; and
- despite the availability of relevant enabling powers, there are several components of the act that are presently moribund in the absence of statutorily prescribed measures and standards.

Water

Part VI of the Water Act [*Chapter 20:24*] primarily governs the control of water pollution. Section 67 declares that the management of water resources must be consistent with the protection, conservation and sustenance of the environment.

The act makes an important step forward in incorporating the polluter-pays-principle in sections 68 and 69.

Section 68, generally criminalises the discharge or disposal of any pollutant, effluent or waste water into any water system unless such action is carried out in terms of a permit issued by the Zimbabwe National Water Authority. The offence created by this section is one of strict liability and amenable not only to punishment but also the possibility of a court order to enforce remedial action and compensation.

In issuing a permit under section 69, the authority must take into account the prescribed quality standards and any operative outline plan. Additionally, it must specify the quantity and quality of the discharge or disposal concerned. It may also impose specific conditions and such fees as may be prescribed. The fees recoverable from permit holders are to be paid into the Water Fund and applied towards the cleaning up of water pollution and research related to water pollution and its control. Section 70 empowers the authority to require, at any time, the taking of various preventive measures, including the installation of testing devices, the construction of pollution control works, and the preparation and submission of reports on existing or proposed activities. The failure to comply with such requirements attracts criminal penalties as well as other remedial sanctions.

Box 2.7: Polluter-pays-principle

Simply put, the polluter-pays-principle asserts that the costs associated with pollution should be borne by the persons or entities that cause these costs.

The origins of this principle can be traced back to the Trail Smelter Arbitration (33 AJIL (1939) 182 and 35 AJIL (1941) 684 and the Corfu Channel ICJ Rep(1949) 1. The Trail Smelter Cases case was concerned with damages arising in the USA from a smelter in Canada. Emissions caused crop damage. The arbitration tribunal required Canada to take steps to abate pollution to avoid any future harm and to pay compensation for harm caused.

The need to recognise the polluter-pays-principle is recognised in the 1992 Rio Declaration which provides that:

> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage; they shall co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdictions or control to areas beyond their jurisdiction." (Principle 13)
>
> "States should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the costs of pollution, with due regard to the public interest and without unduly distorting international trade and investment." (Principle 16)

Source: Alder and Wilkinson, 1999, pp 171 -175

Finally, section 71 authorises the delegation of the authority's powers under part VI of the act to any local authority, having regard to the financial resources available to the latter.

Insofar as emission and ambient quality standards are concerned, these are presently prescribed in the Water (Effluent and Waste Water Standards) Regulations, 1977.[77] These regulations were last amended in 1982[78] and the applicable standards have not been updated since that time.

Land

Three different statutes –the Public Health Act [*Chapter 15:09*], the Urban Councils Act [*Chapter 29:15*] and the Rural District Councils Act [*Chapter 29:13*] – govern the regulation of land-based pollution.

Part IX of the Public Health Act provides generally for proper sanitation and housing. Section 82 prohibits owners and occupiers of land or premises from causing or allowing any "nuisances". This term is defined in Section 85 to include unhygienic or overcrowded premises and unduly smoky chimneys. Additionally, section 94 empowers the framing of regulations controlling the disposal of rubbish and waste matters as well as prescribing effluent quality standards.[79] Regulations may also be made to control the establishment of factories or trade premises which are liable to discharge effluents or pollutants

and to prohibit such factories or trade premises in unsuitable localities.[80]

Reference has already been made to the extensive regulatory powers conferred upon municipal councils in combating environmental pollution. Apart from various executive powers under the Second Schedule, the Third Schedule to the Urban Councils Act allows the framing of council bylaws for a wide range of purposes. Thus, part XV of that schedule enables bylaws controlling air pollution from fires and combustible materials. With reference to water, part VII of the schedule permits bylaws for the protection of any water from pollution. Finally, under part IX of the schedule, bylaws may regulate sewerage systems, the removal of effluent and refuse, and the clearing of vegetation, rubbish and waste material.

In the rural context, local authorities are similarly endowed with wide executive and legislative powers under the Rural District Councils Act. In terms of paragraph 30 of the First Schedule to that act, councils are empowered "to do all things necessary to prevent pollution in any form, whether of water, the atmosphere or otherwise". They may also require the taking of requisite measures for that purpose, or even undertake those measures themselves at the expense of the responsible parties. On the regulatory front, parts VI, VII and XIII of the Second Schedule to the act respectively provide for the making of bylaws controlling water, land and atmospheric pollution.

Box 2.8: "Walk softly but carry a big stick"

Relying on "punitive" approaches alone – big fines and occasional jail terms – has frequently been shown to be ineffective, especially where the legal system is weak or where there is a lack of resources and will to enforce consistently. Persuasive approaches can help make real progress in such situations. At the same time, however, environmental regulators must have a battery of tools at their disposal to address the wide range of pollution problems and local circumstances. The skill lies in selecting those tools that can be most effective under the given circumstances.

Persuasion can achieve much, and building a social consensus around achieving key environmental objectives provides a good foundation for making even more progress. But there will always be some polluters who resist persuasion and incentives, and for these there must be a credible threat of real punishment. The old saying holds: "walk softly but carry a big stick."

Source: Hanrahan, D (1997)

Hazardous substances and wastes

The Hazardous Substances and Articles Act [*Chapter 15:05*] is essentially designed to control and regulate hazardous substances which are specifically declared as such. In terms of section 15, the power to declare extends to any substance "which may endanger the health of human beings or domestic or wild animals, birds or fish by reason of its toxic, corrosive, irritant, sensitising or inflammable nature". Radioactive substances are also covered in the list of potentially hazardous substances.

The regulatory scope of the act is confined to hazardous substances as defined and declared in terms of the act. This scope of

coverage is limited in at least one respect, as regards ozone depleting substances, inasmuch as the latter do not directly endanger human or animal health by reason of their inherently deleterious nature. Therefore, until the definitions of the act are appropriately expanded, the importation, distribution and consumption of such substances will continue to remain beyond the bounds of legal control.

The broad scheme of the act is to prohibit the importation, manufacture, conveyance, storage, sale or use of hazardous substances, otherwise than in accordance with a permit or licence issued under part III of the act. In terms of section 38 of the act, regulations may provide for the imposition of additional controls and restrictions on the supply and use of hazardous substances, including precautions to be taken in their handling and packaging. In this respect, regulations have been framed in the past to cover, among other things, protection from ionising radiation,[81] the provision of protective clothing,[82] and the transportation of substances in road tankers.[83]

More recently, the handling of waste has been brought under statutory control by virtue of the Hazardous Substances and Articles (Waste Management) Regulations, 2000.[84] These regulations provide a fairly comprehensive regime embracing the formulation of waste management plans and targets, the location and licensing of waste collection enterprises, principles governing the management of hazardous wastes, and the import, export and transportation of such wastes.

ENVIRONMENTAL POLICY DEVELOPMENTS

In contrast with the relative superabundance of environmentally related laws, the elaboration of environmental policies in Zimbabwe has been somewhat sporadic and gradual. Nevertheless, such policies as have been formulated are fairly significant in terms of their scope and impact. Some of the main policy developments that have taken place since the late 1980s include the national conservation strategy; the wildlife policy; the biodiversity strategy and action plan; the environmental impact assessment policy; and the national action programme on desertification.

Box 2.9: Policies affecting environmental management

Policies affecting natural resource management include:

- land policy – allocation, use and tenure;
- decentralisation policy;
- agricultural policy;
- livestock policy;
- wildlife policy;
- forest policy;
- environment impact assessment policy;
- national biomass energy strategy; and
- development and economic strategies – structural adjustment; growth with equity; sustainable development and poverty alleviation

National conservation

strategy

The National Conservation Strategy (NCS) was finalised in 1987 by the then Ministry of Natural Resources and Tourism[85] in order to implement the World Conservation Strategy.

Part 1 of this document delineates the existing natural resource base in terms of classified agro-ecological regions. Part 2 enunciates the conservation strategy itself, detailing the objectives and targets set for the protection, sustained utilisation and development of Zimbabwe's natural resources. The resource base covered includes arable and non-arable land, flora and fauna, water, energy, minerals and the human population. Also addressed are issues relating to genetic diversity, urbanisation, environmental monitoring and pollution control.

Finally, the strategy identifies the necessary administrative organisation and implementing agencies, at central and local government level, which are to be deployed or newly created in order to ensure the requisite institutional capacity.

Wildlife policy

The Department of National Parks and Wildlife Management formulated the policy in 1992.[86] The preface declares the government's primary responsibility to conserve all wildlife and natural habitats. This responsibility is to be exercised through the advisory role of the Parks and Wildlife Board and the executive functions of the department. It is also to be decentralised and devolved to other authorities, as well as the owners and occupiers of alienated and communal land, so as to foster and enhance local accountability for the preservation of wildlife.

Box 2.10: Implementing the NCS

The goal of the National Conservation Strategy (NCS) was to "integrate sustainable resource use within social and economic development programmes." However, it is relatively difficult to discern many significant implemented activities, which stem from the NCS – this may be attributed to the fact that it did not have an implementable action programme. Additionally, the gap between policy and practice makes it difficult to argue that Zimbabwe is currently close to pursuing a sustainable development path.

The strategy has "not been presented for adoption by government through parliament even though a Parliamentary Select Committee on the environment was established in response to the strategy. However, more recently a small secretariat has been supported by the World Conservation Union (IUCN), the United Nations Development Programme (UNDP) and the Department of Natural Resources to backstop a District Environment Action Programme. This initiative, which aims to encourage local participation planning efforts and seek funding for projects, is currently in a pilot phase in a number of districts. Its instigators hope that these local efforts will build gradually into a national programme in tune with the spirit of the original NCS."

Source: Nhira et al, 1998

The substantive components of the policy elaborate these objectives and principles in relation to the following:

- administration of wildlife in Zimbabwe;
- the parks and wildlife estate;
- wildlife outside the estate;
- wildlife tourism;
- sport-hunting;
- capture, movement and maintenance of wildlife in captivity;
- trade in wild life and its products;
- conservation and management of aquatic resources;
- species conservation and management policies; and
- relations with non-governmental organisations.

Box 2.11: CAMPFIRE

The Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) was conceived by the Department of Parks and Wildlife to address problems of illegal poaching and pressure on increasingly scarce resources.

CAMPFIRE was originally implemented in 1989 in two experimental districts. Since then it has grown on a national scale and is now firmly entrenched as a successful environmental project.

The ethos underlying CAMPFIRE was defined by its architects as: "a rural development philosophy that recognises that natural resources can and should be identified, conserved, managed and utilised in an economic and sustainable manner, to improve the living standards of those that live with those resources."

The evolution of the project was founded on the realisation that where the local community is delegated the authority to manage and reap the benefits from the neighbouring wildlife, it is thereby motivated to conserve and utilise that wildlife on a more sustainable basis.

In terms of legal competence, this delegation of functions was effected by an amendment to the Parks and Wildlife Act [*Chapter 20:14*] enabling the conferment of appropriate authority status upon rural district councils. This status entitles such councils to carry on and control hunting and related activities within communal lands under their jurisdiction.

Biodiversity strategy and action plan

This plan was prepared in 1997 under the auspices of the then Ministry of Mines, Environment and Tourism and the Global Environment Facility. It was officially adopted in 1999 and launched in June 2000.

The plan seeks to identify the current status of and the prevailing pressures on biological diversity in Zimbabwe. Having regard to these factors, the objectives of the Plan are to consider and formulate available options and appropriate actions to ensure the conservation and sustainable use of biological diversity in Zimbabwe.

These objectives are to be effected in conformity with the National Conservation Strategy and the Policy for Wildlife, and

in accordance with Zimbabwe's obligations under the 1992 Convention on Biological Diversity.

Box 2.12: The Biodiversity Action Plan: Meeting priority needs

Pursuant to its obligations under the Convention on Biological Diversity, the government of Zimbabwe has adopted a Biodiversity Strategy and Action Plan, with the defined objectives of conserving the country's biodiversity, sustainably utilising it, and the equitable sharing of its benefits for this and future generations. This strategy and action plan focuses on addressing "unmet and priority" needs:

- the absence of comprehensive biodiversity inventory and monitoring programmes;
- inadequate incentives for some local communities and individuals to undertake bio-diversity conservation and sustainable use activities in both the protected and non-protected areas;
- inadequate environmental awareness, education and training at various stakeholder levels;
- limited appreciation of the importance and contribution of biodiversity to the national economy and to local communities by policymakers;
- inadequate, conflicting and poorly enforced legislation that tends to adversely affect biodiversity conservation and sustainable use;
- a limited financial base and institutional capacity to facilitate the formulation, implementation and monitoring of biodiversity projects at the local level;
- inadequate affordable alternatives to reduce reliance on natural resources at the local level; and
- inappropriate research and extension approaches to conservation and sustainable use.

Jennifer Mohamed-Katerere

Environmental impact assessment policy

The then Ministry of Mines, Environment and Tourism finalised and publicly circulated the policy in 1997. Its primary goal is to encourage environmentally responsible investment and development in Zimbabwe, having regard to the long-term sustainability of natural resources and the conservation of biological diversity. It sets out the guiding principles of environmental impact assessment (EIA).

The administration of the policy is to be carried out by the ministry through the Department of Natural Resources. The policy applies to both public and private sector development activities, which fall within the list of "prescribed activities". The approval of such activities is generally subject to the preparation, submission and acceptance of an EIA report.

The thrust of the policy is to require the proponents of all prescribed activities to obtain either an EIA acceptance or a specific exemption for their projects. Without such acceptance or exemption, a project cannot receive the required authorisations to proceed from other relevant permitting authorities.

The fundamental difficulty with this policy is that it does not have the force of law. In effect, it purports to preclude developers from proceeding with their otherwise lawful activities unless they first obtain the requisite exemption or acceptance. It

further requires other relevant authorities to act outside the remit of their statutory competence by conditioning the grant of their approvals to compliance with EIA requirements. In short, the policy is legally unenforceable and will remain so until it is duly prescribed by statute.

National action programme on desertification

This programme was prepared and published in 1997 by the National Taskforce on Desertification, with support from the UNDP. It was produced in keeping with the National Conservation Strategy and in accordance with Zimbabwe's obligation to formulate a national action programme in terms of the 1994 United Nations Convention to Combat Desertification.

The programme identifies the incidence of desertification in Zimbabwe, the causes of land degradation, and other major programmes relevant to desertification. It then proceeds to elaborate the priority areas to be addressed in implementing the Convention:

- landuse planning and soil conservation;
- management of water and energy resources;
- education and public awareness;
- land tenure and poverty alleviation; and
- strengthening of institutional capacity.

The programme also outlines the funding arrangements and mechanisms required to support the entire project.

The long-term objective of the project is the elaboration of a National Action Programme that is geared to mitigate the effects of drought and land degradation.

Adequacy of Zimbabwe's environmental laws

As is evident from the foregoing survey, there is a multiplicity of natural resources and environmental legislation. Although these pieces of legislation are by no means exhaustive, they afford a fairly formidable array of rules designed to manage natural resources and control environmental degradation.

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However, it is now generally recognised and accepted that this body of law is fragmented and uncoordinated and, therefore, inadequate for the purpose of dealing systematically with existing and emerging environmental imperatives. The overall thrust of these laws does not reflect the kind of holistic and purposeful approach that is necessary in order to constitute a comprehensive and effective legal framework.

Box 2.13: Legislative reform

Priority areas for legislative reform in the area of natural resource management include:

- Reform of legislation to give communities greater control over resource use and management (including abolition of legal restrictions which undermine productive natural resource management strategies such as the use of dambos and riverine areas for cultivation, or the marketing of woodland products).
- A legal mechanism is needed to vest proprietorship for natural resource ownership, management control, and (natural resource) derived revenues into one group at the local village level, and to decentralise control below the rural district council level.
- Incentives for the sustainable management of natural resources should increasingly be incorporated into legislation, A legal mechanism is needed to channel financial incentives for improving management to local institutions.

Source: McNamara, 1993, 3

There are many reasons for this state of affairs. First and foremost, most existing legislation was conceived and enacted several decades ago, at a time when policymakers and legislators were largely oblivious to the concerns of environmentally sound development. Linked to this is the inherently "command-and-control" nature of the prevailing rules allowing for greater administrative discretion. This authoritarian system of management entails the exercise of unwieldy administrative control rather than an informed and enabling milieu conducive to the practice of sustainable development.

Apart from structural defects in the legislation, it is flawed by several critical deficiencies of a definitional and substantive nature. Among other things, the laws do not contain any comprehensive definition of all the elements that comprise "the environment". Equally significantly, they are almost totally devoid of any explicit requirement enjoining EIA as a prerequisite for development projects.[87] Another major omission is the absence of any fiscal or other incentives for the use of environmentally sound technology and techniques. Finally, in the sphere of pollution control, there is no comprehensive regime of environmental quality standards, while such standards as have been prescribed are either outmoded or deficient.

Compounding the above-mentioned features is the underlying inconsistency that pervades environmental legislation in Zimbabwe. This inconsistency operates at two distinct but interrelated levels. The first arises from the disparate and uneven treatment of environmental considerations in different statutes. Thus, a few statutes contain a fairly rigorous and exacting approach to questions of planning and conservation,[88] while others are relatively flexible and imprecisely formulated insofar as concerns the enforcement of environmental stipulations.[89]

The second problem relates to the inequitable manner in which competing interests are prioritised in the allocation of rights and

resources. This is particularly evident in the subordination of land husbandry and forestation to the overriding interests of the mining sector.

FUTURE DIRECTIONS

Policy and practice

It is axiomatic that laws cannot be devised in the abstract. Their formulation depends upon the dictates of policy which, in turn, must be informed by accurate empirical and technical data. By the same token, laws cannot operate in a vacuum. No matter how carefully they may be devised; their application may be rendered futile in practice. This may occur, for instance, if the administering authorities are unwilling or unable, due to institutional inadequacies, to enforce the law or, conversely, if legal subjects choose to disregard their duty to comply with the law. These dangers inhere in both the national and international dimensions. At the national level, the legal policy and principles adopted may be so inflexible or so divorced from reality as to be inexecutable on the ground. Or it may not infrequently be the case that the existing institutional infrastructure is inadequate and inept for the purposes of effectively implementing the law. And at the international level, the less regimented nature of the normative order coupled with the absence of a truly supra-national authority may combine to induce a somewhat cavalier attitude in the practice of states.

This may occur, for instance, if the administering authorities are unwilling or unable, due to institutional inadequacies, to enforce the law or, conversely, if legal subjects choose to disregard their duty to comply with the law. These dangers inhere in both the national and international dimensions.

These difficulties are particularly acute in the circumstances prevailing in non-industrialised countries where the need for economic advancement is a perennially pressing one. The law is called upon to reconcile the seemingly conflicting needs of rapid industrialisation on the one hand and environmental preservation on the other. And the concept of sustainable development is not always susceptible to clear exposition in legal form.

Having regard to all of these considerations, the task of the present-day environmental legislator is essentially to:

- regulate the behaviour, activity and enterprise of legal persons and entities without frustrating their potential and drive towards material development;
- translate a viable policy into normative terms, which are capable of effective application in practice, taking into account prevailing social attitudes and awareness as well as the availability of institutional resources; and
- ensure that environmental justice is afforded to all concerned and that environmental rights are duly recognised and effectively enforceable.

Future directions must include the development of self-regulation systems, the recognition of environmental rights and the

creation of systems for the realisation of administrative justice. This involves redefining the role of public participation, ensuring access to remedies and redress, and the implementation of measures ensuring administrative compliance.

Self-regulation and the polluter-pays-principles

In practice, environmental legislation has two basic approaches at its disposal in order to secure its objectives:

- the direct regulation or control of potentially harmful activity by its prohibition, restriction or subjection to a permit process; and
- the indirect influence of harmful activity by inducing certain forms of conduct by means of incentive or disincentive.

Direct regulation may focus either on the activity itself or on the locality where such activity is to be undertaken. In the former case the conduct of the activity is subjected to a permit with operating conditions attached, while in the latter case activities which are evidently harmful are sited in specific areas so as to confine their deleterious effects.

> ...in keeping with the polluter-pays-principle, any operation or activity that fails to conform to environmentally sound practice is subjected to avoidable pecuniary loss.

The indirect approach attempts to influence human behaviour by offering or imposing economic incentives and disincentives. The clear advantage of this approach lies in its appeal to self-regulation of economic activity in return for some specific material gain or savings flowing from environmentally responsible conduct. Conversely, in keeping with the polluter-pays-principle, any operation or activity that fails to conform to environmentally sound practice is subjected to avoidable pecuniary loss. From an administrative perspective, it also entails considerable benefits for the authorities in terms of reducing the human resources and time that might otherwise be expended on monitoring and enforcing environmental norms.

Incentives usually take the form of subsidies or favourable tax treatment in order to promote environmentally sound behaviour. Examples include:

- agricultural subsidies for limited productive usage and output;
- capital allowances in respect of pollution abatement technology;
- tax deductions for environmental assessment studies and reports; and
- tax credits for the preservation of specific resources.

Disincentives, on the other hand, operate to penalise environmentally undesirable conduct in materially quantifiable terms, either by imposing specific fees or charges or by influencing the

commercial saleability of unsafe products. In effect, the polluter is called upon to pay for environmental misdemeanours. Relevant examples include:

- withholding subsidies for exceeding maximum sustainable yields;
- imposing effluent charges in respect of the disposal of industrial wastes;
- fixing emission quotas and imposing fees for excessive air pollution; and
- requiring the labelling of products so as to identify their content or processing method.

Administrative justice

The vesting and enjoyment of environmental rights necessitates the provision of appropriate legal and administrative mechanisms for their application and enforcement. In this respect, the law must be tailored to take into account the ecological dimensions of a given activity at the same time as is considered its developmental value. It is necessary, in other words, to assess and reconcile the individual interest in development with the public interest in the environment. What follows is a brief discussion of some of the principal components of administrative justice in the environmental sphere.

…the law must be tailored to take into account the ecological dimensions of a given activity at the same time as is considered its developmental value.

Public participation and access to information

The growing practice in many jurisdictions is to enunciate an environmental policy statement as part and parcel of their environmental statutes. In effect, the policy is invested with statutory force in terms of its influence on the application and interpretation of other enactments impacting directly or indirectly on the environment. Since such a policy would be binding not only on the administration but also on the public, it seems logical that the latter should be fully consulted and involved in its formulation.

Generally speaking, various conservation boards, councils and committees supervise environmental statutes. The credibility of such bodies is to a large degree dependent upon the extent to which they are representative of the diverse interests affected by their decisions. Accordingly, it is imperative that their composition reflect such interests and that the public interest in particular should be adequately represented.

A further device for enhancing the credibility of statutory bodies is to provide that their sessions and hearings be conducted in public. Again, their autonomy and transparency could also be buttressed by obliging them to furnish their decisions and the reasons in writing.

Insofar as the practical administration of most environmental statutes is concerned, this would by-and-large devolve on the executive authorities. The functions assigned would include:

- the declaration of specially protected areas and reserves;
- the approval of development plans and the authorisation of developmental activity in eco-sensitive areas;
- the identification of activities requiring environmental impact assessments; and
- the approval of such assessments.

Additionally, the executive would invariably be empowered to frame regulations, notices and directions in order to give effect to the provisions of the enabling statute. In the execution of all of these functions, it seems necessary that the public should be involved at different stages and to varying degrees. Depending upon the function concerned, such involvement would range from the right to submit comments or objections to proposed regulations, declarations or approvals to active participation in the planning and assessment process. Of course, the manner in which such involvement can best be activated is not an exclusively legal problem and much will depend upon the resort to appropriate non-statutory means to heighten the public's awareness of its rights of intervention.

What is important, is that reasonable access to environmentally relevant information is guaranteed and regulated by statute and not left to purely discretionary practice.

The opportunity to participate in the formulation and adjudication of environmental rights presupposes that all the relevant information is readily accessible to all interested parties. This would include not only such information as is in the possession of public authorities but also that which is held by private proponents of the developmental activities concerned. Of course, such rights of access cannot be entirely unrestricted and must be subject to appropriate limitations in the interests of administrative and commercial confidentiality. What is important, however, is that reasonable access to environmentally relevant information is guaranteed and regulated by statute and not left to purely discretionary practice.

Access to remedies and redress

In many legal systems, the most formidable obstacle to the due enforcement of environmentally related rights through the courts is the problem of legal standing or *locus standi*. In effect, the prospective litigant is obliged to establish a legally recognised right or interest, usually of a pecuniary nature, in the subject matter of the case. Generally speaking, the individual has no standing to vindicate the public interest unless he is able to show that his personal interest has been infringed. (See section on civil law in Chapter 5.)

Inevitably, these general propositions are not absolutely unqualified. In certain instances, the public may be statutorily entitled to approach the courts to enforce compliance by the administration even though they may possess no such equivalent remedy against the private offender. Again, it may be open to public authorities to represent the interests of the public in matters falling within their functional jurisdiction. Lastly and very significantly, the courts in some countries have in recent years displayed a preparedness to recognise the *locus standi* of authoritative representative bodies, which seek to vindicate the public interest on the basis of the objectives enshrined in their constituent instruments. This appears to have been the approach of the American courts which have frequently abandoned the traditionalist reliance on personal legal or economic interest in order to recognise legal standing in the so-called "class actions" instituted by various conservation groups.

In Zimbabwe, the courts have in the past inclined towards conservatism in the recognition of *locus standi* in non-environmental matters generally. In the constitutional sphere, however, recent decisions of the Supreme Court have evinced a marked tendency towards allowing relatively liberal access insofar as concerns alleged violations of fundamental rights.[90] The rationale for this approach is the premise that human rights are transcendental in nature and being a matter of collective concern, must be liberally enforceable. This rationale, it is submitted, applies to environmental rights, which are pre-eminently a matter of public interest.

...rigid adherence to traditional notions of legal standing are illogical where they operate to deny or restrict access in matters concerning the environmental well-being of every member of society.

There is little doubt that rigid adherence to traditional notions of legal standing are illogical where they operate to deny or restrict access in matters concerning the environmental well-being of every member of society. Accordingly, any member of the community who is able to establish an interest rooted in the collective right of the public to environmental integrity should be accorded standing to vindicate that right. It is further submitted that the enlargement of standing in this connection should not be left to the process of gradual judicial evolution but should be explicitly spelled out in the governing statutory regimes.

Measures for administrative compliance

In most respects, the public interest in the environment is primarily entrusted to the administrative authority, which is assigned responsibility for the legislation concerned. It does not follow, however, that this authority will adequately represent or further the public interest. It is in this context that it becomes necessary to consider the means by which the administration

can be compelled to faithfully discharge its statutory functions in compliance with the enabling statute.

The most comprehensive power of external supervision and control over the administration rests with Parliament itself. This entails appropriate responses to maladministration by way of legislation to rectify the perceived "mischief" as well as the institution of mechanisms to scrutinise and, if necessary, revoke unacceptable subordinate legislation. All of this, of course, presupposes that Parliament will scrutinise meticulously and legislate expeditiously – in practice this may not always be the case.

Many environmental statutes provide for internal appeal or review procedures within the administrative hierarchy itself. The difficulty with such internal controls is that they do not always import the requisite degree of independent objectivity necessary to ensure a thorough re-evaluation of the decision being reviewed.

The establishment of independent appeal tribunals is a practice, which has evolved in many jurisdictions. The obvious advantage of such tribunals is their presumed independence and objectivity. Nevertheless, any such advantage is often outweighed, firstly, by restricting access to the tribunals through a narrow conception of *locus standi* and, secondly, by limiting the scope of appeal to matters of procedural compliance without regard to the substantive issues at stake.

Unlike special tribunals, the ordinary courts are vested with an inherent power to review administrative actions and decisions. In essence, this review power is confined to a consideration of the legality or procedural propriety of the decision, which is impugned. Thus, although a failure to apply the law may in certain circumstances constitute a reviewable irregularity, the courts cannot interfere with the merits or environmental soundness of the decision in the absence of what might be regarded as "gross irrationality". Again, the problem of *locus standi* would also operate in this realm to exclude the jurisdiction of the courts.

Be that as it may, judicial review is not entirely devoid of value in the environmental sphere and may often be invoked to secure indirect compliance with substantive criteria. Thus, a failure to take into account relevant public representations may result in the decision concerned being set aside. Similarly, where the administrative authority is obliged to heed stated policy objectives or the findings of an environmental impact assessment, the

…judicial review is not entirely devoid of value in the environmental sphere and may often be invoked to secure indirect compliance with substantive criteria. Thus, a failure to take into account relevant public representations may result in the decision concerned being set aside.

failure to pay any regard whatsoever to such objectives or findings might operate to vitiate its decision or action.

Ultimately, the most effective means of judicial control over administrative action or inaction lies in the availability of a comprehensive appeal jurisdiction. This would entail the power to subject the action or decision to a full scrutiny on its merits: does it adequately address the substantive requirements to be observed and does it give effect to the objectives of the enabling statute? At the same time, it would also necessitate an explicit expansion of the bounds of *locus standi* so as to extend the scope of the remedy to persons and groups beyond those who are personally and directly prejudiced.

An interesting statutory development has been the recent enactment of the Class Actions Act [*Chapter 8:17*].[91] The broad scheme of the act is to enable the institution of legal proceedings on behalf of any group or class of persons in order to obtain a judgement, which benefits the whole group or class. Any person may initiate such proceedings, whether or not he or she is a member of the group or class concerned. An application for this purpose must be presented to the High Court, which may grant leave to institute the class action in appropriate circumstances. The factors to be taken into account include the financial standing of the class members concerned and the difficulties likely to be encountered by them in enforcing their claims individually. The act also provides for the establishment of a Class Actions Fund with the object of providing financial assistance towards the expenses of class actions. The Act came into operation in October 2000 and, being relatively new, remains to be tried and tested in practice. In any event, if properly applied, it should prove to be of tremendous utility in the environmental sphere.

An interesting statutory development has been the recent enactment of the Class Actions Act. The broad scheme of the act is to enable the institution of legal proceedings on behalf of any group or class of persons in order to obtain a judgement, which benefits the whole group or class. Any person may initiate such proceedings, whether or not he or she is a member of the group or class concerned.

Constitutional entrenchment of rights

Most legal systems of the world rely on the property paradigm as one of the principal bases for conceptualising rights, duties and liabilities. It is now recognised that exclusive reliance on this paradigm has become outmoded by the profound impact of social, economic and technological changes on the perception of fundamental values. It is, therefore, necessary to reorient the law, as an instrument of social engineering, towards the promotion and protection of environmental values.

In the context of reshaping normative values, it has been vigorously and cogently argued by several commentators[92] that the right to a safe and healthy environment should be constitutionally entrenched. This is based on the premise that a constitution is the ultimate repository of a nation's considered judgement

about basic matters of public policy. The constitutional entrenchment of environmental rights would serve to catalyse the reorientation of legislative as well as executive and administrative policies and actions.

The clear advantage of constitutional provisions lies in their superior normative status and concomitant immunity from being readily or easily amended or repealed. They thus operate to inhibit the legislature itself and render it more accountable to the public interest in the environment. Again, private citizens would also be better conscientised in their perception of fundamental rights under the influence of a new conservation ethos. More significantly, an overarching constitutional norm serves to inform and guide the interpretation of all other laws in their application by the executive as well as the judiciary.

Inevitably, the definition of environmental rights and duties and the formulation of limitations thereto is far from being a simple assignment. Rights and duties couched in general terms without contextual specificity tend to remain dead letters in terms of their enforceability. And the extent to which the rights conferred may be derogated from will need very careful consideration having regard to the relative dominance of the conflicting and competing interests at play.

...the definition of environmental rights and duties and the formulation of limitations thereto is far from being a simple assignment. Rights and duties couched in general terms without contextual specificity tend to remain dead letters in terms of their enforceability.

The Constitution of Zimbabwe does not presently embody any environmental rights as such in the Declaration of Rights. It was hoped that the new Constitution, which was commissioned in 1999,[93] would specifically incorporate the individual and collective right to a healthy environment as a fundamental human right. What was provided instead is the prescription of various environmental duties on the part of the State on national objectives, which are essentially directory in nature.[94] The extent to which these provisions might engender legally enforceable rights is a matter open to debate. Nevertheless, the fact that environmental rights are constitutionally enunciated, albeit in a hortatory and non-justiciable form, would be a major achievement in itself. In any event, the point has been rendered academic at this stage because the new Constitution was rejected by the February 2000 referendum.[95]

Legislative reforms

Omnibus statute

The foregoing survey of current environmental laws and policies and their shortcomings makes abundantly clear the pressing need for an omnibus environmental statute. The alternative of tinkering with existing laws on an *ad hoc* and piecemeal basis is unlikely to provide an effective remedy for the defects and

deficiencies inherent in obsolete and scattered legislation. Nor is it sufficient to rely upon mere policy statements as a basis for sustainable development.

What is required is a comprehensive statute that rationalises and harmonises the environmental legal framework in order to create a normative system that adequately reflects present circumstances and societal values pertaining to sustainable development. If the governing legal principles are appropriately framed, they will operate to engender environmentally sound practices predicated on informed compliance rather than enforced conformity.

From a purely drafting standpoint, the omnibus statute should be structured as an enabling act, leaving questions of technical and administrative detail to be dealt with by regulations made under the act. This would enable the handling of specific environmental issues on a progressive basis and in keeping with changing circumstances.

Consolidation and revision of existing laws

The proposed omnibus act would obviously not repeal and replace all existing environmental laws. Indeed, it would not be practically feasible to consolidate all environmental laws within the confines of a single statute. Rather, the approach to be adopted would depend upon the nature and objectives of the statute under scrutiny.

What is required is a comprehensive statute that rationalises and harmonises the environmental legal framework in order to create a normative system that adequately reflects present circumstances and societal values pertaining to sustainable development.

In most cases, it may suffice merely to amend the statute in order to remove any anomaly or inconsistency. In some instances, it may be more appropriate to leave the offending provisions intact and subordinate them to the provisions of the new act. Both of these amendment options could be effected through the new act itself, by way of schedules appended to that act.

In those cases where more substantial modifications are warranted, it may prove necessary to repeal and replace a statute in its entirety and, as may be considered appropriate, to either incorporate the resulting text into the new act or leave it standing on its own.

Finally, there are those instances where the preferred option would be to consolidate and re-enact two or more statutes. This would apply where the subject matter of these statutes warrants their treatment under the aegis of a single statute.

In short, given the wide range and administrative location of the statutes under consideration, all of the above-mentioned

options will need to be applied in different contexts and to varying degrees. Additionally equitable allocation of resources and institutional reform would need to be addressed.

Box 2.14: Environmental Management Bill 1998

After many years of study and consultation, the Environmental Management Bill, 1998, has emerged as the first draft of an omnibus environmental statute. It is presently undergoing revision and is expected to become law in the near future. The Bill is designed, *inter alia*:

> "to provide for the integrated management of the environment and the conservation and sustainable utilisation of natural resources .... [and] for the prevention and control of pollution ..."

Generally speaking, the Bill succeeds in achieving its stated objectives in terms of prescribing an appropriate regime for pollution control and the conservation of natural resources. It also provides, fairly comprehensively, for environmental planning and environmental impact assessment, thereby redressing many of the anomalies and ommissions that characterise existing legislation. Nevertheless, the draft Bill does not require considerable revision in several respects. Apart from the substantive deficiencies already mentioned earlier, the Bill is riddled with a host of textual errors and inconsistencies. It is hoped that all of these defects and deficiencies will be duly rectified in the revision process.

Insofar as it concerns public participation and access to information, the Bill contains numerous provisions obligating the relevant authorities to notify, inform and consult the public in the cource of their decision-making process. This applies, *inter alia*, to the determination of environmental policies, the decisions of the Environment and Natural Resources Board, the conduct, evaluation and exemption of environmental impact assessments (EIAs), the formulation of environmental quality standards, applications for pollution permits, the preparation of environmental action and environmental protection plans, the declaration of environmental protection areas, and the framing of ministerial regulations. Additionally, the administrative authorities are required to provide full public access to environmental records and information, including environmental impact assessment reports, any environmental information submitted to the authorities, and the official register of permits and licences.

The Bill gives ample recognition to the polluter-pays-principle in several significant respects. These relate to, *inter alia*, the obligation of development proponents to pay rehabilitation and compensation costs, the fixing of differential fees for the issuance or renewal of permits and licences and the provision of fiscal incentives for environmental protection and sustainable utilisation of natural resources. Moreover, the Bill effectively penalises environmental pollution by stipulating very stringent pecuniary penalties for land, water or air pollution. It also enables the imposition and recovery of preventive, restorative and compensatory costs from the polluters concerned by means of court and ministerial orders.

In contrast, the provisions of the Bill governing remedies and redress are somewhat cursory and superficial in content. They provide very generally for ministerial appeals against administrative decisions as well as for the judicial review of such decisions. However, the Bill does not adequately elaborate the nature and extent of such appeals and reviews or the redress that might eventuate therefrom. The Bill is also rather vague as to the measures available for securing administrative compliance, particularly where executive inaction or omissions are concerned. As for *locus standi*, access to these rights of appeal and review is available to persons who are either "aggrieved" by any administrative decision or "whose interests are affected" thereby. The Bill does not, however, clarify the precise coverage of these terms, nor does it address the question of legal standing grounded in the general public interest.

Apart from these deficiencies, the Bill fails to address a number of other important issues, which remain to be appropriately formulated and incorporated therein. These are:

- detailed provisions governing the adoption, incorporation and implementation of international agreements, treaties and conventions;
- a provision for the Bill to prevail in the event of any inconsistency with other enactments;
- a general offences and penalties provision for contraventions of the Bill; and
- a provision to the effect that the Bill binds the State.

INSTITUTIONAL REFORMS

The effective administration of environmental law requires the concomitant formulation of a coherent institutional structure. In other words, the functions and powers of all the authorities and bodies concerned, be they be of an advisory, regulatory or policy-making nature, should be explicitly and clearly spelt out in the enabling statutes.

By the same token, it is also necessary to articulate the inter-relationship between these entities so as to avoid potential overlaps and conflicts in the performance of their functional competence. This is particularly important where powers and duties are exercised by autonomous institutions acting under different statutes. Ultimately, it is necessary to abandon the current rigidly sectoral structure in favour of a cooperative and inter-sectoral approach that lends itself to administrative coordination and cohesion.

It is self-evident that environmental norms are all-pervasive and straddle the entire spectrum of social and economic activity. Consequently, the administration of environmental norms, if it is to be relevant and effective, cannot be confined to the custody of a single centralised authority. It must be divided and shared between the central, regional and local authorities. In the legal system of Zimbabwe, this institutional exigency has resulted in the scattering of environmental laws, which tend to be administered by various sectoral authorities under separate and self-contained statutes. The inevitable consequence is that the administration and application of those laws is fragmented and uncoordinated and, therefore, almost invariably ineffectual in securing an adequate normative regime. This is compounded by the fact that the central environmental authority is often confronted with bureaucratic obstruction and dilatoriness from other administrative authorities.

...the administration of environmental norms, if it is to be relevant and effective, cannot be confined to the custody of a single centralised authority. It must be divided and shared between the central, regional and local authorities. In the legal system of Zimbabwe, this institutional exigency has resulted in the scattering of environmental laws, which tend to be administered by various sectoral authorities under separate and self-contained statutes.

While there can be no ideal institutional structure, given the great divergence of sectoral interests, it may nonetheless be apposite to offer some tentative suggestions as to a structure which might approximate the ideal. First, what must be regarded as a prerequisite is the formulation of a coherent national environmental policy. Second, and in keeping with that policy, institutional practice should be guided by the principle of centralised coordination coupled with the decentralised exercise of delegated functions at the sectoral, regional and local levels. Third, from the standpoint of project or proposal implementation, there is the need to institute an integrated system of controls and permit approvals so as to harmonise and expedite the conduct of proposed activities.

CONCLUSIONS

The foregoing survey is intended to identify some of the major difficulties that bedevil the due observance of environmental norms. It is hoped that it will also serve to mark out the lines along which legislative reform in this sphere should proceed.

At present, the gap between the enforceability of eco-rights on the one hand and administrative and judicial practice on the other is partly attributable to inherent deficiencies in adjectival law. However it is also to a significant extent the result of imprecise definition as to the content and scope of substantive rights. The explicit articulation of these rights will, it is believed, largely overcome the obstacles currently experienced in securing administrative compliance and judicial recognition. In the final analysis, the elevation of environmental rights to the constitutional plane should provide the surest means of guaranteeing the delivery of environmental justice.

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ENDNOTES

1 Executed on the 29th of October 1889
2 Article 21
3 For a fuller discussion of customary environmental law see Chapters in this volume by Mohamed-Katerere, Customary Environmental Law and Ncube, Mohamed-Katerere and Chenje, Environmental Rights and Justice
4 Towns Management Ordinance 1894 (No. 2 of 1894), section 23; Township Sanitary Regulations 1895 (G.N. 109/1895), sections 5 & 6; Municipal Law 1897 (G.N. 101/1897), section 108 and Parts II, III & VI of the Second Schedule; Outspans and Roads Regulations 1898 (G.N. 163/1898), section 14; Village Regulations 1898 (G.N. 182/1898), section 2; Municipal Law Amendment Ordinance 1903 (No. 12 of 1903), sections 10 & 13; Municipal Laws Amendment Ordinance 1910 (No. 7 of 1910), sections 15 & 16
5 Land Occupation Conditions Ordinance 1900 (No. 14 of 1900), subsequently amended by Ordinance No. 4 of 1902 and Ordinance No. 8 of 1905
6 Act No. 17 of 1944
7 Act No. 47 of 1963, repealing and replacing the Land Settlement Act of 1944
8 Act No. 59 of 1969
9 In particular, the Natural Resources Act of 1941
10 Act No. 52 of 1951
11 This new regime treated indigenous resource management practice as backward and denied it a role in land management.
12 Moyo, O'Keefe & Sill – *The Southern African Environment*, Earthscan Publications Ltd., London, 1993, pp. 325, 332
13 Ordinance No. 13 of 1913
14 Act No. 33 of 1971
15 Ordinance No. 13 of 1906
16 Ordinance No. 9 of 1902
17 Ordinance No. 13 of 1913
18 Act No. 22 of 1927
19 Act No. 9 of 1941
20 Natural Resources Act [*Chapter 20:13*]
21 Moyo, O'Keefe & Sill, *op. cit.*, p. 325
22 Importation of Plants Regulation Ordinance 1904 (No. 20 of 1904)
23 Angora Goat and Ostrich Export Prohibition Ordinance 1907 (No. 12 of 1907)
24 Injurious Substances and Animals Ordinance 1909 (No. 3 of 1909)
25 Nurseries Ordinance 1909 (No. 5 of 1909)
26 Act No. 53 of 1949

27 The current Parks and Wildlife Act [*Chapter 20:14*] governs 11 national parks, 16 botanical reserves, 6 sanctuaries, 16 safari areas, and 14 recreational parks
28 See also the Chapter by Chinamora, The Institutional Framework for Environmental Management
29 Section 60
30 Section 65
31 The more important regulations cover the protection of defined areas, the establishment of intensive conservation areas and the protection of natural resources generally.
32 Section 18
33 By virtue of section 119, mining ventures enjoy the special privilege of being able to exercise mining rights within park lands, either in terms of special permits or agreements or by reason of such rights having been acquired before the area concerned became park land.
34 In terms of sections 78 and 79, the power to investigate and control the extent of hunting activities on private land is also vested in conservation committees established under the Natural Resources Act.
35 Act No. 31 of 1998
36 Cf. the recently published Water (River Systems Declaration) Notice, 2000 (S.I. 34/2000)
37 As promulgated in the Water (Catchment Councils) Regulations, 2000 (S.I. 33/2000) and the Water (Subcatchment Councils) Regulations, 2000 (S.I. 47/2000)
38 Section 37
39 Section 36
40 Section 54
41 Section 62
42 Act No. 11 of 1998. This Act repeals and replaces the Regional Water Authority Act [*Chapter 20:16*] which was principally concerned with the exploitation and conservation of water resources in the Limpopo river basin.
43 Section 15
44 Sections 39 and 41
45 Sections 32 and 34
46 Sections 30 and 31
47 Section 3(1). These purposes are explicitly sanctioned by section 16(1)(a) of the Constitution of Zimbabwe.
48 Cf. section 6(2)(a)
49 See also Chapter 3 –- by Webster Chinamora in this volume
50 Section 150
51 Section 199
52 Section 205
53 Paragraphs 2, 3, 5, 6 and 19 of the Second Schedule
54 Parts III, IV, V, VI, VII, VIII and IX of the Third Schedule
55 Section 73
56 Section 86
57 Section 74
58 Section 78
59 Paragraphs 2, 3, 5, 6 and 20 of the First Schedule
60 Parts II, III, IV, V, VI and VII of the Second Schedule
61 Section 7
62 Sections 8, 9, 11 and 14
63 Section 10
64 Sections 20 to 23
65 Sections 5 and 6
66 Section 15(2)(b)
67 Statutory Instrument 419 of 1999
68 The term "alienated land" in this context means any land other than State land
69 Statutory Instrument 538 of 1983
70 Sections 3 to 5

71 Section 18
72 The areas and processes presently regulated are prescribed in the Atmospheric Pollution Prevention (Gas Control Area and Specified Processes) Notice, 1974 (S.I. 205/1974), as amended from time to time
73 Atmospheric Pollution Prevention (Smoke Control Areas) Notice, 1976 (S.I. 1/1976), as amended
74 Atmospheric Pollution Prevention (Smoke Control) Regulations, 1975 (S.I. 939/1975), as amended
75 Atmospheric Pollution Prevention (Dust Control Area) Notice, 1981 (S.I. 51/1981), as amended
76 Atmospheric Pollution Prevention (Control of Emission) Regulations, 1977 (S.I. 53/1977), as amended
77 Statutory Instrument 687 of 1977
78 Statutory Instrument 434 of 1982
79 Public Health (Effluent) Regulations, 1972 (S.I. 638/1972), as amended
80 E.g. Public Health (Siting of Feedlots) Regulations, 1975 (S.I. 474/1975)
81 Hazardous Substances and Articles (Ionising Radiation Protection) (General) Regulations, 1990 (S.I. 132/1990)
82 Hazardous Substances and Articles (Protective Clothing: Pesticides) Regulations, 1985 (S.I. 205/1985)
83 Hazardous Substances and Articles (Transportation by and Labelling of Road Tankers) Regulations, 1984 (S.I. 262/1984), as amended
84 Statutory Instrument 37 of 2000
85 As it was then known
86 In November 1999, the Department produced and circulated a revised draft Zimbabwe Policy for Wildlife. One of the key innovations broached in the draft is the intended commercialisation of the Department's activities and the retention of revenues accrued from those activities. These revenues are to be retained in a new fund styled the Parks and Wildlife Conservation Fund. However, this change of policy and the proposed fund do not as yet have any statutory backing and will necessitate appropriate amendments to the Parks and Wildlife Act.
87 A notable but striking exception is to be found in section 159(3) of the Mines and Minerals Act [*Chapter 21:05*]. This provision, introduced in 1994, requires every applicant for a special mining lease to furnish, *inter alia*, a report on the anticipated impact of the proposed mining operations on the environment. This requirement is confined to special mining leases and does not extend to the grant of any other mining right or permit.
88 E.g. the Regional Town and Country Planning Act [*Chapter 29:12*] and the Parks and Wildlife Act [*Chapter 20:14*]
89 E.g. the Mines and Minerals Act [*Chapter 21:05*] and the Factories and Works Act [*Chapter 14:08*]
90 *Catholic Commission for Justice and Peace v Attorney-General & Others* 1993 (1) ZLR 242 (S), at 250; *Retrofit (Pvt) Ltd v Posts & Telecommunications Corporation* 1995 (2) ZLR 199 (S), at 207-208; *Law Society of Zimbabwe & Another v Minister of Finance* SC 92/99 (not yet reported).
91 Act No. 10 of 1999, published in July 1999
92 See Ncube, Mohamed-Katerere and Chenje in this volume
93 Through the Commission of Inquiry into a new Constitution for Zimbabwe, instituted by Proclamation 6 of 1999 (S.I. 138A/1999)
94 Section 18 as read with sections 13 and 14 of the draft Constitution published in the *Gazette* on 2 December 1999
95 Held in February 2000

CHAPTER 3

INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT

By Webster Chinamora

In Zimbabwe, as in other countries, the importance of the environment is recognised by the establishment of institutions and regulations that ensure rational utilisation, conservation and protection. The theoretical basis for protection is to conserve resources to sustain development and take care of present needs without compromising the ability of future generations to enjoy the benefits of the environment.

It is essential that the administrative structure for environmental management is capable of meeting these objectives.

ADMINISTRATIVE INSTITUTIONS FOR ENVIRONMENTAL MANAGEMENT

At present, environmental legislation in Zimbabwe is seriously fragmented[1] and bedevilled by lack of coordination and uniformity in areas of responsibility. To compound this problem, the institutional arrangement for environmental management is spread among no less than eight different ministries. Table 3.1 shows the main environmental legislation in Zimbabwe and the government institutions charged with its administration. There is also, to a considerable extent, an overlap of institutional mandates. Another problem is that colonial institutions displaced traditional indigenous institutions in the field of environmental management and new structures have not been created.[2]

Ministry of Environment and Tourism

The Ministry of Environment and Tourism is the main government institution with overall responsibility for environmental management and natural resource conservation. Until recently this mandate included minerals.[3] However, with the appointment of the 2000 Cabinet the ministries were separated once again.

The Ministry is responsible for making environmental policy and administering certain legislation pertaining to the environment (See Table 1). In addition to lack of legislative power to enforce environmental policies, the ministry faces problems of inadequate human and financial resources to carry out significant enforcement activities.[4]

Table 3.1: Statutes and administering authorities

Statutes	Administering Authorities
Agricultural and Rural Development Authority Act	Ministry of Lands, Agriculture and Resettlement Agricultural and Rural Development Authority
Agricultural Land Settlement Act	Ministry of Lands, Agriculture and Resettlement Agricultural Land Settlement Board Agricultural Land Settlement Appeal Board
Alienated Land (Information) Act	Ministry of Lands, Agriculture and Resettlement
Animal Health Act	Ministry of Lands, Agriculture and Resettlement Department of Veterinary Services Local authority councils
Atmospheric Pollution Prevention Act	Ministry of Health and Child Welfare Air Pollution Advisory Board Department of Environmental Health Local authority councils
Bees Act	Ministry of Environment and Tourism Department of National Parks and Wildlife Management Forestry Commission Rural district councils Conservation committees
Communal Land Forest Produce Act	Ministry of Environment and Tourism Forestry Commission Rural district councils
Factories and Works Act	Ministry of Public Service, Labour and Social Welfare National Social Security Authority Local authority councils
Forest Act	Ministry of Environment and Tourism Forestry Commission Mining Timber Permit Board Natural Resources Board Conservation committees
Hazardous Substances Act	Ministry of Health and Child Welfare Hazardous Substances and Articles Control Board Department of Environmental Health
Land Acquisition Act	Ministry of Lands, Agriculture and Resettlement Compensation Committee Derelict Land Board
Land Occupation Conditions Act	Ministry of Lands, Agriculture and Resettlement
Locust Control Act	Ministry of Lands, Agriculture and Resettlement Department of Research and Specialist Services
Mines and Minerals Act	Ministry of Mines Mining Affairs Board Chamber of Mines Mining commissioners
National Museums and Monuments Act	Ministry of Home Affairs Board of Trustees of National Museums and Monuments Department of National Museums and Monuments
Natural Resources Act	Ministry of Environment and Tourism Department of Natural Resources Natural Resources Board Conservation councils Conservation committees

Table 3.1: *Continued*

Statutes	Administering Authorities
Noxious Weeds Act	Ministry of Lands, Agriculture and Resettlement Local authority councils
Parks and Wildlife Act	Ministry of Environment and Tourism Department of National Parks and Wildlife Management Parks and Wild Life Board Rhodes Nyanga /Matopos Committees Natural Resources Board Conservation committees
Plant Pests and Diseases Act	Ministry of Lands, Agriculture and Resettlement
Public Health Act	Ministry of Health and Child Welfare Department of Environmental Health Department of Veterinary Services Local authority councils
Quelea Control Act	Ministry of Environment and Tourism Department of National Parks and Wildlfe Management Local authority councils
Regional Town and Country Planning Act	Ministry of Local Government, Public Works and National Housing Department of Physical Planning Surveyor-General's Department Local authority councils
Rural District Councils Act	Ministry of Local Government, Public Works and National Housing Rural district councils Rural district development committees Ward development committees Area committees Village development committees Neighbourhood development committees Conservation committees
Rural Land Act	Ministry of Lands, Agriculture and Resettlement Ministry of Local Government
Trapping of Animals Control Act	Ministry of Environment and Tourism Department of National Parks and Wildlife Management Natural Resources Board Conservation committees
Urban Councils Act	Ministry of Local Government, Public Works and National Housing Urban councils Local Government Board
Water Act	Ministry of Rural Resources and Water Development Zimbabwe National Water Authority Local authority councils Catchment councils Subcatchment councils Department of Physical Planning
Zimbabwe National Water Authority Act	Ministry of Rural Resources and Water Development Zimbabwe National Water Authority

Source: Bharat Patel (2000) paper for IMERCSA

The mandate of the Ministry of Environment and Tourism is effected through various departments and agencies – the Forestry Commission, Natural Resources Board and the Department of Natural Resources.

Forestry Commission

The Forestry Commission is a statutory body established by the Forest Act[5] which provides, among other things, for the establishment of a commission for the administration, control, management and exploitation of state forests, plantations and forest nurseries. The commission also gives advice and disseminates information on forestry matters, as well as conducting forestry research.[6] Commission members are appointed by the President for periods not exceeding three years and on such terms and conditions as the President decides. It is subject to the general direction of the Minister of Environment and Tourism.

The Forestry Commission provides policy advice to the minister and functions as semi-autonomous regulatory agency. It has a statutory mandate to consider all questions and matters arising out of and relating to general forest policy.[7] In its timber exploitation functions, the commission is a commercial entity expected to make a profit in the process. The commercial focus could lead to the unsustainable exploitation of forest resources, undermining its conservation functions. For this reason, it has been observed that the regulatory functions of the commission could conflict with its commercial activities, underlining the need for a clearer institutional split between the two.[8] It has been proposed that the commission's plantations and processing activities be fully commercialised, either within the commission itself or as a privatised company or companies.[9]

> ...the regulatory functions of the commission could conflict with its commercial activities, underlining the need for a clearer institutional split between the two. It has been proposed that the commission's plantations and processing activities be fully commercialised, either within the commission itself or as a privatised company or companies.

The Act enjoins the commission, in carrying out its duties and exercising its powers, to comply with the minister's policy directions.[10] The provision holds out the prospect for the minister to include environmental criteria in his directions to the commission. Nevertheless, it would be more appropriate if it had been specifically stipulated that the directions are intended to ensure that in carrying out its developmental functions (i.e. commercial utilisation of forest resources) attention is paid to the environmental impact of these activities.

The Commission is also required to submit a programme of projected revenue and expenditure for each of the succeeding four years at the end of each financial year.[11] To ensure compliance with environmental imperatives, the programme could be

required to set out how environmental impacts of the commission's activities were prevented or minimised.

A landowner has authority over the forest resources on private land unless it is decided to place the land under a system of forest management approved by the commission. Private landowners are required to apply for permission from the minister following which the land would be protected under the Forest Act[12] and under the authority of the commission. Private landowners and occupiers are required to give the commission written notice concerning any intention to cut or remove indigenous timber at least 14 days in advance.

Natural Resources Board

The Natural Resources Act establishes the Natural Resources Board as an independent agency with authorised regulatory powers and duties to exercise general supervision over natural resources.[13] The board is granted direct access to any government minister through its chairperson.[14] Like the Forestry Commission, its eight members are appointed by the President who fixes the terms and conditions. Recognised representatives of special interests may submit a panel of names through the Minister of Environment and Tourism for the President's consideration.[15] This provision could bring environmental representation to the board.

Box 3.1: Fines inadequate

Regrettably, the penalties imposed for non-compliance do not encourage landowners and occupiers to comply with legislative obligations. A fine not exceeding $2,000 or imprisonment for up to six months or both are imposed. Cutting indigenous timber for various commercial uses is likely to generate money in excess of the maximum fine. These provisions limit the ability of institutions to fulfil their statutory mandates.

The Board may recommend to the President that land be acquired or set aside for conservation or improvement of natural resources.[16] The Minister of Environment and Tourism may, on the recommendations of the Board, construct on any land, works necessary or desirable for the conservation or improvement of natural resources. These include the disposal and control of storm water, mitigation or prevention of soil erosion and conservation of water.[17] The Board may require persons who stand to benefit from these measures to contribute towards the costs of putting them in place.[18]

Apart from these powers, the board is also authorised to inspect any land and to order landowners to undertake conservation measures to preserve natural resources on their properties. The orders may direct the affected landowners to stop activities which may degrade the land.[19] The Natural Resources Act also provides for ministerial declaration of an area, upon application by landowners in that area, to be an intensive conservation area. On the recommendation of the Board, the Minister may make

loans, subsidies or grants to conservation committees established in intensive conservation areas to enable them to carry out their functions.[20]

In communal areas, the board has power (with the approval of the minister responsible for the administration of communal land) to direct that the whole or part of any communal land be reserved against human occupation or destruction, the depasturing of stock or cutting down of trees and other vegetation, if it is convinced that such areas have become despoiled or have deteriorated through overgrazing or other misuse.[21] The authorities are obliged to resettle on suitable land those affected as a result of such a declaration. A similar power is given to the President. On the recommendation of the board, he may authorise the reduction of the number of domestic animals and prescribe the maximum number that may be pastured on a fixed unit of land.[22] The President can also, on the recommendation of the board, set aside areas in any communal area for the conservation or improvement of natural resources or for the protection of irrigation works and sources of water supplies. The minister could, acting on the board's recommendation, construct conservation works in communal areas at the state's expense.

> The President can, on the recommendation of the board, set aside areas in any communal area for the conservation or improvement of natural resources or for the protection of irrigation works and sources of water supplies.

There is potential for conflict between mandates of the board given by the Natural Resources Act and the role of the Minister of Local Government, Public Works and National Housing under the Rural District Councils Act. The latter act provides that, on the recommendation of the Minister of Environment and Tourism, the Minister of Local Government, Public Works and National Housing may declare any council area to be an intensive conservation area for the purposes of the Natural Resources Act. In such areas, the RDC shall be assigned the role of natural resources conservation committee.[23]

In an attempt to resolve the conflict, the Rural District Councils Act allows for the dissolution of the intensive conservation area established under the Natural Resources Act and included in the RDC area. It is reconstituted as a "natural resources conservation sub-committee" in one of the wards in the council area.[24] This seems to be undesirable. It would have been easier to allow the intensive conservation committee to continue performing its functions but be deemed to be exercising such functions under the Rural District Councils Act.

Department of Natural Resources

The department of natural resources is not provided for under the Natural Resources Act but has evolved more out of prac-

Box 3.2: Environmental Impact Assessment functions of the NRB

The board is, however, involved in a rudimentary kind of EIA. The act provides that no large dam may be constructed unless the Natural Resources Board has reported to the relevant Minister on "the state of the catchment area of such a large dam". Similarly, no soil conservation project may be embarked upon unless the board has reported to the minister on the effect of the project on the natural resources of the area.

It is doubtful whether the report would comprise an adequate mechanism to guarantee protection of the environment. First, such a report is not an environmental impact report and merely describes the state of the catchment. Second, when furnished with the report, the minister is merely required "to inform the appropriate minister, or any other person responsible for the dam or project, of any conservation problems identified, the remedial measures necessary and the apportionment of costs as recommended in the report."

It would seem that once the report has been prepared and the minister has advised the proponents of the contents, that is the end of the matter, since no provision is made for the minister to ensure that the recommendations in the report have been complied with. To complicate the problem, the Water Act introduces little control over the construction of dams. No "state of the catchment" report is required when structures to keep water for stock watering or domestic purposes are constructed.

tical convenience than legislative design. The department functions as a service or implementing appendage of the Natural Resources Board and it carries out regulatory functions under a director of natural resources. Its functions include the promotion and adoption of objectives or standards relating to environmental quality and pollution control, conducting EIAs for new projects and disseminating environmental information.

The role of the department in EIA enforcement has assumed prominence recently.[25] EIA Policy is implemented on a voluntary basis, however, when this happens the department plays a significant role. At the moment, before the Environment Management Bill becomes law, EIA is being implemented on a trial basis.

The Ministry of Environment and Tourism has overall responsibility for managing the EIA process. It receives the EIA documents from project proponents or authorities and refers them to the department of natural resources for technical review. Once the department has reviewed the documents, it prepares an EIA review report, which is sent back to the proponent or authority through the ministry. The department employs standard criteria against which EIAs are evaluated. EIA acceptance can be given in deserving cases, stipulating the terms and conditions that should apply. In other cases, a proponent is required to prepare a detailed EIA report before re-submitting it to the department for evaluation.[26]

Box 3.3: DNR role in environmental planning

District Environmental Action Plan (DEAP) is a strategic action and planning process initiated by the Department of Natural Resources. The United Nations Development Programme supports DEAP with technical assistance from the World Conservation Union (IUCN). Its objective is to, at the district level:

- engage people in assessing their well-being and that of their environmentl;
- engage people in identifying their needs as well as priority actions and strategies to meet those needs;
- empowering communities and RDCs to meet those needs through sustainable development programmes; and
- providing a process for cross-sectoral planning which is coordinated at the district level

Source: IMERCSA, "Policy Brief: Implementing the Convention on Biological Diversity", 2000

Parks and Wildlife Board

The Parks and Wildlife Act provides, *inter alia*, for the establishment of a parks and wildlife board, the establishment of national parks, botanical reserves, botanical gardens, sanctuaries, safari areas and recreational parks. It also provides for the conservation, propagation and control of wildlife, fish and plants and the protection of natural landscape and scenery in Zimbabwe.

The Minister of Environment and Tourism is responsible for developing policies for the control, management and maintenance of national parks and other nature reserves provided for by the act. However, the board has a duty to assist the minister in policy formulation and "to do things, not inconsistent with the provisions of (the Act)" as may be required by the minister. In this regard, the board is required to examine and report on "the policy, which should be adopted to give effect to the objects and purposes of the act and generally, the conservation, utilisation, preservation and protection of specific resources in Zimbabwe".[27] The board is also to advise the President on which areas of Zimbabwe should be declared national parks.[28] Nevertheless, the board acts in a purely advisory function and has no statutory power to carry out regulatory functions.[29]

Part XI of the Parks and Wildlife Act provides for the protection of animals and indigenous plants in alienated land. However, the minister may formulate policy for the protection of certain animals and plants after consulting the natural resources board and conservation committees of the areas concerned.[30] Interestingly enough, there is no mention of what role the parks and wildlife board plays. For the purposes of part XI, it would seem that the natural resources board is assigned an advisory function on conservation matters. This role could, however, conflict with the overall function of the parks and wildlife board, which is authorised to examine and report from time to time upon policies for the conservation and utilisation of wildlife and indigenous plants and particular species of animals in protected areas.[31] The respective roles of the parks and wildlife board and the natural resources board should be properly defined to avoid this overlap. This could be achieved by a requirement for the two boards to coordinate their advice to the minister.

Box 3.4: The 1982 amendment of the Parks and Wildlife Act

This amendment created the basis for the department of parks and wildlife to nominate selected RDCs as appropriate authorities.

"The amendment was designed to eliminate the discrimination between farmers on privately-owned land and farmers on communal land. It was also aimed at helping communal land farmers and residents to take advantage of the Act's proven environmental and economic benefits, opening an important new door to rural communities and their elected leaders for income generation and poverty alleviation. This new status gave the rural district councils the right to manage and utilise wildlife as if they were the owners thereof."

This set the basis for the Communal Areas and Wildlife Management Programme for Indigenous Resources (CAMPFIRE). Today, 37 RDCs have appropriate authority status, and CAMPFIRE has been established in these districts.

Based on http://www.campfire.zimbabwe.org/
Cited in IMERCSA (2000) Land Policy Brief

The provisions of Section 66 of the act underscore the need for coordination. Persons or occupiers of land who wish to obtain a licence to hunt a protected animal or pick a protected indigenous plant on their land are required to apply to the natural resource conservation committee in the area for the licence.[32] A committee may refuse or grant such a licence or grant it with conditions. An applicant who is either refused a licence or wishes to challenge any conditions imposed by a conservation committee may appeal to the natural resources board.[33] The board may confirm the decision of a conservation committee or direct that a licence be issued to the applicant with conditions. The decision of the board is final in either case.[34]

It is surprising that even though the licence may relate to the hunting of protected animals and indigenous plant species, the parks and wildlife board has no say in the matter. As pointed out, this anomaly needs to be addressed.

Finally, members of the parks and wildlife board are appointed by the Minister of Environment and Tourism and hold office for up to four years under terms and conditions set by the minister.[35] However, the act does not establish the requirements for board membership. It has been suggested that criteria be set for board membership to ensure that its composition is multidisciplinary and that the policy recommendations made in terms of Section 11 of the act incorporate both environmental and developmental values.[36]

Department of National Parks and Wildlife Management

Apart from the Parks and Wildlife Board, there is the Department of National Parks and Wildlife Management which, though not a statutory body, is responsible for the actual management of parks and wildlife areas. The department is headed by a director and has back-up staff, including national parks' rangers who have become well known for their anti-poaching activities.

Parallels can be drawn between the parks and wildlife board and the department of national parks and wildlife management on the one hand, and the national resources board and the department of natural resources on the other.

Ministry of Mines

The Mines and Minerals Act establishes the office of mining commissioner who deals with applications for prospecting or mining authorisations. Unfortunately, despite giving the mining commissioner EIA responsibilities[37] when issuing licenses, the qualifications for the position have not been statutorily defined. There is no provision for a body of multidisciplinary persons to assist the mining commissioner in this new function.

Yet another authority with decision-making concerning the environment is the mining affairs board. Its composition is, however not, defined by the act. Guidelines are given and the board, in exercising its functions, may:

- require any area of ground or mining location subject of an application to be examined by persons appointed by the board for that purpose;
- ask the applicant, holder of any mining location, owner of land or "any person having an interest in or knowledge of any matter before the board" to give evidence or explanations which the board may require; and
- require the production of books, plans, accounts and other documents relating to the application.[38]

...the mining affairs board shall not recommend to the minister that an application be granted unless the applicant's mining development plan "takes proper account of environmental and safety factors".

The examination contemplated in paragraph (a) above could result in environmental considerations being factored into the design of a mining location. "Persons" appointed by the board to do the investigation could include people with expertise in environmental planning and management. In addition, people "having an interest or knowledge" in an issue before the board could include similar expertise. Finally, the provision relating to the production of documents could enable environmental impact assessment reports to be submitted to the board and considered when it decides whether or not to grant a mining authorisation.

Also commendable is that the mining affairs board shall not recommend to the minister that an application be granted unless the applicant's mining development plan "takes proper account of environmental and safety factors".[39] The board is, therefore, empowered to do some kind of EIA review. This underlines the need for its membership to have been defined and their qualifications stipulated. In this regard, the provisions of Section 159(2) merit a careful examination. The board may permit an applica-

tion for a special mining lease even if it does not really qualify if, *inter alia*, the extent of the investment and the proposed method of extraction, mining and treatment, and any other relevant circumstance are such that it is desirable in the interest of development to give the approval. Here, the board has a delicate balancing exercise between developmental and environmental factors. It is suggested that the board examines the proposed method of extraction, mining and treatment of ore in terms of its relationship with the environment and the mitigating aspects before approval is granted. The board would have to work in close cooperation with the department of natural resources in EIA reviews.

Efforts to promote sustainable mining are not assisted by the overriding nature of the Mines and Minerals Act over other statutes concerned with environmental conservation. The creation of other agencies to deal with mining activities in protected forest areas and nature reserves does not at all help the situation. For instance, timber rights conferred upon prospectors by the Mines and Minerals Act or under any title to land can be exercised by a miner in any demarcated forest or protected private forest or in respect of any tree or forest produce which has been reserved or any tree, forest or plantation which has been protected so long as the miner obtains a permit from the mining timber permit board.[40]

In the case of private protected forests, the mining commissioner may, after consulting with the owner, authorise the miner to cut or fell any vegetation where the vegetation interferes with prospecting or mining operations, development work or the erection of buildings for mining purposes.[41] In the case of demarcated forests, the forestry commission may authorise a prospector or miner to cut, fell and use, stack or remove any forest produce where there is interference with some mining activities as in the case of protected private forests.[42] There appears to be no rational basis why three separate agencies should be involved in the issuance of authorisations to interfere with the environment with no coordination mechanism built into the whole exercise. This state of affairs invariably leads to inconsistency in decision-making and needs to be addressed.

There appears to be no rational basis why three separate agencies should be involved in the issuance of authorisations to interfere with the environment with no coordination mechanism built into the whole exercise. This state of affairs invariably leads to inconsistency in decision-making and needs to be addressed.

Authorisations to cut vegetation could have been left to the mining timber permit board and its composition seems to vindicate this suggestion. The membership is one forest officer nominated by the forestry commission, a senior administrator from the Ministry of Environment and Tourism, an officer of the natural resources board, a Zimbabwean resident nominated by the Chamber of Mines and one Zimbabwean from such agricultur-

Box 3.5: Issuing of licenses

The Mines and Minerals Amendment Act, No.26 of 1987, provides for "a programme of the prospecting operations", in respect of an application to prospect on reserved ground, to be submitted to the mining commissioner. The amendment further stipulates that:

> "Every programme shall contain particulars of the prospecting operations which are intended to be carried out thereunder and of the estimated cost of such operations."

This provision does not specifically direct the mining commissioner to take into account the environmental impact of the prospecting operations. Nevertheless, the expression "a programme of the prospecting activities" seems to be more encompassing and holds the scope for including environmental criteria into the mining commissioner's decision-making who should, therefore, not shy away from taking advantage of that possibility.

Additionally, the Act in section 157B(3)(e) now requires applicants for a special mining lease to furnish the mining commissioner with "a report on the anticipated impact of mining operations on the environment and any measures to be taken to assess, prevent or minimise such impact, including proposals for:

- the prevention or treatment of pollution;
- the treatment and disposal of waste;
- the protection of rivers and other sources of water;
- the reclamation of land disturbed by mining operations; and
- monitoring the effect of mining operations on the environment."

Furthermore, the mining commissioner must also be provided with the following information (Section 157 B(3)(x) :

> "details of any insurance to be taken out against liability arising out of mining operations, including liability for damage to the environment and injury to persons and property."

al farming unions or associations as the Minister of Environment and Tourism selects.[43] The multidisciplinary nature of the composition lends the board well for balanced decision-making that takes care of both the environment and development.

It is interesting that some environmental evaluation is allowed to enter the mining timber permit board's decision-making. The board may only refuse to issue or renew a permit if, in its opinion:

- the taking of timber would result in undue damage to the locality from which the applicant proposes to take timber or would adversely affect the timber supplies of that locality or Zimbabwe as a whole; or
- suitable alternatives are available to the applicant.[44]

The board should nonetheless consider environmental criteria even when the application involves not only timber but also the cutting of vegetation and removal of other forest produce. This would ensure that forest resources are used sustainably. Should the board enforce this provision jealously, it could take care of the problem created by the inadequacy of penalties referred to earlier.

Ministry of Rural Resources and Water Development

The Minister of Rural Resources and Water Development is in charge of water, a vital component of the environment, and is charged with the administration of the Water Act. However, the minister shares responsibility over custodianship of water resources with the President since "all water is vested in the President".[45] In addition, no person shall be entitled to owner-

ship of any water in Zimbabwe and water shall be dealt with as provided in the act.[46]

The Minister of Rural Resources and Water Development is required to:

- develop policies for the orderly and integrated planning and optimum development, utilisation and protection of water resources in the public interest;
- make sure that water is available to everyone for primary purposes and for the needs of ecosystems where there are competing demands; and
- achieve equitable and efficient allocation of available water resources in the public interest among competing sectors.[47]

However, the act allows the minister to delegate his powers to the Secretary for Rural Resources and Water Development or the Zimbabwe National Water Authority (ZINWA).[48]

Zimbabwe National Water Authority

ZINWA has the responsibility to prepare outline water development plans in conjunction with the relevant catchment council.[49] Also consulted are authorities and bodies likely to be concerned with the development of the catchment area of the river system in question. The Commercial Farmers' Union (CFU), Zimbabwe Farmers' Union (ZFU), committees established in intensive conservation areas where the catchment area occurs, the department of natural resources and the department of agricultural, technical and extension services (AGRITEX), are some of the institutions certain to have an interest in catchment development. In addition, regard must be paid to the resources of the catchment area and to any regional plan prepared in terms of the Regional Town and Country Planning Act. The consultation envisaged in the act tends to ensure that a holistic approach is adopted to water resource conservation and utilisation.[50] Since there is a specific directive to consider the resources of the catchment area, focus is, as a result, directed to resources other than water.

The consultation envisaged in the act advocates a holistic approach is adopted to water resource conservation and utilisation. Since there is a specific directive to consider the resources of the catchment area, focus is, as a result, directed to resources other than water.

The outline plan has to be published before its implemented. In the event no objections or representations are received in the stipulated period, the Minister of Rural Resources and Water Development approves the plan and fixes the date it becomes effective.[51] Should there be any objections or recommendations, however, the minister must refer them to ZINWA for further consideration. After considering the objections, ZINWA is required to consult with the Secretary for Rural Resources and Water Development before submitting the plan with any further recommendations to the minister. At this stage, the additional

recommendations must include a report on the objections or representations and any changes made to the outline plan in consequence of the representations. The minister may then, after considering these documents and any other relevant matters, approve the plan with or without changes.

The requirement for a report on the objections and representations to be prepared is encouraging, as it tends to ensure that objections and recommendations are taken on board in administrative decision-making. It would require a lot of justification to ignore the objections and recommendations. In any event, it could open the possibility of a challenge through the process of judicial review.

Catchment councils

The authority to grant permits to use water is vested in catchment councils. These are required to include all stakeholders. They may not grant permits in a catchment area where an operative plan is in force if such allocation affects the water use envisaged in the operative plan.[52] Temporary permits may, nevertheless, be granted provided the catchment council obtains the consent of the Secretary for Rural Resources and Water Development.

A novel development introduced in the new Water Act is the provision, which makes an order of a catchment council binding between parties to a dispute over water utilisation.[53] If it is a monetary award, it has the same effect as an order of the High Court. This development is welcome, as it has simplified the process by which disputes are resolved at the local level.

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Permits may also be granted by catchment managers involved in the day-to-day administration of the affairs of a catchment provided there is no opposition.[54] They are, in addition, empowered to extend the duration of permits or cancel them where there is no opposition. The ability of catchment managers to grant, extend or grant permits in non-contentious circumstances has reduced the bureaucracy attached to water allocation.

Nevertheless, in the case of water for mining purposes, the application for a permit is lodged with the Mining Commissioner of the relevant district.[55] The commissioner then transmits the application, together with a report by a government mining engineer, to the relevant catchment council. It is, however, not indicated how the catchment council is expected to interpret the technical recommendations presumably contained in the mining engineer's report. This underlines the need to

enhance the capacity of catchment councils in technical and specialised issues.

It is worth noting that, members of catchment councils have been given powers of entry and search where they have reasonable grounds to suspect that a violation of the act has occurred.[56] Obstructing a member of a catchment council while performing duties without reasonable excuse attracts a penalty of a fine of up to $10,000 or imprisonment for up to six months. Obstruction also constitutes a ground for refusing to grant a permit or for rescinding a permit.[57] Loss of a permit is indeed a positive factor in improving the ability of catchment councils in their management and conservation of water resources in a sustainable way.

A "person aggrieved" by a decision of the catchment council may appeal to the Administrative Court for appropriate relief.[58] However, any such appeal does not suspend the decision or order appealed against.[59] This provision will significantly enhance the institutional ability of catchment councils to protect the environment generally, and water resources in particular, as it effectively prevents dilatory appeals lodged simply to buy time. While the appeal is pending, the aggrieved party no longer has the ability to continue abstracting water unsustainably or to pollute the water environment, hiding behind the previous legal protection.

Loss of a permit is indeed a positive factor in improving the ability of catchment councils in their management and conservation of water resources in a sustainable way.

While catchment councils have the powers referred to, their work is hampered by human resource problems. In 1995, there were only four officers assigned to environmental pollution control functions in the Ministry of Rural Resources and Water Development.[60] This situation has not improved significantly since then. Furthermore, as earlier noted, catchment councils do not as yet have the technology to detect pollutants. Reliance on the assistance of the parent ministry is rendered futile by the personnel inadequacies. There is need for greater cooperation and coordination to be fostered with AGRITEX, which has officers experienced and knowledgeable in this area.

Ministry of Health and Child Welfare

Hazardous Substances and Articles Control Board

The Hazardous Substances and Articles Act provides for the establishment of a control board whose functions include the licensing of:

- hazardous substances and articles; and
- the suppliers of hazardous substances and premises, vehicles, vessels or aircraft on which hazardous substances are carried or sold.[61]

The board advises the Minister of Health and Child Welfare in the declaration of substances that are hazardous and assigns them to one of three groups for regulation and control purposes, and in the declaration of articles, which are hazardous for the purposes of the act.[62] It plays a fundamental role in policy development. Some guidance is provided to the board about the characteristics of hazardous substances. Section 16 provides that "a substance, mixture of substances or class of substance may be declared hazardous where the health of human beings, domestic or wild animals, birds or fishes is endangered by reason of the toxic, corrosive, irritant, or inflammable characteristics".

The membership of the hazardous substances and articles control board gives rise to concern from an environmental perspective. First, the membership of the board is at the will of the Minister of Health and Child Welfare to whom it is assigned. The act provides for at least one member to be from the Ministry of Environment and Tourism.[63] It may, therefore, be too optimistic to believe that this single person will be able to bring environmental considerations to bear on the decision-making process among eight or more people representing different sectoral interests. Therefore, it has been suggested that the board be given a statutory obligation to:

- consult with labour groups, industrial sectors and associations concerned with environmental health matters in its assessment of potential substances and articles for classification; and
- require submission of data relating to the formula, composition, chemical ingredients, hazardous properties of a product, material or substance and such other information as may be required in the determination of its possible dangers to health, safety of humans, birds, animals and the environment.[64]

"a substance, mixture of substances or class of substance may be declared hazardous where the health of human beings, domestic or wild animals, birds or fishes is endangered by reason of the toxic, corrosive, irritant, or inflammable characteristics".

This recommendation could ensure that environmental considerations are given adequate evaluation when a substance or article is classified. It is encouraging, however, that upon receipt of an application for a licence, the board is authorised to conduct such investigation or inquiry as it considers necessary or desirable.[65] The board may hear evidence from the applicant and may require further information. However, the scope of the investigation or inquiry is uncertain. It would be desirable if such investigation covered environmental issues and ensured that they were accommodated in the licensing process.

The act empowers the board to approve, refuse or issue a licence and attach conditions to it. Alternatively, it may notify an applicant that it "intends to refuse" to issue a licence, and the applicant has 14 days to make representations with respect to the

board's intentions. This means that the board is inviting the applicant to re-open negotiations about the application. However, no criteria are provided to guide the board's decision-making. It is, therefore, unclear what considerations would motivate the board to change its stance when it revisits the issue. This provision is unsatisfactory as it may be abused by unscrupulous persons who may resort to unorthodox methods (e.g. corruption and bribery) in order to unduly influence a favourable decision. The act should have stated in clear terms the criteria the board should use in deciding an application, especially the second time around.

Air Pollution Advisory Board

The Atmospheric Pollution Prevention Act establishes the air pollution advisory board.[66] Its functions are to advise the Minister of Health and Child Welfare on matters of control, abatement and prevention of air pollution. The board is constituted between five and seven members appointed by the minister and there is no indication how the membership is selected. Whether or not a person representing environmental interests would be incorporated into the board becomes a matter of coincidence. There is also no direction as to the qualifications of members required to advise on such technical matters as control, abatement and prevention of air pollution. In addition, the tenure of office of members is not stipulated, a situation which could tempt members to please rather than challenge existing policies in order to guarantee continued tenure.

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It is also unfortunate that the board has no investigative and information-gathering powers so that any research it carries out is meaningful and informed. Unlike the hazardous substances and articles control board, the act has no provision for the air pollution board to establish standing and special committees to provide it with technical knowledge and other information. Finally, no provision is made for public participation in the exercise of its policy formulation functions.

In a situation where the act is assigned to the Minister of Health and Child Welfare, it would have been desirable for the legislation to clearly state that one of the board members is from the Ministry of Environment and Tourism. The additional power to set up special committees could have ensured that appropriate qualified and experienced personnel is recruited to assist in establishing ambient air quality standards for the benefit of the public and the environment.

Apart from policy formulation functions, the minister, in conjunction with the chief health officer, has regulatory functions.

The minister may, by statutory instrument:

- declare "noxious or offensive gas" areas and "smoke control" and "dust control" areas for control purposes; and
- designate certain industrial operations, which are emitting or may emit noxious or offensive gases as "specified processes".[67]

After the declaration or designation no person shall, in a gas control area, carry on a specified process without a registration certificate issued by the chief health officer authorising the activity in accordance with any conditions imposed.[68] The section also prohibits the erection or construction of any new building or plant or material alteration or extension of any existing plant carrying on a specified process without the chief health officer's approval. Furthermore, section 10 allows the chief health inspector to issue notices calling upon holders of registration certificates to adopt certain measures to prevent the pollution of the atmosphere by noxious or offensive gases.

Section 33 enables the application of regulatory standards by the chief health officer to ensure that systems and devices are installed in internal combustion engines to reduce or prevent the emission of contaminants. These provisions hold a lot of potential for the incorporation of environmental criteria in the granting of an application for a registration certificate. The provision permitting the chief of health officer to issue notices directing certain preventive action to be taken should in fact specify that such notices would be made in the event it appears that danger would accrue to the environment. If no preventive action is taken, the process should be closed. This is not a novel phenomenon. The Factories and Works Act, via section 11, allows for such kind of factory closures.

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An application for a registration certificate is made to the chief health officer who is required to consult with the local authority in whose area of jurisdiction the "specified process" is or will be carried out, as well as any local authority whose residents may be affected by the specified process.[69] Although there is no specific mention of EIA, there seems to be room for environmental interests to be accommodated in the decision-making process. The chief health officer must be satisfied that reasonable measures are or will be properly maintained and-operated in the specified process for preventing or reducing the escape of noxious or offensive gases into the atmosphere, in the light of:

- local conditions and circumstances; and

- the prevailing extent of technical knowledge and costs involved, and that the specified process in question may reasonably be permitted to be carried on having regard to:
    - i the nature of that process;
    - ii the character of the locality in question;
    - iii the purposes for which other premises in the locality are used, including whether the carrying out of the process would conflict with any operative town planning scheme; and
    - iv any other consideration which the chief health officer believes to have a bearing on the matter.

After conducting this assessment, the chief health officer may issue or refuse a registration certificate with suitable conditions. In the case of approval, special conditions specified in section 8 have to be included:

- all plant and apparatus used to carry on the specified process and all appliances for preventing or reducing atmospheric pollution shall at all times be properly maintained and operated; and
- the holder of the registration certificate shall ensure that all reasonable and necessary measures are taken to prevent the escape into the atmosphere of noxious and offensive gases.

These provisions, if properly implemented, are very encouraging since the requirement for plant, apparatus and appliances to be properly maintained "at all times" ensures and assures that the environment, and the health and safety of the public are not compromised. However, the requirement is so stringent it has to be backed up by an adequate inspectorate system for effective monitoring of compliance.

> ...the requirement for plant, apparatus and appliances to be properly maintained "at all times" ensures and assures that the environment, and the health and safety of the public are not compromised.

A person aggrieved by the chief health officer's refusal to grant a registration certificate, imposition of conditions, refusal to grant permission to construct a new facility, materially alter existing facilities, give a notice to adopt corrective measures, cancelling or suspending a registration, may appeal to the Administrative Court.[70] In terms of the Act, the launching of an appeal suspends the operation of any decision (including a notice to take measures) made by the chief health officer.[71]

This provision is in sharp contrast to the one in the Water Act. The inconsistency in approach is not justifiable. The provision in the Atmospheric Pollution Prevention Act is undesirable as it encourages the launching of appeals solely for the purposes of delaying the operation of the order.

Consequently, issuing the "notice to take measures" is rendered nugatory since the notice is intended to prevent the escape into the atmosphere of noxious or offensive gases. The use of the word "escape" in the legislation implies truancy, necessitating urgent corrective action. Therefore, any dilatory tactics on the part of those regulated has the effect of making the control measures redundant. Accordingly, the approach in the Water Act needs to be adopted. This development will rationalise environmental regulation.

Local Government, Public Works and National Housing

The Minister of Local Government, Public Works and National Housing, through the regional Town and Country Planning Act, exercises significant responsibilities over the physical environment. These powers are exercised mainly through local authorities.[72] The Regional Town and Country Planning Act provides for the planning of regions, districts and local areas with the object of conserving and improving the "physical environment" and efficient economic development.[73] There is, therefore, an implicit mandate to balance environmental and developmental issues in decision-making by local authorities.

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However, in the planning of regions, districts and local areas, the act does not specifically urge the decision-maker to take account of environmental factors. For example, no provision is made for EIA in the preparation of regional, master and local plans, or any town planning scheme, zoning or subdivision of land. Yet, the preparation of a regional plan includes preparing an inventory of assets and resources in the region and surrounding areas.[74] Such an inventory is obviously critical to comprehensive landuse planning.

Despite these shortcomings, there are certain provisions in the act, which the relevant minister and local authorities could utilise for environmental protection since they lend themselves very well to implementation of EIA. Local authorities are empowered to "make a special order applicable to a specified area" and to impose "conditions or limitations subject to which any development is permitted".[75] This opens the possibility for environmental assessment to be done before development in ecologically sensitive areas is allowed. Increased use should be made of these provisions by local authorities.

Furthermore, in various zones, certain uses of land and development are freely permitted while some require the "special consent" of the relevant planning authority. Nevertheless, special consent has been judicially defined to mean "no more than

the consent required for putting property to a use to which it cannot be put in the zone in which it is situated without such consent".[76] It would have been more helpful had the special consent requirement included environmental criteria.

A more effective provision, from an environmental standpoint is to be found in the Atmospheric Pollution Prevention Act. In respect of controlling smoke emissions, the minister may vest authority in either the chief health officer or the local authority within which a "smoke control area" is situated.[77] And, if the minister is satisfied that the local authority has failed to adequately exercise authority, the authority may be revoked and vested in the chief health officer. This provision, which allows for revocation of delegated authority in the event of dereliction of duty by the delegatee, is an important tool in environmental regulation. The environment is saved the consequences of neglect by an inept local authority. However, the effective implementation of the provision would largely depend on the minister adequately monitoring delegations of authority for evidence of dereliction of duty.[78]

Box 3.6: Local government

One of the earliest attempts at decentralisation was the development of local government structures. The 1984 Presidential Directive on local government sought to replace local administration of land by the chiefs and to promote an egalitarian, democratic and socialist institutional development structure. Its declared objective was:

> to define the administrative structures at provincial and district levels and the relationships and channels of communication between all participants in the development at provincial and district levels in order to achieve the coordinated development of provinces and districts in Zimbabwe.

In terms of this directive, a system of rural district councils and development committees was developed. In theory, development planning would now be based on the priorities and interests of village development committees. Village and ward development committees were established in terms of this directive, paving the way for the introduction of a structured planning system that began at village level. The Rural District Council Act of 1988 only partly incorporated this process into legislation.

Source: IMERCSA, "Policy Brief: Decentralisation", 2000

Also noteworthy is that a local planning authority has power to control and regulate the cutting down, injuring and destruction of any forest, tree or woodland on any land within its jurisdiction.[79] This allows a local authority to have environmental control and management powers over natural resources in its area. It is, however, not indicated how these powers are meant to dovetail with powers given to other institutions under the Natural Resources Act and the Forest Act.

The Rural District Councils Act gives RDCs powers over natural resource regulation and utilisation, subject to ministerial controls.[80] These powers include conservation of natural resources, cultivation and farming, grazing, provision and control of water resources and land clearance. The RDCs have authority to promote development in their areas, prepare development and other plans and formulate policies for development of rural district council areas.[81] In this regard, the act establishes district development committees to assist in the

preparation of district development plans.[82] However, the committees are comprised of chairpersons of all council committees, chief executive officers of councils, representatives of the Zimbabwe Republic Police, Zimbabwe National Army, the President's Office and all sectoral ministry departmental heads.[83] Such a composition is not representative of district inhabitants and is more biased towards involvement of people not directly affected by developmental and environmental policies implemented in these areas. This anomaly is unfortunate and needs to be rectified.

Lower level institutions are also created by the Rural District Councils Act. In each ward of a council area, there is a ward development committee (WADCO) consisting of the councillor for the ward as chairperson and the chairperson and secretary of every village development committee (VIDCO) and neighbourhood development committee in the ward.[84] Every WADCO must prepare and submit to the rural district development committee a ward development plan.[85]

In practice, once the rural district development committee has adopted a plan, it is forwarded to the provincial development committee (PDC) chaired by the governor of the province.[86] The PDC then integrates district plans and gives the projects priority ranking and prepares a provincial development plan which is forwarded to the National Planning Agency. This process brings into decision-making coordination between central government, provincial institutions and local-level participation.

As previously noted, the Minister of Local Government, Public Works and National Housing may declare a council area to be an "intensive conservation area". The council, upon such declaration, becomes the natural resource conservation committee for that area. It may appoint sub-committees to administer natural resources in the ward areas within the intensive conservation areas.

While the elaborate mechanism for natural resource management exists, it is not clear how coordination is achieved with officers from departments such as AGRITEX who do extensive conservation-related work in commercial areas. A statutory basis needs to be created for such coordination so that the expertise these departments can bring to bear on the whole exercise is not wasted.

While this elaborate mechanism for natural resource management exists, it is not clear how coordination is achieved with officers from departments such as AGRITEX who do extensive conservation-related work in commercial areas. A statutory basis needs to be created for such coordination so that the expertise these departments can bring to bear on the whole exercise is not wasted.

Many aspects of air and water pollution are administered and enforced by local authorities. In the process, they impose penalties to make their enforcement role effective. However, care must be taken to ensure that penalties imposed by local author-

ities do not differ with those prescribed by other institutions under different statutes for the same transgressions of the law. A case in point is the previous Water Act, which had a maximum fine of $500 for a first water pollution offence, while bylaws made by the City of Harare had a maximum penalty of $5,000 for the same offence. There should be a standardisation of penal provisions regulating the same issue. A system of institutional cooperation and coordination of activities has to be developed and the law should reflect this approach. This could be achieved through an environmental policy cutting across all sectors specifically obliging all functionaries of government charged with regulating one aspect or other of the environment or whose activities impinge on the environment to perform their functions subject to the environmental policy. It is encouraging that the environment management bill attempts to achieve this.

Landowners and occupiers

Environmental legislation places various obligations on owners and occupiers of land *vis-à-vis* the protection of natural resources and the environment. As previously noted, part IV of the Natural Resources Act authorises the Minister of Environment and Tourism, upon the application by landholders in an area, to declare the area to be an intensive conservation area. The effect of such a declaration is to empower the landowners to set up conservation committees. The act authorises the conservation committees to inaugurate and undertake works and measures for soil and water conservation, improvement and proper management, control and use of natural resources.[87] The committees can levy taxes from landowners in the area and raise funds by other means to finance their activities.[88] The act, in addition, places an obligation on all landholders in the intensive conservation areas to contribute to the conservation works.[89] These are important provisions, from a resource conservation perspective, as they enable landholders, on their own initiative, to undertake environmental conservation measures. This direct involvement of landholders or users in the protection of natural resources is important as it engenders a sense of community responsibility towards natural resources and the environment.[90] However, a notable shortcoming of these provisions is their dependency on the readiness of people to take action to protect the natural resources, which presupposes a high level of environmental consciousness among landowners.[91] The same opportunity is not on offer for people in the communal areas.

This direct involvement of landholders or users in the protection of natural resources is important as it engenders a sense of community responsibility towards natural resources and the environment.

In communal areas, however, despite the duties assigned to conservation committees by such statutes as the Rural District

Councils Act, Parks and Wildlife Act and the Communal Land Forest Produce Act, the institutional framework is essentially of a command-and-control type. A more participatory approach needs to be adopted to facilitate grassroots involvement in resource and environmental management. In fact, it is the community members themselves who are normally aware of the land degradation and other resource conservation issues in their communities.

Non-statutory bodies

NGOs play a significant role in environmental conservation and in promoting environmental awareness. These institutions include both international and national organisations.

There are well over 30 local NGOs which have a primarily environmental mandate and many more whose mandates overlap with environmental matters. Environmental organisations in Zimbabwe include research and advocacy bodies such as:

- ZER0 (A regional environment organisation)
- Africa Resources Trust
- Southern Centre for Energy and Environment
- Musokotwane Environmental Resource Centre for Southern Africa (IMERCSA).

Purely research institutions include the:

- Centre for Applied Social Sciences
- Institute for Environmental Studies
- Water and Sanitation Research Centre.

Hands on environmental NGOs include the:

- Intermediate Technology Development Group
- Biomass Users' Network
- Environment and Development Activities
- Southern Alliance for Indigenous Resources
- AZTREC
- Community Technology Development Association
- Zambezi Society
- Environment 2000.

NGOs with a human rights focus, which are occasionally engaged in environmental related matters include the Legal Resources Foundation and ZIMRIGHTS.

There are also a number of international organisations active in the environmental sector and these include the:

- World Conservation Union (IUCN)
- Food and Agriculture Organisation (FAO)
- United Nations Development Programme (UNDP).

There are also specialised international research institutions based in Zimbabwe:

- Consultative Group for International Agricultural Research (CGIAR)
- Centre for Forest Research (CIFOR)
- International Centre for Research in Agro-Forestry (ICRAF).

There are also a number of donor agencies directly involved in funding environmental activities. In fact, the environmental law reform process initiated by the Ministry of Environment and Tourism from 1994 was made possible with technical and financial support through the Canadian International Development Agency (CIDA).

The role of NGOs in development and environment-related work cannot be underestimated. Since Independence, they have spent between Z$300-Z$400 million on various projects.[92] It was through NGO-pressure that Mobil Oil Company was compelled to commission an environmental impact study of its oil exploration activities in the Zambezi Valley.[93] More recently, some NGOs have published materials emphasising that the now defunct government-appointed Constitutional Commission should indicate an environmental right in the new Constitution.[94]

An important exception is created under the Class Actions Act, which allows any person to apply to the High Court for leave to bring an action, which benefits a group or class of persons. In granting such leave, the financial standing of the class or group is considered.

The ability of NGOs to effectively act in the environmental interest is, however, hampered by the *locus standi* requirement. Judicial review is the most important form of external control over administrative decisions. The first shortcoming of judicial review as a control measure is the standing requirement. Generally, to have standing to challenge an administrative action, there must be sufficient personal interest in the matter concerned. This is a major problem with respect to the enforcement of environmental law because the courts will generally not allow a party to claim relief in the public interest.[95] An important exception is created under the Class Actions Act, which allows any person to apply to the High Court for leave to bring an action, which benefits a group or class of persons. In granting such leave, the financial standing of the class or group is considered.

The constricted nature of the standing requirement is not in the environmental interest, since environmental problems affect all persons who live in that environment. Therefore, the more widespread the problem, the more difficult it is likely to be to establish an individual interest in environmental integrity. While it is easier for a plaintiff who lives near a factory, which is polluting the atmosphere to establish *locus standi* (e.g. a resident of Mabvuku in relation to the Circle Cement plant), it is difficult for anyone to establish *locus standi* in relation to the depletion of

the ozone layer. Other jurisdictions have adopted a more liberal approach in relation to the right of environmental NGOs to vindicate the environmental public interest.[96]

Judge Otton succinctly explained why environmental NGOs should be given standing in issues concerning the environment:

> "Greenpeace is a campaigning organisation which has as its prime object the protection of the natural environment.… I have not the slightest reservation that Greenpeace is an entirely responsible and respected body with a genuine concern for the environment... It seems to me that if I were to deny standing to Greenpeace, those they represent might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee [of the polluting company] or a near neighbour. In this case, it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less-well informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."[97]

This seems to be an eminently responsible approach and the courts in Zimbabwe are urged to adopt a similar trend. It appears, at any rate, that environmental NGOs (or most of them) are less likely to be mere busybodies in issues for which they have expressed so much advocacy and stewardship.

PUBLIC PARTICIPATION

All decisions affect the public in one way or the other. Decisions, which have an impact on the environment, are no exception, particularly when they regulate people's behaviour towards the environment. Therefore, public participation is a necessary ingredient of every decision-making. Notwithstanding these laudable ideals, environmental statutes in Zimbabwe have little or inadequate provisions for public participation when decisions affecting the environment and the people are made.

The main planning statute, the Regional Town and Country Planning Act is the first culprit. There are minimal requirements for public notice when development applications come before local authorities. For

Box 3.7: Key ingredients of public participation

Principle 10 of the Rio Declaration provides that:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

instance, an applicant for a permit to carry out development is required to give public notice at their own expense. And, the notice shall invite objections and representations to be made within one month of the notice.[98] This period is inadequate and the requirement for the proponent to meet the costs of publication may militate against giving notice. In addition, the minister or local authority is not required to give reasons for allowing a project to proceed. Therefore, the extent (if any) to which objections and representations by the public are taken into consideration is unclear.

Also unfortunate is that there is no public input until after regional, master and local plans have been prepared. The plan lies for inspection, comment and objection by any interested person *ex post facto*.[99] It would be more helpful were the public involved at the actual preparation stage and not be presented with what is, in most cases, a *fait accompli*. As there is no statutory obligation to give reasons for adopting a plan, it is difficult to ascertain the contribution public participation makes to decision-making. Until the problem is addressed, public participation in Zimbabwean legislation remains largely reactive rather than proactive.

While development orders made in terms of section 26 hold considerable promise for the environment, the way they are made leaves a lot to be desired. The relevant minister issues development orders by notice in the government *Gazette*.[100] Not many people outside the legal fraternity have access to, or know about the existence of, the *Gazette*. Therefore, more adequate means of communication need to be developed, particularly if the needs of the rural constituency are to be addressed.

Not many people outside the legal fraternity have access to, or know about the existence of, the *Government Gazette*. Therefore, more adequate means of communication need to be developed, particularly if the needs of the rural constituency are to be addressed.

Nevertheless, the Water Act provides interesting opportunities for public participation in water resource management. It provides that, in determining any matter submitted before it, a catchment council shall satisfy itself that all persons, who in its opinion have an interest in the matter for determination, have been notified.[101] Such interested persons may appear before the catchment council and present argument and evidence. This opens the possibility for environmental NGOs and other people with expertise, experience and interest in water management issues to contribute in decision-making affecting the water resource. It is disappointing, however that the discretion to determine who is an interested party remains with the catchment council. Also of concern is that initial studies suggest that local inhabitants feel alienated from the bodies.

The Fertilisers, Farm Feeds and Remedies Act incorporates the requirement that the registration of a fertiliser, farm feed, remedy or other biocide "not be contrary to the public interest".[102]

However, no mechanism is built in for public participation in order to test whether the public interest is indeed safeguarded by the decision-maker. An inevitable conclusion is that the presence of the expression in the act is merely superfluous.

In communal areas, the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) has enhanced local level participation in natural resource management. The programme has helped to foster the spirit of communal ownership of resources occurring in communal areas. This type of public participation in wildlife management should be extended to natural resources other than wildlife.

The problems created by the standing requirement on public participation in environmental decision-making have previously been alluded to. However, the Natural Resources Act has an intriguing provision in the following terms:

> "When any matter arises for the determination of the Board, all persons having an interest in such matter shall, as far as reasonably practicable, be notified of the questions at issue and given facilities for making such representations thereon as they may wish."[103]

The public should have as much access as possible to information about the operations of government, its departments and agencies, and public authorities. This enables the public to make a meaningful input, helpful criticisms and suggestions that shape the final decision of the administrator.

The provision seems wide enough to include any member of the public or organisation interested in environmental integrity. It may, however, require this provision to be tested in a court of law for one to say with certainty that it is a public interest provision.

Finally, public participation is only effective if all participating parties have equal access to information relevant to the matter for determination. The public should have as much access as possible to information about the operations of government, its departments and agencies, and public authorities. This enables the public to make a meaningful input, helpful criticisms and suggestions that shape the final decision of the administrator. Not to mention, the ability to challenge bad administrative decisions through the vehicle of judicial review.

Provisions, which inhibit access to information, even that held by private entities, cripple public participation. For example, the Hazardous Substances and Articles Act makes it an offence to disclose to any person other than the relevant minister or official assigned by him or the police or in court information in relation to someone's business affairs acquired while performing a duty under the act.[104] As presently formulated, this provision could mean that a public health inspector who gives information to workers or the public about the chemical composition of certain products could commit an offence if that information fell in the

realm of a company's trade secrets. Yet, information on the chemical identification of products is essential for the provision of adequate protective measures or the taking of remedial action in the event of a hazard. Nonetheless, a reasonable balance has to be struck between the private interest in preserving trade secrets and the public interest in safe and environmentally friendly products coming into commerce.

Box 3.8: A new institutional system

An effective institutional system must be based on a new vision for the environment and people of Zimbabwe. It should create the basis for a development approach that addresses basic needs, equity, and redistribution of wealth while promoting environmental conservation.

Such an institutional system must:

- Ensure that the decision-making processes are inclusive of all stakeholders.
- Link responsibility and authority.
- Guarantee administrative fairness: the administrative process should be transparent and based on principles of accountability, the right to be heard and a right of access to information on which decisions are made. There must be an obligation on the decision-making authority to give reasons for its decisions.
- A right of access to information forms the basis of effective public participation and also creates the basis for administrative accountability.
- Be capable of providing adequate monitoring and enforcement. This may include developing systems of self-monitoring.
- Provide a variety of mechanisms for conflict resolution

Based on Mohamed-Katerere, IUCN ROSA, Stewart and Ncube

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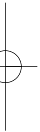
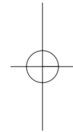
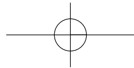
1 Henley, D., "A Review of Zimbabwe's Natural Resources and Land Use Legislation and Some Options for Implementing an Integrated Approach to Natural Resources to Sustainable Development", Ministry of Mines, Environment and Tourism, Harare, Unpubl, 1990, lists 12 major environmental statutes while *The National Conservation Strategy: Zimbabwe's Road to Survival*, Ministry of Information, Harare, 1987, identifies 18. In their report prepared for the Ministry of Mines, Environment and Tourism, W. N. Chinamora and D. W. Ruhukwa, "Towards an Environmental Management Act: Review and revision of Zimbabwe's Environmental Legislation", Ministry of Mines, Environment and Tourism, Harare, Unpubl, 1995) examined 18 statutes having a bearing on the environment.
2 Gore, C., Katerere, Y. and Moyo, S., *The Case for Sustainable Development in Zimbabwe: Conceptual Problems, Conflicts and Contradictions* (Enda-Zero, Harare, 1992) at p2. For Further discussion on this point see Mohamed-Katerere, Customary Environmental Management System in this volume
3 In 1997, that the former Ministry of Environment and Tourism was merged with what was the Ministry of Mines. This was important as it recognised that mining had significant environmental impacts.
4 Report on the National Response Conference to the Rio Earth Summit, "Towards National Action for Sustainable Development", Ministry of Mines, Environment and Tourism, Harare, March 1993 at p19.
5 Section 3.
6 Preamble sections 4 and 8.
7 Section 8(a).
8 McNamara, K., "Optional Strategies for the Management and Conservation of Trees and Woodlands in Zimbabwe's Rural Areas: Past Emphasis and Future Directions" (Agricultural Sector Memorandum, 1990).
9 McNamara, 1993, 7
10 Section 10.
11 Section 15(2).
12 Section 31.
13 Section 3.
14 Section 12.
15 Section 4(2).
16 Section 42.
17 Section 42.
18 Section 44.
19 Section 46.
20 Section 57.
21 Section 61.
22 Section 62.
23 Section 61, Rural District Councils Act.
24 Section 61.
25 That is, with the coming into effect of the EIA Policy of 1994. The Environment and Natural Resources Management Bill also seeks to establish a statutory basis for the Department of Natural Resources.
26 The Environment and Natural Resources Management Bill seeks to formalise this procedure, which has no legislative foundation. The procedure outlined above is contained in a document titled, "Administrative Procedures for Implementing the EIA Policy in the Ministry of Mines, Environment and Tourism and Department of Natural Resources", 10 April 1995.
27 Section 11.
28 Section 3.
29 To emphasise this role, in terms of Section 102(1) the Minister may establish advisory committees to receive policy advice and recommendations with respect to botanical gardens and reserves.
30 Section 66.
31 Section 3.

32 Section 66(8).
33 Section 66(9).
34 Section 66(10).
35 Section 3.
36 Chinamora and Ruhukwa, "Towards an Environment Management Act" *supra* at pp57-58.
37 The law has, regrettably, also not taken EIA the full distance since EIA is limited to special mining leases and not all mining and prospecting activities generally. Special mining leases are mining developments of a magnitude exceeding US$ 1 million and those whose output is essentially for export. If EIA is to include all aspects of mining, the need to increase the capacity of the Mining Commissioner to deal with EIA reviews is imperative.
38 Section 11.
39 Section 160(2)(c).
40 Section 39.
41 Section 38(3).
42 Section 38(4).
43 Section 40.
44 Section 44(2).
45 Section 3.
46 Section 4(1). Under the old Water Act, private ownership of water was recognised. Section 43(1) of the previous Act provided that: "Private water is vested in the owner of the land on which it is found and its sole and exclusive use shall belong to such owner."
47 Section 6.
48 Section 7. What may not be delegated, however, is the power to make regulations.
49 Section 12.
50 ZINWA and the catchment councils are also required to indicate in the outline plan the priorities in the utilisation and allocation of water. This requirement has the effect of making ZINWA and the catchment councils more responsible and responsive to environmental and other issues when they plan for water conservation and utilisation.
51 Section 16.
52 Section 19. In addition, section 23 sets out the principles, which a catchment council must observe when considering applications for permits to use water. The principles incorporate environmental criteria and are intended to ensure that water is utilised sustainably with mitigatory measures being applied in the event of effluent being discharged.
53 Section 27. It nonetheless has to be reduced to writing and signed by the chairman of the relevant catchment council.
54 Section 29.
55 Section 34.
56 Section 31.
57 Section 31(3).
58 Section 34(8).
59 Section 28. Without this provision an appeal would have suspended the operation of the order appealed against.
60 Chinamora and Ruhukwa, "Towards an Environment Management Act" *supra* at p16.
61 Preamble and Section 15.
62 Section 15.
63 Section 4.
64 Henley, "A Review of Zimbabwe's Natural Resources and Land Use Legislation" *supra* at p78.
65 Section 22(1)(a).
66 Section 3.
67 Section 5.
68 Section 6.
69 Section 7.

70 Section 13.
71 Section 14.
72 Section 10 creates local planning authorities which are defined as every municipal or town council for the area under its jurisdiction and every Rural District Council or local board for the area under its jurisdiction. However, Rural District Councils have no power to prepare master and local plans.
73 Preamble.
74 Section 6(1)(a).
75 Section 26(2)(a) and (b).
76 *City of Salisbury v Sagit Trust Limited* : 1981 ZLR 479 at p488.
77 Section 16.
78 Chinamora,W., Ncube, M. M., Bundsgaard, B. and Mutubuki, N., "Towards a Working Environment Act for Zimbabwe" (Danida-NSSA, May 1999). NSSA refers to the National Social Security Authority.
79 Section 32.
80 Section 71. The detailed powers are contained in the First Schedule.
81 Section 74(1).
82 Section 60(5).
83 Section 60(1).
84 Section 59(1).
85 Section 59(3).
86 Ncube, W., and Nkiwane, V., "Review of Current Legislation Governing Land and Natural Resources in Zimbabwe". A report for the Land Tenure Commission, September 1994 *supra* at p35.
87 Sections 52 and 53.
88 Section 58.
89 Section 54.
90 Ncube, and Nkiwane, "Review of Current Legislation Governing Land and Natural Resources in Zimbabwe". A report for the Land Tenure Commission, September 1994.
91 Chinamora and Ruhukwa, "Towards an Environmental Management Act" *supra* at pp43-44.
92 Gore et al, *The Case for Sustainable Development in Zimbabwe supra* at p72.
93 Ibid at p74.
94 See Chenje, M., "Environmental rights should be enshrined in Constitution", *Environment Dialogue*, Vol.1, No.1, Sept 1999 at pp1, 4 and 5. Environmental Dialogue is an IMERCSA publication.
95 See, *Alder v Salisbury City Council*: 1947(3) SA 220 (SR), *Salisbury Bottling Co. v Central African Bottling Co*: 1958(1) SA 750 (FSC).
96 See, *R v Her Majesty's Inspectorate of Pollution and Ministry of Agriculture, Fisheries & Food, ex parte Greenpeace*: [1994] Env. Law Reports 76 (QBD),
97 At pp.100-101. See also, *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co.*: [1990] IQB 504, and dissenting judgement of Lord Denning in *Gouriet v Union of Post Office Workers* [1978] AC 435 in which he remarked that the courts are open to anyone who has a genuine grievance to bring before them and that he must not be prevented by "some technical objection about *locus standi*".
98 Section 27(4).
99 Section 7.
100 Section 26.
101 Section 25. A irrigation scheme in a catchment area appears as of right as it is deemed by section 25(3) to have an interest.
102 Section 4(2)(a)(ii).
103 Section 15.
104 Section 37.



CHAPTER 4

CUSTOMARY ENVIRONMENTAL MANAGEMENT SYSTEMS

By Jennifer Mohamed-Katerere

LEGAL STATUS OF CUSTOMARY LAWS COVERING THE ENVIRONMENT

Customary law is a manifestation of local rules and practice. Customary law is a system of rules that describe substantive and procedural rights, decision-making processes and institutional arrangements that apply to a defined group of people. It is also a reflection of local indigenous knowledge. "Indigenous knowledge is local knowledge that is unique to a given culture or society…. Indigenous knowledge is the basis for local-level decision-making in agriculture, food preparation and natural resource management and a host of activities in rural communities. Every society has a large body of indigenous knowledge based on careful observation and the use of natural resources."[1]

Zimbabwe has a dual legal system, meaning that the law has two primary components, general or received law (the law brought in by the colonialists and developed and implemented since then) and customary law. These two legal systems are treated as parallel, governing, in terms of the law, distinct areas. Legally, customary law applies primarily in the private law arena, under certain specified conditions.

In terms of the Customary Law (Application) Act,[2] customary law is applied only in civil law cases where the parties involved want their dispute settled in accordance with customary law.[3] Consequently, with respect to natural resources, disputes may only be determined according to customary law where the dispute is civil (that is between two private individuals) and both parties are African. There are no statutory provisions in any of the main legal instruments dealing with natural resources (such as the Forest Act,[4] Communal Lands Act,[5] Water Act or Parks and Wildlife Act) that directly incorporate customary law. In fact, many statutory provisions fly in the face of customary law and

Box 4.1 Statutory definition of customary law

The Customary Law and Local Courts Act, as read with the Customary Law and Primary Courts Act, the Traditional Leaders Act and the Communal Lands Act are the primary legal instruments defining customary law. The Customary Law and Local Courts Act defines customary law as the law of the people of Zimbabwe or of any section or community of such people, before 10 June 1891, as modified or developed since that date.

practice. There are, however, a few instances under which customary law is considered, for example:

- traditional leadership institutions have a minimal role in the management of resources under the Traditional Leaders Act; and
- customary law, in terms of the Communal Lands Act, is also recognised in respect of land allocation.

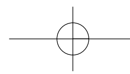
Given this artificial delineation and also the failure of the statutory system to adequately conceptualise customary law, there is often a "great disparity between customary law which is practised by the … courts and people's customs and practices that are constantly evolving outside the framework of court decisions and interpretations."[6] In Zimbabwe, particularly as a result of the rules of precedent, the courts have codified certain norms and this has regrettably resulted in their stagnation. As a result, there is also a disparity between the legal status and the *de facto* status of customary law.

Statute law not only excludes custom but may also undermine the continuance of certain traditional practices (see Table 4.1). Nevertheless, there is evidence of the continued use of certain customs. In many instances, rules and practices have been modified in response to new economic and social conditions. Additionally new rules, that are not traditional, have evolved. These rules may also be considered to be part of customary law.

Table 4.1: Impact of forest statutes on customary practice

	PROVISION	IMPACT
FOREST ACT	The Forest Act gives the state, through the Forestry Commission, general authority for protected forests. Rural district councils have a right to grant concessions to outsiders to utilise forest products for commercial purposes in communal areas.	As concessions may be awarded without consultation with communal area inhabitants, areas that communities attribute cultural and economic significance may be leased out without their knowledge or consent. The act in its present form fails to recognise the rights and interests of communities that have conserved these resources over a period of time.
COMMUNAL LAND FOREST PRODUCE ACT	The Communal Land Forest Produce Act restricts the use of forest products in communal areas by the local people to "own use". Although the act does not know what own use is, it has define however, in practice come to be interpreted by the relevant institutions as "domestic use" and to exclude commercial use. The right to utilise forest produce for "own use" applies only to a communal land inhabitant within the communal area of which he/she is an inhabitant.	This prevents local level initiatives for resource sharing or resource exchange. This makes the exchange of fruit between areas illegal, undermining an important drought management strategy within the communal areas.

Source: Mohamed-Katerere (1996)



TRADITIONAL RESOURCE MANAGEMENT RULES AND PRACTICES

Although customary law is formally excluded from natural resource management, in practice communities continue to apply locally evolved rules to resource management. In practice the distinction between customary and imposed systems is not clear. The use of customary laws, particularly those of a traditional origin, at the local level is determined by a number of factors. These include the extent of migration, immigration, western education, Christianity, the dependence local people have on the formal sector and also the economic viability and legality of certain local practices. Dependence on the formal sector may include agricultural extension services, farming implements such as seeds and fertilisers, marketing opportunities, employment, health, education and welfare. As communities are further incorporated into the formal sector, formal and state institutions replace the functions of traditional institutions. This has implications for the power, legitimacy and the level of respect local people accord traditional institutions. Therefore, the status and role of customary law varies from community to community. In some places, management by customary law has almost totally broken down whereas in others it continues to have an important role as illustrated in Box 4.2.

Box 4.2 Responses to land use pressures and commercial opportunities

"We are not allowed to cut down trees for firewood but only to collect dry wood. Because firewood is becoming scarce, we no longer respect the norm that trees like mumvira and nyamapuradza which are believed to cause trouble between husbands and wives should not be cut. We cut them with no ill effects at all." (Women's Group, Masoka Village)

"Likewise, we are not supposed to use fertiliser, supposedly it weakens the soil and the smell offends the *Mhondoro*. However, as we are not supposed to cultivate the streambanks and there is land pressure that forces people to move into less productive areas, fertiliser is used surreptitiously." (Masoka Village, composite views)

Source: ZERO, Mohamed-Katerere and Stewart

Since custom varies from community to community, the rules emanating from such cutoms also vary. Both primary and secondary research demonstrate a wide ambit of rules at customary law pertaining to:[7]

- protection of local weather observation sites;
- protection of sacred sites (including cultural sites, catchment areas, wells, tree groves, selected forest areas);
- definition of landuse categories;
- utilisation of wildlife, fruit and woodland resources; and
- protection of selected species of trees, plants and animals.

Principles of wider application may be deduced from locally applicable rules. Some of these principles are capable of inclu-

sion in a formal legal system. Many such principles demonstrate an appreciation for the very fine balance between environmental integrity and social well-being within customary practice.

Environment – spiritual connection

In many societies, conservation strategies are inter-woven with cultural beliefs. This is also true for many communities in Zimbabwe. In Shona thinking, as with other ethnic groups such as the Ndebele, people are not seen as separate from the environment.[8] There are not only rules that link abuse of resources to spiritual sanctions but also spiritual rules that control use and undermine abuse. Such rules take various forms. In many communities, people not only view themselves as part of nature but also perceive nature as being closely linked to the supernatural.[9] As a result, nature or its elements may be personified, serving as a constraint on resource use. The relationship between elements of nature and persons becomes one of civility, encompassing respect for the survival of nature.

In many communities, people not only view themselves as part of nature but also perceive nature as being closely linked to the supernatural. As a result, nature or its elements may be personified, serving as a constraint on resource use. The relationship between elements of nature and persons becomes one of civility, encompassing respect for the survival of nature.

This relationship between nature and people is captured in the words of Mike Hove, an elder from Bulawayo:

> "The human being is a part of a bigger system. Of course, that's what we are, we have never been anything else .… I'm not very different from the antelope that grazes in our forest. ... The Europeans (white Zimbabweans) think the human mission is to conquer nature. ... The African mission was opposite ... natural resources are there for us to use but there is a moral obligation to leave natural resources in their original condition .… (We) are blamed for having messed up natural resources. We didn't, Bulawayo was a mining district."[10]

Due to the spiritual connection or the moral obligation to conserve or wisely use one's environment, the violation of rules or customs general result in "evil falling upon you." Commonly sited sanctions for violating management rules include marital problems, being bitten by a snake, seeing a snake that results in one's death, being struck by lightning and one's children falling ill.[11]

Many sites and animal and plant species are protected for spiritual reasons. Such sites include places for rainmaking, burial, weather observation sites and water catchments. Spiritual sanctions may also apply for violating the rules of access. In some communities, illegal entry into such protected areas may result in people disappearing or seeing the dreaded snake.[12] Some plants and animals may have a protected status for spiritual reasons.

In some areas, general social upheaval and disaster are believed to be the result of violating environmental protection rules. Elders in Nkayi[13] attributed both ecological demise and social conflict to the settlement and agricultural production by younger people along Gwampa River. Similarly, the increasing intrusion and destruction of forestland in Nyaminyami District by settlers is believed to have angered the ancestors, resulting in greater conflict between people and animals.[14]

Box 4.3: Angering the gods

The Gwampa Valley was once a pristine area. The river brought not only water but also luscious grasslands, a forest and animals. The northern side of the river is densely populated. There was until 20 years ago no settlement along the banks of the river. In the middle of the last century, the state gazetted the forest as state land, reducing the community's holding. The river continued to flow and bring prosperity.

After the liberation struggle, some young people moved into the valley claiming this is what Zimbabweans fought for. According to the elders, Ndebele custom does not condone settlement near riverbanks. The result, they say, has been devastating drought in the area (1991-92), the loss of grass species, and the loss of wildlife.

In late 1990s, the Nkayi Rural District Council in collaboration with the Forestry Commission sought to establish a natural resource management project in the valley. Those who had settled in the valley were angered and violently sought to prevent the project from going ahead, often beating those who supported the project.

Today, the communities are divided between young and old. The violation of custom has, it is said, angered the gods and brought social upheaval, disintegration and natural disaster.

This example illustrates that in terms of local custom use shall not be at the expense of environmental destruction. Put differently, the economic value of a resource is not given precedence over its environmental function.

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Integrated environmental approaches

Given this relationship between environmental integrity and human well-being, customary resource management takes a holistic approach to resource management and does not give precedence to any particular value of the environment. Cultural aspects of the environment are regarded as significant as its economic productive capacity (see Box 4.3). The maintenance of harmony with the environment and its components is a fundamental precept of management.

The integrated approach to environmental management is evident from the diversity of rules pertaining to a single resource. Table 4.2 shows that woodland management incorporates various functions or objectives. These include the protection and use of resources so as to ensure subsistence needs are fulfilled and also that the spiritual, aesthetic, ecological and medicinal value is retained.

Rights of access

In many communities, access regimes were close linked to use and survival.[15] In many instances, a right to land was treated as a universal right and nobody was denied such right where land was available. This applied to other resources as well. Outsiders were not arbitrarily denied rights – in many communal areas,

evidence exists that chiefs have allocated land to new settlers from outside the district on the basis of need.[16] The rules of access are evolving in response to new problems. In some areas, this has been done in order to:

- create a human buffer between the original community and wild animals;[17]
- accumulate or gain access to wealth including wives and cattle;[18] or
- gain access to certain skills.[19]

Although some land was held communally for grazing, cultural and other purposes, individual land holdings were allocated to families provided they used it. However, this did not mean that rights in communities were undifferentiated. Social status as well as the individual's role in a society affected the quantity of the resource made available. Access, to certain resources, is in some instances restricted because of scarcity or its particular value to a group. Chiefs, for example, could only harvest certain animals, while other resources and areas were reserved for traditional healers. Similarly, status also influenced land allocation.[20] (See Box 4.4.)

Box 4.4: Differential/preferential rights to resources

In most communities, tenure, as a system of rights, is multi-layered. Rights include not only rights of use but also rights of passage. Women, children, traditional healers and spirit mediums are all holders of special rights:

- in many communities the harvesting of wild fruits was seen as the preserve of children. This played an important role in supplementing diets but also had implications for distribution and equity. However, given the commercialisation of wild fruits, competition for access to fruit has increased. Adults are increasingly involved in harvesting, undermining the nutritional needs of children;
- traditional healers may have exclusive rights to certain areas or species of medicinal importance; and
- women's rights have been over-simplified in legislation and interpreted restrictively by the courts. The formal legal system took the view that women were only entitled to land through men. This has virtually destroyed the traditional practice of *tseu* with serious implications for subsistence of families, particularly for the production of specialist food crops, traditionally the preserve of women. Without access to *tseu*, women are unable to generate extra income from specialist crops.

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A large amount of empirical evidence that suggests that land is held subject to the guardianship of ancestors or spirits exists in Zimbabwe.[21] The spirits specifically protect certain resources and the use of these is subject to consent by spirit mediums. The conflict over the Nharira Hills typifies this (see Box 4.5). Cultural rights are often at the centre of land disputes in Zimbabwe. In Chundu Village in Hurungwe District, the RDC seeks to evict "illegal settlers." The settlers dispute the legality, not simply in terms of the

Table 4.2: Traditional resource management rules and practices

FUNCTION	FEATURE OBSERVED	RULE	SANCTION
SPIRITUAL	Protected sacred mountain groves, treed areas and also water bodies	Prohibited entry into sacred mountain groves except on special occasions. Prohibition against harvesting wood or woodland products in these areas.	Getting lost if entered without appropriate purpose Seeing a snake, which leads to death by virtue of seeing it Being threatened by a lion.
AESTHETIC	Restricted entry to unusual geographical sites	NONE KNOWN	NONE KNOWN
SCIENTIFIC	Protected sites used to observe weather patterns Sites used for species identification	NONE KNOWN	NONE KNOWN
MEDICINAL	Protection of certain species of trees and plants of medicinal value	A prohibition against excessive or unauthorised plant collection	Children becoming ill Divorce Financial sanctions Sanctions in kind
ECOLOGICAL	Protected water bodies or catchment areas seen as spiritually important Protected woodlands and certain tree species Protection of certain species	A prohibition against felling trees around sacred pools or waters. Limited rights of entry into certain areas Rules of collection	Seeing a snake, which leads to death by virtue of seeing it Drying up of water sources
ENERGY MANAGEMENT	Protection of certain woodlands, tree species	A prohibition against cutting a variety of important tree species A prohibition against reaping wet wood Prohibition against cutting wood for poles in certain woodlands	Children becoming ill Divorce If all trees are removed around the homestead, lightening will strike. Financial sanctions Sanctions in kind
FOOD and DROUGHT MANAGEMENT	Protection of certain fruit trees Protection of fruit	A prohibition against cutting certain species of fruit tree Prohibition against collecting unripe fruit	Children becoming ill Divorce Financial sanctions Sanctions in kind
CULTURAL HISTORICAL	Protection of historical sites including: ● old burial grounds ● caves ● sites associated with battles; and ● ancient terraces and abandoned settlement Protection of folklore and myth through the: ● protection of sites where there were unusual occurrences ● protection of certain tree species; and ● protection of unusual geological sites	NONE KNOWN	NONE KNOWN

Derived from Clarke J (1994) and Lue-Mbizvo C & J.C. Mohamed

law, but also on the basis that the spirit Chimoyo led them to settle in the area.

Imposed land tenure systems have impacted negatively on these special rights. In addition, the land tenure system has forced communities to abandon traditional agricultural practices without giving them a viable alternative. (See Boxes 4.6 and 4.7.)

Box 4.5: Nharira Hills and the Nyamweda people

Nharira Hills are a granitic assemblage and forms the sacred shrine of the Nyamweda people. They have put a claim on the hills, an area which is part of Saffron Walden Farm, 24 km along the Bulawayo Road. This is land held under private land tenure system. The claim is based on their demand that Nharira Hills are the most sacred site for the Nyamweda people and that the area has been the burial site of their ruling ancestry for over 250 years. It is their right to have direct access to it because of the cultural heritage resident in the area. The claim is also based on the fact that for most of this century, the Nyamweda people have had access to the property to commune with their ancestors in the hills. This access is now being denied because, they claim, the current owner of Walden farm would like to use the hills for cultural tourism for people from outside of Zimbabwe.

The Nyamweda people have the current *svikiro* for their clan, Sekuru Mushore, and a few of his aides living at Nharira Hills. The *svikiro* is the custodian of the hills and the shrines, as is the case in many other places such as at Matonjeni. Many people of the clan subscribe to the rights of Sekuru Mushore to physically reside at the shrine. Some have gone as far as saying they are prepared to buy the farm so as to exercise this claim. Others have suggested that they should only purchase 25 ha on which the site is and allow the *svikiro* to be able to reside at the site with his aides and earn a living. In addition, others have suggested that should the government not be in position to help, then they would forcibly occupy the land.

Further problems have arisen because the Nyamweda people allege that the current owner has removed the remains of one of their ancestors. Therefore, they claim a defilement of the site, in addition to the illegal removal of the remains of a human being. They also claim that a number of the artifacts of the Nyamweda, some grain (finger millet) and some grain bins used long ago and also placed at the shrine have been removed. They want to know to where these have been moved. Additionally, the Nyamweda people have taken very strong offence to the painting of a red cross across parts of the hill. There is a conflict over the spiritual domain with the indigenous beliefs fighting the Christian. This is another significant factor in that Eurocentric and Afrocentric cultural heritages are at loggerheads on this issue.

The Nyamweda people sought protection of the site by attempting to have it declared a national monument under the National Museums and Monument Act. The Museums and the Ministry of Home Affairs have, thus far, rejected this on two substantive accounts:

- i They say that there are several physical archaeological remains at Nharira Hills, which are similar to other sites in many parts of the country. Partly as a result of this, the department of national museums and monuments have said Nharira Hills is not of such national significance as to warrant proclamation as a national monument.
- ii They say that they have also accepted that the site is of spiritual significance, but only of a local nature and confined to the Nyamweda people. The site has not hosted any major or national ceremonies. Therefore, it is not of national importance as are the sites at Njelele and Matonjeni.

Given this, the people are seeking to have the shrine proclaimed a district monument, citing precedence in Makate Hills in Mutoko, Tsindi Hills in Marondera and Domboshava Caves north of Harare.

In 1999, the hills area was declared a national monument under the National Monuments and Museums Act, representing an important victory for the recognition of local people's values.

Source: Updated by Mohamed-Katerere from ZERO, Mohamed-Katerere and Stewart (1996)

Box 4.6: Current tenure regimes undermine traditional values

The tenure regime instituted under colonialism and continuing today has forced local people to occupy marginal agricultural land. This fact, in conjunction with the growing population and the lack of access to financial and other resources, has meant that these farmers have been unable to establish a sustainable farming system based on their own value and knowledge systems. For example, land rotation has been disbanded given the shortage of land. At the same time, the system has failed to fully integrate them into the new economic system. People have in many cases been marginalised and have, therefore, been unable to emerge as efficient and productive farmers.

Derived from ZERO, Mohamed-Katerere and Stewart

Institutional arrangements

Most African political systems were hierarchical. Despite this, most of them were generally governed by consensus and broad participation – through group representation at the central level and village councils at the local level.[22]

In most instances, the responsibility for ensuring that there was compliance with local rules lay with the chief. However, he was always guided in the administration of justice by his advisors or *dare*. The chief also consulted with his wives prior to the meeting. Additionally, the decision-making systems nearly always included a special role for spirit mediums.

In many communities, strong systems of accountability existed. This was in part a manifestation of the ways in which rulers were elected and removed from office. Additionally, failure by a ruler to discharge the understood duties led to retribution, often in the shape of dispossession.[23] In some Shona communities, chieftainship moved between different lineages. Although only men once constituted the dare, decision-making systems at the local level have evolved in response to changing social and economic conditions. In particular, women's central economic role has been an important factor in their incorporation into decision-making

Box 4.7: Traditional soil and water management

"Agriculture before the introduction of the plough was based on livestock and shifting cultivation. Livestock provided food, clothing, transport and manure but not draught power, and had a major role in the social system. Finger millet was the main crop together with sorghum, pearl millet, groundnuts and other minor crops. Land was cleared from the bush with hand axes and cultivated for three to 10 years. A fallow period, which allowed soil fertility to be restored, followed and a new piece of land was cultivated after shifting. Wetlands were also cultivated and provided a major source of food during drought years. The collection of wild fruits and the hunting of wild animals contributed considerably to food security.

Traditional rules ensured the sustainable use of natural resources. The burning of trees without good reason was prohibited. Water sources were mostly sacred and, therefore, protected from pollution. The permission to cultivate a new piece of land came from the traditional authorities, who enforced these rules together with spirit mediums.

With low population density and limited tools, traditional soil management prevented severe soil degradation. For example, when bushland was cleared with hand axes and hoes, tree stumps were left in the field and ash spread on the field, while soil disturbance was minimised through shallow hoe cultivation. A considerable area of drylands was planted on hand-made ridges. Intercropping developed a dense soil cover so that erosion hazard after crop establishment was minimal, and the high percentage of ground cover reduced soil evaporation and, therefore, drought vulnerability. Further measures included mulching with weeds, or burnt crop residues, construction of soil bunds, stone bunds and ridges, and the management of wetlands for rice production in the wet season and maize on big ridges in the dry season.

Source: Hagmann and Murwira, 1996,98

structures. In some communities, meetings take place with the entire community, whereas in others parallel structures exist.

New kinds of institutions are emerging at the local level. In Mutambara, for example, the community established water management committees responsible for regulating the use of water sources in keeping with locally developed rules.[24] These same committees were also involved in monitoring usage and enforcing local sanctions. Some communities have set up environmental monitoring systems. In Gokwe, for example, Chief Njelele is actively involved in enforcing traditional rules and practices. He has been able to secure the support of his immediate subordinates and the community, who monitor adherence to the rules and enforce them.[25]

In many communities, multiple levels of consultation were required prior to the chief making a decision. This included consultation with wives, spirit mediums and the elders. Incorporation of traditional leaders is more complex than merely including them in the formal structures. The different roles and status of different leaders needs to be acknowledged. The *svikiro* in Masoka Village, for example, indicated "spirit mediums are not supposed to discuss issues of a controversial nature because when possessed by the *vadzimu* he may communicate something that is in contradiction to what he has said previously".[26] Whereas it is appropriate for him to observe at meetings, he is not part of the formal decision-making process, except as a conduit for the views of the ancestors.

> "One of our problems is the new wisdom. It does not accommodate the old wisdom. It does not accommodate the old wisdom of our people. There is a conflict of wisdoms. The new wisdom fought to gain its space. The old wisdom does not fight for its space. It withdrew and looked forward to the day when it will be sought once more."

INCORPORATION OF CUSTOMARY LAW INTO NATIONAL LAWS AND POLICIES

In Zimbabwe, despite the rhetorical commitment to recognising local values, very little progress has been made in incorporating them into law. The status of customary law in terms of environmental management is not significantly different from what existed at the dawn of independence 20 years ago. In the words of Chief Manwa, "One of our problems is the new wisdom. It does not accommodate the old wisdom. It does not accommodate the old wisdom of our people. There is a conflict of wisdoms. The new wisdom fought to gain its space. The old wisdom does not fight for its space. It withdrew and looked forward to the day when it will be sought once more."[27]

This failure, to recognise customary law and practice, needs to be understood in the general context of natural resource management legislation, which essentially sought to harness natural resources for the benefit of the colonialists. Additionally, institutional systems prevent the incorporation of customary practice.

Box 4.8: Factors against the incorporation of customary law and practice

- centralised management regimes;
- absence of rights of participation;
- poorly developed systems of accountability;
- land and nature resources tenure regimes;
- an educational and public system (that treats indigenous technical knowledge as backward);
- formally disempowered traditional leadership structures; and
- narrow conservationist philosophy.

The Traditional Leaders Act

The 1998 Traditional Leaders Act repeals the Chiefs and Headmen Act, and now provides for the appointment of chiefs and defines their functions and roles. The Traditional Leaders Act returns the chiefs to a status akin to that during colonial times. Once again, the chiefs are treated as functionaries of local government.[28] It is the role of chiefs to:

- ensure compliance with the law;
- ensure that communal land is allocated in accordance with the Communal Land Act;
- ensure compliance with natural resource management law and prevent un-authorised settlement;
- oversee the collection of levies, taxes, rates and charges by village heads;
- protect public property;
- provide information to the rural district council about epidemics, natural and other disasters; and about persons who intend to permanently leave his/her area; and
- act as record keepers.

Additionally, chiefs and other traditional leaders have a role in adjudication and dispute resolution as well as a greater role in local governance.

Under the Traditional Leaders Act, chiefs are appointed to preside over their communities. This act repeats the general provision of the repealed act – that a chief's is role to perform the functions pertaining to the office of chief as the traditional head of the community.[29] It does not, however, explain what the traditional role is. Therefore, this needs to be interpreted in relation to this act as well as other acts. Given that the management of natural resources has been left in the hands of government agencies, it is reasonable to presume that the role of chiefs has not changed in respect of natural resource management.

The act makes an important step forward in that it now recognises that chiefs have, historically been involved in land allocation. It does not given them powers of land allocation but the procedure

has been amended to include chiefs. The new section 8(2)(a1) provides that in allocating land, RDCs must:

> "consult and cooperate with the chief appointed to preside over the community concerned in terms of the Traditional Leaders Act."

This, however, is less significant because it simply formalises the existing procedural requirement established by councils, requiring that chiefs approve new settlers (see Box 4.9). Although the right to allocate land in the communal areas lies with the RDCs in terms of the Communal Land Act, chapter 20:04, customary law must be taken into account in defined circumstances when allocating and defining rules for the occupation and use of land.

Box 4.9: Land allocation practice prior to the Traditional Leaders Act

The RDCs established land allocation practice, prior to the 1998 Traditional Leaders Act, involved the traditional leadership. The new settler had to first obtain the consent of a kraalhead, a headman and a chief before formally approaching council. In some areas, the role of the spirit medium was also informally incorporated into the land allocation processes. It is his/her role to vet the claims from the point of cultural acceptability. This practice resulted in some confusion at the local level as people perceived this as a function of the chiefs and did not appreciate the role of the council. The confusion was exacerbated by the requirement that the consent or recommendation of the councillor be obtained before council formally considered the application.

Source: Mohamed-Katerere and Ncube (field research records)

Another achievement of the act is in the area of local governance. A new council of chiefs has been created. In terms of Section 39, this council can make representation to the minister on behalf of inhabitants of their area. Additionally, a system of local level assemblies has been created. These are village and ward assemblies. The village assembly is composed of all villagers over 18 years. The ward assembly includes headmen, village heads and the ward councillor. This has been designed to establish a participatory process at the local level. It is uncertain how this act will work in practice, as systems have not yet been established for its implementation. It could potentially create new opportunities for local participation and therefore, the recognition of local cultural and social values.

In Section 15, the act purports to give the village assembly some environmental responsibility. Sub-section (1)(c) provides that these new village assemblies have the function to:

> "consider and resolve all issues relating to land, water and other natural resources … and to make appropriate recommendations in accordance with any approved layout or development plan."

Given that the act has not resulted in the amendment or repeal of legislation dealing with resource tenure, this can only be interpreted as a management and mediation role within the framework created by national legislation. In the end, the law sounds good but seems to achieve little.

The Rural District Councils Act

RDCs have some important environmental functions. They could potentially promote the use of customary law and local values in natural resource management.

As the primary management authority, councils are responsible for controlling and defining use. They could use their right to make bylaws to establish participatory systems and to record customary rules that reflect current social and cultural values. Such rules could, for example, include the protection of animal and plant species that are of cultural significance, economic importance or are of other value to the community.

The RDCs could, in terms of their authority, promote community management in wildlife and forest resources. Such community management should to take the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) (see Box 4.11) a step forward, and ensure communities are effectively involved in management rather than simply handing over that responsibility to commercial enterprise.

Box 4.10: Environmental functions of RDCs

- harvesting and management of trees;
- regulation of pollution;
- provision and control of water resources (as is consistent with the Water Act);
- cultivation and land clearance;
- land acquisition and management;
- wildlife management (if appointed as appropriate authority); and
- forest/woodland management, including issuance of licenses (subject to the Forest Act and Communal Land Forest Produce Act).

Box 4.11: CAMPFIRE

The Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) was initially adopted in response to a legitimacy crisis of the Department of National Parks and Wildlife Management, which had come to be seen as little more than a police unit given their control and command strategies (personal communication, Maveneke, CAMPFIRE Association, 1996). The need for this devolution was based primarily on the need to establish management systems that promoted natural resource sustainability rather than from a concern for governance systems, human sustainability or the inherent rights of indigenous people to utilise a resource. The focus of this programme has been wildlife management. The stated objectives of the programme are to:

- obtain the voluntary participation of communities in a flexible programme, which incorporates long-term solutions to resource problems;
- introduce a system of group ownership with defined rights of access to natural resources for communities resident in the target areas;
- provide the appropriate institutions under which resources can be legitimately managed and exploited by resident communities for their own direct benefit; and
- provide technical and financial assistance to communities which join the programme to enable them to realize these objectives.

Sources: Martin, 1986 in Murphree, 1990

The Water Act

The new Water Act provides for the establishment of the first locally based management institutions that are recognised in legislation – the catchment councils. The right to allocate permits to use water is vested in these councils. This is a departure from the previous system where the administrative court allocated water rights. Although the catchment councils could potentially be multi-stakeholder bodies, there are no legislative provisions that guarantee this. The catchment council is appointed and dismissed at the instance of the minister. Section 23 of the act stipulates the factors to be taken into account when allocating permits. These include equitable distribution and the likely economic and social benefits of the proposed use. However, there is no direct obligation to consider local practices or knowledge, although some provision is made to protect communal people's interests. The provisions of the new act create opportunities for recognising social and cultural values in water allocation and management, however it does not guarantee it.

FUTURE DIRECTIONS

Law should be developed in response to existing realities as it is essentially a strategy or tool to address an existing problem. Environmental management practice in Zimbabwe shows that the current status of customary law is unsatisfactory, particularly as it leads to crisis and conflict at a number of levels. These include managerial crises and a conflict over values and resources. Communities and individuals are effectively denied adequate opportunity to make choices about resource management and to derive full benefit from local resources. This is manifested in the absence of good governance practices at the local level as well as a failure of the management regime to meet certain key objectives, including conservation, human sustainability and development.

The recognition of customary law may provide opportunities to lessen the conflict and to create management systems that are supported locally. Specifically, the further incorporation of customary law may be useful in conflict resolution related to:

- contested rights of use/ownership;
- managerial rules; and
- exclusion and alienation.

It is important that any attempt to recognise or incorporate customary law into the formal systems of environmental management is based on a respect for the existing and different value systems that exist in Zimbabwe and not just a desire to resolve conflict in the managerial sphere. Customary law is potentially a valuable component of environmental management in so far

as it represents the values, concerns and priorities of a given community. Nevertheless, it must be acknowledge that there may well be areas where local people do not wish customary law to apply. Therefore, a degree of convergence between formal and non-formal institutions may be required. "Convergence begins when both informal and indigenous and formal institutions recognise the need for some level of sustained interaction."[30] As a consequence "when indigenous institutions renovate themselves, they build themselves anew to meet the demands and challenges of a changing outside environment in a process that is internally initiated."[31]

Defining a role for customary law and practice requires effective participation. Meaningful recognition of customary law requires the creation of partnership between state agencies and communities. Partnership requires that the state or its management agencies accept the community as a legitimate manager and planner and not as a subject of their rules. This implies respect and acknowledgement of difference. Valuing different knowledge and livelihood systems, including the recognition of the value of indigenous knowledge systems and their potential in environmental management, is implicit in such partnership. Similarly, partners must have equal authority to forge an agreement and the right to withdraw from an agreement.

Valuing different knowledge and livelihood systems, including the recognition of the value of indigenous knowledge systems and their potential in environmental management, is implicit in such partnership. Similarly, partners have equal authority to forge an agreement and the right to withdraw from an agreement.

In determining solutions, it is critical to take account of the *de facto* status of customary law, the nature of customary law and the problem to be solved. International law may also be an important consideration as it determines certain human rights standards in relation to environmental law. For example, the Convention on Biological Diversity recognises that local communities should be directly involved in natural resource management and that their local value and management systems should be recognised. (See Box 4.12.)

Bylaws as a method for incorporating local values

At the purely legal level, the issue of how customary law can be recognised without being distorted by the formal legal system presents serious challenges.[32] Certain characteristics of customary law must be understood and provided for:

- custom is constantly evolving in response to new circumstances; and
- custom is peculiar to a given locality and thus rules are not necessarily nationally applicable.

Additionally there is the problem that local values, practices or priorities may in some instances run counter to national ones. The really challenge is how to give rights and recognition at

Box 4.12: Indigenous peoples' rights in selected MEAs

Chapter 26 of Agenda 21, recognising the role of indigenous people and their communities, calls for:

> "Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies...."

Article 8j of the Convention on Biological Diversity, requires parties to:

> "Subject to their national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of holders of such knowledge, innovations and practices, and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices."

Principle 22 of the Rio Declaration asserts:

> "Indigenous people and their communities and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interest, and enable their effective participation in the achievement of sustainable development."

Principle 5(a) of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests states:

> "National forest policies should recognise and duly support the identity, culture and the rights of indigenous peoples, their communities and other communities and forest dwellers."

The International Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification in Article 16 (g) parties agree to:

> "... Exchange information on local and traditional knowledge, ensuring adequate protection for it and providing appropriate return from the benefits derived from it, on an equitable basis and on mutually agreed terms, to the local populations concerned."

And in Article 17(c) to:

> "... protect, integrate, enhance and validate traditional knowledge, know-how practices, ensuring ... that the owners of that knowledge will directly benefit on an equitable basis and mutually agreed terms."

the local level so as to support and not undermine national objectives or values.

Secondary legislation, such as bylaws, can constitute a useful mechanism to establish local systems of governance that are based on partnership and consultation (compare with Box 4.13). Locally applicable bylaws could include rules as well as principles. More importantly, local bylaws should set out processes for making environmental decisions and clearly define the rights of communities.

The Communal Land (Model) (Land Use and Conservation) Bylaws, 166/1985 and the Communal Land (Model) (Land Use and Conservation) (Amendment) Bylaws (No. 1) 295/1985) provide for local level natural resource management. These bylaws:[33]

- tend to be based on command-and-control systems;
- do not include communities or community institutions in developing management plans;

Box 4.13: Content of customs and norms to be applied

A point of concern is how the relevant rules derived from local customs and norms are to be determined. Although the notion of a comprehensive collection of customary laws that might be used as the basis for model bylaws is a seductive concept, it is inherently flawed as this process would rob the customs and practices of their flexibility. Rather, any legislative intervention, be it at the level of enabling legislation, statutory instruments or bylaws, should contain broad directive management principles and minimum environmental management standards for an area. The actual daily managerial practices and how compliance is to be effected should be in the hands of the community itself.

Whether that community chooses to rely on IKS and customary frameworks for enforcement and adjudication of issues of environmental management is a question of local democratic choice.

The field research confirms the assumption that in the area of the environment as in other areas of law such as family law, customary law transcends detailed rules and that determinations are more the product of considerations of general issues of policy and principle as worked out by the community dynamics. However the rules, as captured are not imbedded in the customary frameworks as the basis of determinations. What are imbedded are the underlying principles that guide the individual determinations. For example, it is evident that there are different processes of achieving what might be perceived as a broad general objective, these being largely responsive to and dependent on local conditions. Therefore, if attention is to be paid to indigenous knowledge systems, their efficacy, and the formalised local methods of enforcement, the trap of collecting the end product rules and regarding these as somehow representative of a general customary law or practice is avoided. (WLSA, 1994)

There is no need for any attempt to be made to collect all the relevant customs and norms that relate to land and the environment throughout the country and transform them into a coherent body of "law". What is required is for the detailed rule level of the processes of customary adjudication and environmental management to be transcended in favour of the identification of broad general managerial and enforcement procedures.

Source: ZERO, Mohamed-Katerere and Stewart, 1996

- do not create adequate consultative and negotiating mechanisms;
- were not drafted in consultation with communities or their institutions;
- do not recognise traditional systems of management or indigenous knowledge;
- do not take into account the prevailing social and economic circumstances;
- do not create incentives and benefits; and
- do not necessarily reflect the interests, concerns or priorities of the local community.

Bylaws that are capable of recognising local values and priorities, including custom must address these shortcomings in the existing system. Bylaws should:[34]

- recognise the diversity of actors. This requires establishing or understanding their respective roles, benefits and rights, and procedures and mechanisms for mediating between conflict or different interests and negotiating collective decisions;
- recognise the diversity of management practice, including traditional management rules and indigenous knowledge;

- establish an agreed set of management priorities and objectives (conservation, use, economic development);
- define management rules that are based on the local reality;
- be participatory
  - the process for determining natural resource management plans is made more participatory, it is probable that the plan developed would have a higher degree of acceptance; and
  - the contents of a management plan and the rules of management are agreed upon, then there is likely to be greater levels of compliance and self-monitoring as well as support for the legislation;
- establish transparent decision-making processes;
- establish systems and structures of accountability;
- ensure that decision makers and managers have access to all relevant information;
- establish a monitoring and evaluation system;
- allow for adaptive management; and
- provide for enforcement.

Governance and management systems

Environmental legislation adopted in Zimbabwe sought to replace local institutions and management processes. However, in many instances these new institutions have been unable to create and implement viable rule systems. Nevertheless, it has had a severe impact on or undermined local institutions and rule systems. Local values and priorities that had formed the basis of resource management are treated as outside of the management arena. As a result, rules tend to be formulated in culturally inappropriate ways and often trivialise local values or neglect local priorities. An example of this is the attempt by rural district councils to impose restrictions on livestock ownership, which were effectively unenforceable.[35] Traditional practice was not only undermined by the law but it also imposed new farming practices that failed to take account of the ecological reality. (See Box 4.14)

Box 4.14: Impact of colonial agricultural extension

The introduction of the plough and maize as a food crop came with the white settlers at the end of the last century and became adopted on a large-scale by indigenous farmers between 1920-40. Improved weed control allowed an expansion of the cultivated areas. Attractive maize producer prices were an incentive for the expansion of maize production, triggering the market produce of maize.

With the introduction of the plough and maize, agricultural extension started in the 1930s. A package of cropping practices was developed by an American missionary and is still promoted today. This included the utilisation of manure, crop rotation (cereal crops with legumes), row planting and monocropping, autumn and pre-plant ploughing, as well as the uprooting of trees in the field to provide easy tillage and straight planting lines.

The expansion of the area under cultivation and increasing population pressure resulted in longer cultivating periods. The shifting of fields was reduced and later abandoned completely. The recovery of fields during the bush fallow took longer after the complete clearance of woody vegetation. Two-thirds of the respondents noted an increase in soil erosion after the introduction of the plough. Rill and gully formation particularly increased.

Source: Hagmann and Murwira (1996) 99

Many aspects of good governance need to be addressed if local values are to be fully incorporated. Good governance requires:[36]

- recognition of the right of individuals and groups who are affected by any act or decision to challenge the decision-making processes used;
- obligation of government agencies to give written reasons for decisions and full disclosure of information;
- promotion of efficient, accessible, accountable and appropriate administrative structures at all levels;
- recognition of a right to prior informed consent;
- communities also must have the right to be consulted about any environmental changes or initiatives that are likely to take place in their proximity or which may affect their enjoyment of the local environment;
- an obligation on government agencies to make timeous decisions; and
- establishment of dispute resolution systems, including the office of an environmental ombudsman.

Although the state has an obligation, both in terms of national and international law to ensure conservation, the devolution of management responsibilities is necessary. Both soft law and international conventions also increasingly require such devolution.[37] Real rights pertaining to management, including rights of acquisition and alienation, need to be transferred to end-users. This requires redefining the role of the national government in resource management. The state should be trustee of natural resources and primarily responsible for ensuring the sustainable use and equitable distribution of resources. The concept of trusteeship implies responsibility and accountability to the citizens and not an exclusive right to determine management regimes. The responsibility to monitor and evaluate actual use would lie with the state. Other institutions, including state agencies, local government, communities and community-based organisations should assume managerial responsibility depending on environmental, social and other factors.

> The concept of trusteeship implies responsibility and accountability to the citizens and not an exclusive right to determine management regimes. The responsibility to monitor and evaluate actual use would lie with the state.

Appropriate institutional systems need to be created at the local level. This requires a system that guarantees participation of individuals and groups, and is able to accommodate the diversity of interests within a community. Participation implies not only the right to be involved in decision-making but also the right to have one's values and priorities reflected in the management system.[38] Participation needs to go beyond consultation – it requires reconciliation of formal and informal sytems.[39] This requires that both local and national rule systems be redressed. Customary values need to be reflected at the national as well as at the local level.

Box 4.15: Localisation does not guarantee participation

At the local level, CAMPFIRE is managed by local youths who get selected as game guards. The problem is that these youths have now become poisonous, they do not allow us to even catch a bird (mainly guinea fowl) or to fish in our rivers .... This is very disappointing. (Women, Masoka Village)

Even if you are prepared to pay to hunt the animal, you are not allowed. Instead, it is suggested that arrangements be made for an animal to be provided for festivals such as Christmas or Independence. Why should we not hunt? These rules do not encourage us to preserve the animals – they do not benefit us. Our question is: Who owns these animals – us or CAMPFIRE? (Men's Group, Masoka Village)

Source: ZERO, Mohamed-Katerere and Stewart (1996)

Participation requires transparency in the decision-making processes and accountability to stakeholders. Failure to consult at an adequate level and with sufficient transparency leads to resentment that there may be other more powerful stakeholders whose interests are paramount to those of weaker ones. Transparency and accountability require the obligation to give reasons for decisions and the disclosure of all relevant information.

Real and meaningful access to information requires effective communication of accessible information. It is also essential that the vernacular languages be used and that all sectors of the community are involved, especially women. The right of freedom of information is critical for good governance and should be recognised in law either through statute or constitutional provisions. Additionally it should be recognised that traditional modes of communication may be highly effective, in that they are culturally congruent and highly legitimate.[40]

Although the Traditional Leaders Act attempts to devolve governance, it does not make provision for the inclusion of women or other specific interest groups. Further, it does not tail participation to local conditions and values. Instead, it simply tries to fit these structures into the formal system – and consequently fails to create the basis for reconciliation of the formal and informal sytems. Similarly, the Rural District Council Act needs to be amended to create more participatory processes. This can be achieved by creating better systems of accountability and transparency.

Resource claims

Local communities and individuals make claims to title, rights to use and rights of management. These claims are primarily made on the basis of historical rights but are also a result of investment in the resource through time and labour, proximity and need.[41] A key expression of this is the squatting on state and private land, and the unauthorised harvesting of resources on all land categories. State policy on settlement that is inconsistent with legis-

lation is treated as unlawful. In *Makanyanga & Others v Forestry Commission* (SC 1/91), the Supreme Court, held that historical claims could not form the basis of a legal claim. (See Box 4.16.) Although the courts have rejected the legality of historical claims, there is clearly a strong social and cultural affinity to land that cannot simply be wiped away by the law. The issue of historical rights may also be directly linked to customary systems of land allocation.

In customary law, there were often rules relating to priority of access. Some of these continue to be seen as important today. Therefore, it maybe appropriate to create systems of priority. This would protect communities from outsiders as well as some vulnerable groups within communities. Priority rights of communities can be incorporated into national law. Box 4.17 suggests possible criteria for differentiation.

Box 4.16: Fighting for forests in Nyanguyi

The Forestry Commission obtained an eviction order from the High Court evicting settlers who had settled in contravention of the Forest Act. The community appealed against the eviction order to the Supreme Court. That case, *Makanyanga & Others v Forestry Commission* (SC 1/91) became the authoritative legal statement on traditional resource rights. The community appealed against the order on several grounds, including the fact that the land from which they were being evicted was their original home to which they had historical title. Further, they claimed that the forestry Commission title was unlawful as it had gained control illegitimately and without consultation during the colonial era. It was undisputed that the community had resided in this area prior to it being declared a forest. Notwithstanding this, the Supreme Court found that title vested lawfully in the Forestry Commission by virtue of the fact that it had acquired such title continuos through an act of Parliament. It did not consider the nature of the colonial state's authority in reaching its decision. The issue of prescription did not arise, as occupation had not been for a period of 30 years.

Source: Katerere and Mohamed-Katerere, 1996

Box 4.17: Proposed criteria to distinguish between stakeholders

- existing rights to land or natural resources;
- continuity of relationship;
- unique knowledge and skills for the management of the resources at stake;
- losses and damage occurred in the management process;
- historical and cultural relationship with the resource at stake;
- degree of economic and social reliance on such resources;
- degree of effort and interest in management;
- equity in access to the resources and the distribution of benefits from their use;
- compatibility of the interests and activities of the stakeholder with national conservation and development policies; and
- present or potential impact of the activities of the stakeholder on the resource base.

Source: Borrini-Feyerabend, 1996

It is essential that the national system recognise traditionally sacred areas:[42] Wherever sacred sites are found, it is clear that they must be protected because they are the repositories of people's cultures and local people attribute great significance to them. Protection needs to go beyond that created in the National Museums Monuments Act, which essentially preserves them for historical purposes. The act does not acknowledge the local

social and cultural values attached to them. This is also important as for many people at the local level, knowledge and traditional resources are central to the maintenance of their identity.[43]

Box 4.18: Fundamental principles and rights pertaining to the environment

General rights and principles

1 Public trusteeship
2 Rights of producer communities
3 Principle of cooperation
4 Principles of prevention and precaution
5 Rights to environmental information
6 Citizens' rights and duties
7 Rights of participation
8 Right to Just administrative action
9 Rights of standing
10 Rights to investigation

Management principles

1 Conservation and sustainable Use
2 Adaptive management
3 Integrated and cooperative management
4 Prior informed consent

Constitutional rights

Ideally, creating a framework for the recognition of social values, including customary law should not be undertaken in a piecemeal fashion. The entire resource management framework needs to be re-thought and general principles for the management of the environment should be established.

These key environmental principles should be provided for in a legal instrument that is superior to other instruments, for example, the Constitution. Constitutional rights to the environment will need to go beyond the recognition that "everyone has a right to an environment that is not harmful to health or well-being and to have that environment protected for the benefit of present and future generations."[44]

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CHAPTER 5

ENVIRONMENTAL RIGHTS AND JUSTICE

By Welshman Ncube, Jennifer Mohamed-Katerere and Munyaradzi Chenje

The recognition of environmental rights and the creation of fairness are critical if Zimbabwe is to develop sustainable environmental management systems and development. Many contemporary approaches view an environmental right as premised on a basic right of survival as articulated through the recognition of the fundamental values of the sanctity of life, the inviolability and integrity of persons and the protection of life. The need for environmental rights may be addressed from both national and international perspectives. At both levels, the relationship between different kinds of interests and values needs consideration. In particular, the potential conflict between private and public interests needs to be taken into account. At a national level, the need to recognise environmental rights stems not only from the various international commitments Zimbabwe has made but also more importantly, from its specific domestic needs and priorities. Sustainable development has been identified as Zimbabwe's primary environmental policy objective.

Box 5.1: Legal rights are not the same as moral rights

According to Stone (1996) a legal right has four components:

1 That some public authority is prepared to give some amount of review to actions that are inconsistent with that "right",
2 That the thing that holds the right must "be able to institute legal action at its behest;"
3 That in granting relief "the court must take account of injury" to it;
4 That "the relief must run to the benefit of it."

Source: Alder & Wilkinson, 1999,354

A sustainable development strategy must be concerned with:

- the alleviation of poverty;
- creation of livelihood opportunity and food security;
- the creation of inter- and intra-generational equity;
- economic growth, promoting investment in the rural areas;
- integrated/holistic (environmental and human) management;
- the efficient use of resources in such a manner so as to obtain maximum value from them;
- balancing competing interests or values at various levels, including the global-national and the national-local;
- the establishment of a good governance system that is capable of supporting sustainable environmental management. This necessarily includes addressing the issues of public participation, a right to information,

Box 5.2: Making links

In the Chimanimani district, increasing numbers of people opt to cultivate steep slopes rather than starve. This choice has serious implications for watershed management, woodland depletion and soil conservation. As Chief Mutambara`s representative said, " how can we talk about environment when we have no land". This statement, in effect, identifies two critical issues – the lack of access to resources and the absence of rights of management – that are at the crux of the issue of environmental rights and fairness. Further interviews in Chimanimani made the point that it was meaningless to address the issue of environment unless the issue of human sustainability was resolved and they linked this to the issue of justice as it pertains to the distribution of resources. These two factors have critical implications for human sustainability.

Source: field research of the authors, 1996

co-management, institutional efficiency; mediation, empowerment and capacity building; and

- systems and institutions for the realisation of defined environmental rights and duties.

Importantly, the recognition of environmental rights could lessen the burden on an already over-stretched state and give individuals greater responsibility for and interest in protecting the environment. It has become evident that the state, for financial and capacity reasons, is unable to adequately protect the environmental interests of individuals and communities. In this context, it is imperative that greater opportunities be given to individuals and communities for the enforcement of their rights and interests.

Recognising environmental rights is important given that the authority of administrative bodies has been continually extended and their portfolio now includes development activities that may affect both public and private interests. It may serve as a check on administrative decision-making and ensure that administrative institutions fulfil their mandate to act in the public interest. Further, a decision-making process that recognises environmental rights provides a mechanism for determining what constitutes the public interest.

ENVIRONMENTAL RIGHTS AND HISTORICAL WRONGS AND INJUSTICES

In discussing the issue of environmental rights in Zimbabwe, it is not only important to highlight the issue of fairness but also that of justice. Even though environmental rights and justice today must be considered within the context of current Zimbabwean laws and regulations, such rights existed or were perceived to exist before the creation of the nation state. The laws introduced by the colonialists were not a reflection of the people's customs – they represented an imposition of foreign customs and were, therefore, not supported by Africans. The colonial era holds important lessons for how these rights and issues need to be addressed in contemporary Zimbabwe.

Pre-colonial era

The people of present-day Zimbabwe, especially the Shona - the largest group in Zimbabwe - first entered this region in the later part of the Iron Age, about AD 1000.[1] They were involved in activities such as hunting, agriculture, mining and trade. Both

men and women had access to resources such as land, wildlife and minerals, trading in products such as ivory and gold with Arab and Portuguese traders. The writings by explorers, particularly the Portuguese in the 16th century confirm this. Portuguese explorer Antonio Fernandes wrote:[2] "Passing through a village near the source of the Pungwe river in Zimbabwe ivory was plentiful."

Fernandes, the "first known European to find the Monomatapa" and to enter Zimbabwe in the 16th century,[3] documented the activities of the people about three centuries before British settlers arrived in the country in pursuit of raw materials to satisfy the demands of the Industrial Revolution in Europe. "From these accounts it is clear that the natives extracted gold from reef, rubble and alluvial deposits. The men, women and children joined in the work, for which the permission of the chief had to be obtained. For this he would usually have taken half the gold recovered."

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Sustainable use

This utilisation of resources was designed in a sustainable manner. There were mechanisms to ensure sound exploitation of the mineral resource. Checks and balances were in place to guard against overexploitation. Mining was carried out during the dry winter months when there were no rains for two reasons: it would have been almost impossible to work the mines with water flowing in and leading to soil erosion; and the rain could also have caused siltation and polluted some of the rivers on which the people depended. The rainy season also signalled the beginning of the agricultural season, marking the resumption of another critical activity – farming. The seasons determined the people's activities as well as access to resources during certain periods of the year. People also hunted at specific periods of the year. This in itself served as a mechanism for preventing overexploitation.

Traditional societies in Zimbabwe practised and enforced wildlife conservation through timely hunting of animals and birds, avoiding indiscriminate killing, and fostering selectivity. Societies believed wanton killing was punishable by the spirits and, as a result, control mechanisms are found in traditional taboos, totems and customs. In some tribes, the custom of totems forbids people to eat certain animals – scavengers such as vultures and hyenas. Taboos forbade the killing of young animals and females in gestation. Hunting in sacred places was also prohibited. The killing of rare species such as python and the pangolin could only be done with permission from the chief. In addition, only the chief could hunt the *Kori* bustard, a rare bird.

Trees were also protected through traditional taboos and customs. Certain trees were not cut because of their cultural importance, for example, the *parinari* tree under which ceremonies were held. Fruit trees were also protected. Debarking was done only on one side and ring barking was prohibited. Young people did not question the sacredness of places as defiance led to ordeals such as: [4]

- getting lost if one ventured into a scared place alone;
- seeing a snake, the mere sight of which led to death; and
- seeing a lion below a protected tree such as a fruit tree or one used for rain-making ceremonies, which one had climbed.

Colonialists acknowledge that the people of Zimbabwe lived in harmony with nature, doing nothing to disturb the balance between people and their environment. They were not only close to but part of nature, acknowledging that their very existence depended on the earth, which was viewed as a living organism. As observed by Merchant,[5] the belief that the earth was a living and nurturing mother served as a cultural constraint, restricting people from overexploiting the resources which were "freely" available for their own sustenance.

> ...the belief that the earth was a living and nurturing mother served as a cultural constraint, restricting people from over-exploiting the resources which were "freely" available for their own sustenance.

Chiefs played an important role in safeguarding their people's access and rights to resources. All land was held in communal tenure, and the headman or sub-chief was responsible for allocating each family grazing and arable land. Each community, therefore, had full property rights, making decisions on how land could be used. Writing about the people's customs and beliefs in 1949, Morkel said each family had "absolute right to a garden" provided they used it. Even though resources were held in community, there was a commitment to the protection of common resources, because communities had real rights to manage the resource and benefited from it. With the intrinsic value of resources lost, people overexploit resources for survival and individual gain.

Colonial era

The advent of colonialism in the last decade of the 19th century laid the foundation for the usurpation of the people's rights to their environment. Colonialism promoted a rapid ecological transformation in southern Africa as the new settlers cleared land for settlements, mining, agriculture, and due to unrestricted hunting. The indigenous people were displaced into marginal and unproductive areas. Such displacements broke the people's strong ties to nature.

As colonialism entrenched itself, the people also lost their most fundamental right – freedom. With that gone, the people lost all

other rights and access to resources. The pillage of large animals, clearing of more land for agriculture, uncontrolled prospecting for minerals raised concerns about environmental degradation, leading to the introduction of various measures to curb over-utilisation of resources.

The colonial state was highly interventionist. It consolidated the land alienation through legislation, market interventions and financial support to the white agricultural sector. By Independence, the colonial government had not only systematically removed all title of the local people to natural resources, seriously undermined their resource management practices and systems, including forest management systems, forced the peasantry onto the most marginal agricultural land and also partially co-opted the traditional leadership institutions. This situation ensured that the indigenous people were unable to participate competitively and efficiently within the economic system.

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The decimation of wildlife was largely due to the indiscriminate use of guns by settlers. Africans were generally not allowed to own guns by law, and could not have contributed to the mindless slaughter, which led to the introduction of protectionist regulations less than a decade after British colonialists settled in present day Zimbabwe. The clearance of large tracts of land for agriculture, mining and settlements such as Harare (then Salisbury), Masvingo (then Fort Victoria) and mining towns destroyed the habitats on which wildlife depended and also contributed to the reduction of wildlife populations.

The 1930 Land Apportionment Act not only partitioned all the land into European areas, African reserves and other areas but was a form of social engineering designed to keep the African people and the settlers apart except in a master-servant relationship. It was also designed to curtail their access to different resources. The act was introduced only four decades after the first white settlers moved into Zimbabwe, entrenching the dispossession of the indigenous people and expunging any claim to natural resources they had. While the act allowed settlers to hold or to be compensated for land in the so-called native areas created by the law, it also categorically prohibited Africans to "hold or occupy land in the European area". The colonialists and their heirs were also given powers to exclude others interested in the resources from exploiting them.[6] Africans were not allowed to exploit resources without approval from the colonialists.

The seizure of resources from the people of Zimbabwe by the colonialists was carried out under the so-called Lobengula's Concession of October 1888, which gave Charles Rudd and his colleagues sweeping rights over the entire country. In exchange of 100 pounds a month and 1,000 rifles, the concession, signed on October 30, gave the colonialists, their heirs and representatives, exclusive rights over all metals and minerals, and full powers to collect, and enjoy the profits and revenues from the metals and minerals.[7]

About a year later, the British South Africa Company (BSAC) was incorporated with sweeping powers to mine, develop industries and make concessions of mining, forestry or other rights. It also had the power to improve, develop, clear, plant, irrigate and cultivate any lands it owned. The BSAC was also given the power to "grant lands for terms of a year or in perpetuity, and either absolutely or by way of mortgage or otherwise". This provision was not designed to benefit the Africans but the settlers.

The dispossession of the indigenous people became more systematic following the 1896-98 *Chimurenga* (first war of liberation) against colonialism during which the people were not only defeated but had their lands seized, and their rights and access to resources circumscribed further.

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The impact of such sweeping powers was that the indigenous people were totally alienated, losing access to the resources they had always enjoyed. About a decade following the first *Chimurenga* war, in 1907, some 12,000 colonial settlers allocated themselves 32 million ha of land and parcelled off a meagre 8.4 million ha to a population of indigenous Zimbabweans about 60 times larger.[8] Africans then numbered about 700,000.

The BSAC also enjoyed unfettered rights to introduce regulations controlling the hunting of elephants and other game. Under section 21 of its charter, the company had powers to levy the hunting of "elephants or other game as they may see fit" in order to preserve them. Africans could only enjoy hunting rights provided these had been provided for under treaty between "native chiefs or tribes".[9] The 1893 Game Law Amendment Ordinance banned people from selling, bartering or hawking game without a licence. They required a licence to kill, catch, capture, pursue, hunt or shoot game, and each licence cost three pounds,[10] an amount far out of reach for the majority of the people at that time. This effectively meant that the local people could no longer depend on game meat for their protein needs. Failure to comply with the regulations often resulted in a stiff penalty or imprisonment.

Game management

The 1899 Game Preservation Ordinance further tightened the utilisation of game and increased the cost of a licence to hunt to 25 pounds. Even with a licence, people could not "hunt, pursue, capture, or kill" animals such as the elephant, hippopotamus, eland, kudu, blesbok, bontebok, hartebeest, rhinoceros, roan and sable, antelope, tsessebe, sitatunga, giraffe, ostrich, and waterbuck without written permission from the administrator.[11]

Perhaps the most notorious but least known law after the Land Apportionment Act, is the 1929 Game and Fish Preservation Act, which was enacted about a year earlier. The law, which succeeded the 1906 Game Law Consolidation Ordinance, gave the governor of Southern Rhodesia the powers to control the exploitation of wildlife, including animals, fish and birds. The governor could ban the hunting of animals for various reasons.

The Game and Fish Preservation Act also provided for the establishment of Hwange National Park (then Wankie Game Reserve), Victoria Falls Reserve and Matobo National Park. Hunting game in these protected areas was banned. With that decision, it became illegal for Africans living adjacent to those areas to hunt game for their sustenance. Hunting became poaching.

The victimisation of Aficans became ever more vicious.

Water management

The 1927 Water Act excluded the local people from participating in the decisions of the Water Court because only registered voters could do so. Section 26 of the Act stated, "Unofficial members of Water Courts shall be persons residing in the colony, and whose names appear on the roll of voters for members of the Legislative Assembly … As far as possible such person shall be landed proprietors, holders of leases to land, or persons in responsible positions, such as directors or managers of companies or other undertakings."[12] The act said nothing about chiefs, let alone the ordinary "native" participating in water courts.

Forest resources

The Native Reserves Forest Produce Act, 1929, gave sweeping powers to the chief native com-

Box 5.3: Colonial legislation dealing with the environment

Game Law Amendment Act, 1886
Lobengula's Concession, October 30, 1888
Game Law Amendment Ordinance, 1893 (Amending the 1886 Act)
Matabeleland Order in Council, 1894
The Game Preservation Ordinance of 1899
The Gold Trade Ordinance, 1901
Minerals and Minerals Ordinance, 1903
The Game Preservation Ordinance, 1899
Noxious Weed Act, 1926
Land Apportionment Act, 1930
Game and Fish Preservation Act, 1929
Gold Trade Act, 1940
Natural Resources Act, 1941
Forest Act, 1949
The African Status Determination Act, 1949
The African Land Husbandry Act, 1951
Fish Conservation Act, 1960
Bees Protection Act, 1961
Mines and Mineral Act, 1961
Tribal Trust Lands Act, 1967
Agricultural Land Settlement Act, 1969
Land Tenure Act, 1969
Land Occupation Conditions Act, 1970
Land Redistribution Act, 1970
Trapping of Animals Control Act, 1973
Parks and Wildlife Act, 1975
Water Act, 1976
Hazardous Substances and Articles Act, 1977
Tribal Trust Lands Act Amendment, 1979
Rural Land Act, 1979

missioner to control forest areas in the so-called native reserves who could:

- grant licences and permits to fell, cut, take, work and remove any forest produce; and
- limit or prohibit the cutting or destruction of forest produce in the whole or any part of a reserve if it appeared to him that such limitation or prohibition was necessary in the interests of the inhabitants of the reserve or for the prevention of deforestation.

Taxation

In addition to laws enacted to deal exclusively with resource issues, the colonialists also introduced laws to enhance the subjugation of Africans. Under the Native Tax Act, 1930, the colonialists also ensured the subjugation of the indigenous people by introducing a tax of one pound-a-year for all males. Those with more than one wife had to pay an additional 10 shillings for each additional wife. Such measures were not only aimed at forcing the indigenous people into employment, facilitating the exploitation of their own resources for export, but also started social engineering in Zimbabwe.

> "...any native who neglects or refuses to pay native tax due by him within one month after such tax has become due payable shall, upon conviction, be liable to a fine not exceeding 10 pounds, or in default of payment, to imprisonment with or without hard labour for a period not exceeding three months".

According to the act, "any native who neglects or refuses to pay native tax due by him within one month after such tax has become due payable shall, upon conviction, be liable to a fine not exceeding 10 pounds, or in default of payment, to imprisonment with or without hard labour for a period not exceeding three months".

The tax was not based on the earnings of an individual but his status as a "native". To raise such money to pay the tax, African men were forced work for the colonialists, reducing the close ties they had with nature as hunters, farmers, miners and gatherers. The native tax also attacked the people's traditional system which required them to pay some form of tax to their own chief depending on the success of each individual as a hunter, farmer, miner or gatherer.

It is evident that establishing fair rights or access is fundamental to the creation of socially and economically sustainable systems at the local level. Therefore, the issue of access maybe considered to be the foundation of an environmental right.

ENVIRONMENTAL RIGHTS AND FAIRNESS IN CONTEMPORARY NATIONAL LEGISLATION

Internationally, the trend is to recognise that individuals and communities have rights *vis-à-vis* the environment and in envi-

ronmental management.[13] Zimbabwe lags behind these international developments. Environmental rights must not just address the historical wrongs initiated in the colonial period but must address related deficiencies with in the existing natural resource management regime.

In Zimbabwe, the Constitution sets the arena for all state activities, placing some limitations on governance practices. All activities of the state must be consistent with the recognition of human rights as protected in the Constitution. These rights are essentially first and second generation rights. Environmental rights are not recognised in the Constitution. There is limited protection of environmental interests through the criminal, delictual and administrative law. The ability to use these general law mechanisms to protect certain environmental interests is significant but is severely curtailed by other legal factors.

The environmental rights and interests protected by the law stem either from some gratuity of the state, consequently the state is responsible for protection under criminal law; or are derived from property rights, making the property owner responsible for the protection of these rights. Legally, these individuals and the state have some opportunity to protect their environmental interests through both the criminal and civil laws. This limited conceptualisation of rights stems, in part, from the conservationist policy of the colonial regime, which saw environment as primarily the state's domain. As individual rights are treated primarily as a derivative of property rights, there is a clear parallel between environmental rights and land and natural resources tenure. Historically, the indigenous people were treated as right-less people by the law. For rural Zimbabweans, this state of affairs continues today. Both the Constitutional Commission's and the National Constitutional Assembly's (NCA) draft constitutions address the issue of the environment. (See Box 5.4.)

Environmental rights are not recognised in the Constitution. There is limited protection of environmental interests through the criminal, delictual and administrative law. The ability to use these general law mechanisms to protect certain environmental interests is significant but is severely curtailed by other legal factors.

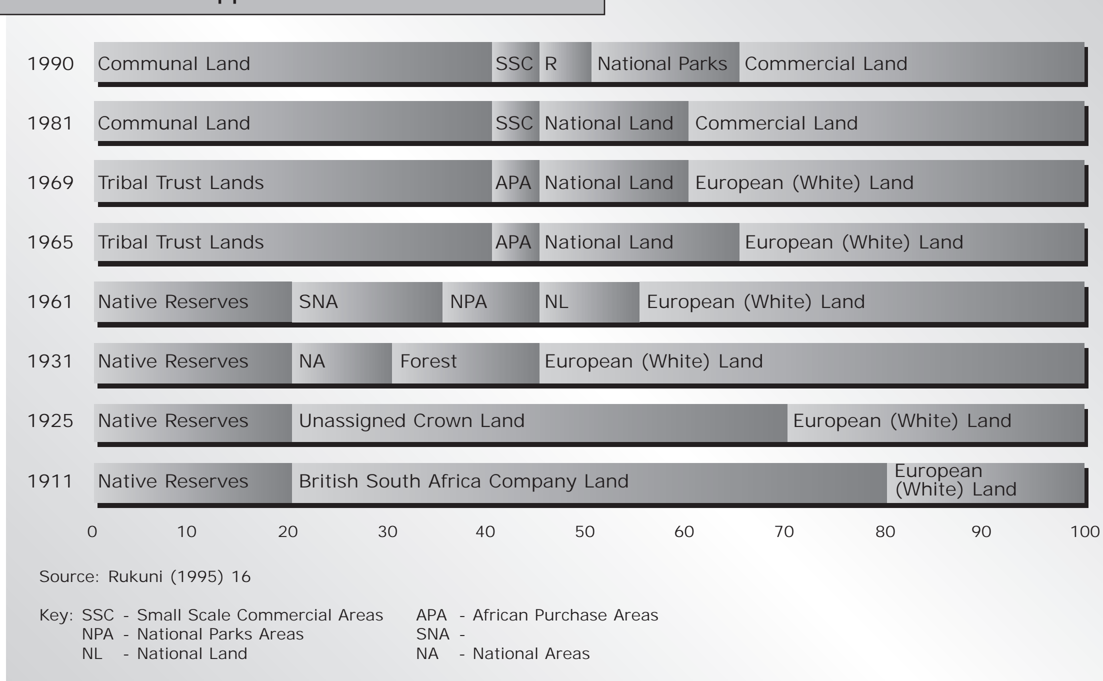
Rights of access to resources

The natural resource tenure regime in force today is virtually identical to that created during the colonial era. The issue of access to resources and fairness has, therefore, remained topical and controversial in Zimbabwe. The question of land redistribution for which Africans went to war twice – in the 19th and 20th centuries – remains unresolved with hundreds of thousands of families still waiting to be resettled. Lack of progress in land resettlement has led to land occupations with some families settling in fragile areas, destroying ecosystems.

Land tenure

Land tenure systems before and after independence have had a large bearing on people's access to resources. Nkala[14] has argued that the disparity in land allocation between the colonialists and the indigenous African population from the beginning of colonialism to after independence in 1980, resulted in land shortage, human and livestock pressure on land, degradation of the land, decreasing productivity and increasing poverty.[15] The Land Apportionment Act effectively sealed the development of peasant production systems. The land was divided along racial lines, into European and African areas with distinct forms of tenure. The act facilitated the transfer of large tracts of land into white settler hands.

Table 5.1: Land apportionment trends 1911-90



The 1951 Native Land Husbandry Act purportedly sought to improve agricultural practices in African areas. It allocated agricultural plots for private use to individual African farmers, grazing areas to communities, categorising farmers, supposedly according to their level of competence and expertise. In 1969, the Land Tenure Act confirmed the allocation of land under the 1967 Tribal Trust Lands Act as follows; 18.2 million ha to native reserves and 18.1 million ha to Europeans. The total population then was 5.1 million with the vast majority of this population living in the so-called reserves. This law, which was in force for

a decade, led to increasing pressure on land as the with the growth of African population. Under the Land Tenure Act, the African majority was confined to the tribal trust lands located mostly in the drier agro-ecological zones (natural regions).

Zimbabwe has a total land area of 39 million ha of which 33.3 million ha are for agriculture. The remainder of the land is designated as state (national parks, forests) and urban land.

Box 5.4: Incorporating environmental rights into the Constitution

Constitutional Commission draft constitution
The proposed constitution drafted by the presidentially-appointed Constitutional Commission did not include environmental rights as fundamental rights.

It included the right to life: "Every human being has the right to life and may not be deprived of it intentionally." This could lend itself to recognise the right to a clean environment as a polluted environment may threaten human life directly. It could also be argued that this includes the right to have access to water and other resources as a matter of survival.

It also recognised other rights that are essential for the protection of environmental rights and interests, including a "right to information" and the right to "just administrative action."

The environment is addressed under the section on Constitutional Principles and National Objectives. This does not create a justiciable right. It is provided in section 18, that the "State must take appropriate measures, within the resources available to it, to provide the people with a clean, safe and healthy environment." Additionally, the "State must promote ecologically sustainable development and the management of natural resources in a balanced manner for the benefit of present and future generations." Also, the "State must take all practical measures to conserve natural resources; to prevent or minimise degradation and destruction of land, air and water resources...; to promote at all levels an efficient system for the storage of water and the management of water resources; to ensure that people have access to clean potable water; to promote and implement energy policies that will ensure that people's basic needs are met; and to safeguard the bio-diversity of Zimbabwe."

The draft constitution, in the same chapter, identifies key principles and objectives in relation to development. This enjoins the state, *inter alia*, to "bring about balanced development of the different area of Zimbabwe and a proper balance in the development of urban and rural areas, and to redress imbalances resulting from past practices and policies.

This constitution was rejected in a public referendum in February 2000.

The National Constitutional Assembly working draft constitution
This draft recognises environmental rights in its Bill of Rights as a fundamental right. It provides in section 38 that:
"everyone has the right to:
- an environment that is not harmful to their health or well being; and
- have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
  - i prevent pollution and ecological degradation
  - ii promote conservation
  - iii secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

This draft also recognises a right to life. It provides, "Every person has the right to life and this right must be respected and protected." An alternative formulation is given that focuses on the deprivation of life through war. Additionally, the rights of "access to information" and "just and competent administrative action" are recognised.

Zimbabwe may be broadly divided into two tenure categories: state and private land.[16] This may be further subdivided into four main land tenure regimes, which are state lands (forests, parks, botanical gardens), communal areas, commercial lands and resettlement areas. The agricultural potential of the country is categorised into five natural or agro-ecological regions with region I having the highest potential. Table 5.2 shows the agricultural land distribution by natural region until this time until the 2001 resettlement initiative. Communal lands occupy 42 percent of the total land, followed by large-scale commercial farms, which occupy 28.7 percent, resettlement areas 8.5 percent and small-scale commercial farm with 3.5 percent. State farms occupy 1.3 percent of the total land. About 4,500 predominantly white commercial farmers occupy the 11.2 million ha of commercial farmland while over one million communal and small-scale commercial farmers share 17.7 million ha.[17] The situation is exacerbated by the fact that 56 percent of the large-scale commercial farms are located in the more productive and higher rainfall regions I-III. Seventy-four percent of the communal farming land is located in the marginal agro-ecological zones IV and V. In the 110 years since the colonisation of Zimbabwe, the indigenous people moved from a people who had access to the most fertile soils in the country to one with little.

Table 5.2: Agricultural land distribution by sector and natural region until 2001 redistribution

Sector	Unit	NATURAL REGION					Total
		I	II	III	IV	V	
LSCA	(000 ha)	200.0	3 690.0	2 410.0	2 430.0	2 490.0	11 220
	%	1.8	32.8	21.5	21.7	22.2	100
State	(000 ha)	10.0	10.0	160.0	60.0	260.0	500
	%	2.0	2.0	32.0	12.0	52.0	100
Small-scale	(000 ha)	10.0	240.0	530.0	500.0	100.0	1 380
commercial farms	%	0.7	17.4	38.4	36.2	7.3	100
Communal	(000 ha)	140.0	1 270.0	2 820.0	7 340.0	4 780.0	16 350
	%	0.9	7.8	17.2	44.8	29.3	100
Resettlement	(000 ha)	30.0	590.0	1 240.0	810.0	620.0	3 290
	%	0.9	17.9	37.7	24.6	18.9	100

Source: D.M. Mukora, 1994

This is set to change under the land reform programme, which has earmarked over 5 million hectares for acquisition for resettlement.

Natural resource tenure

In the communal areas, wildlife and forest resources are state resources. Communal areas' inhabitants have very limited

rights in respect of these resources. Woodland resources may be harvested for "own use" in these areas, but the people have no right to hunt wildlife. Legally, the inhabitants in these areas have no managerial rights. The Ministry of Environment and Tourism is responsible for wildlife management and the RDCs (which fall under the Ministry of Local Government) for woodlands. However, under a 1982 amendment to the Parks and Wildlife Act, the minister may grant rural district councils "appropriate authority" so that they can control wildlife in much the same way as private landowners.

This authority is generally granted where the council will implement the Department of National Parks and Wildlife Management's policy initiative, the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE). This gives communities the opportunity to benefit directly from the resource, through income, employment and in kind. CAMPFIRE activities generated $7 million in 1993 in these districts. The money is used for community projects, such as building schools, clinics, roads, boreholes and erecting electric fences. Some of it is shared out among households in the community.

Table 5.3: Negative Impacts of the Communal Land Forest Produce Act

Legal Provision	Impact
The Act vests management of common woodland areas in the communal areas in the rural district councils.	Councils have a right to grant concessions to outsiders to utilise forest products for commercial purposes. As this can be done with minimal consultation with communal areas inhabitants it may result in the leasing of areas to which communities attribute cultural or spiritual significance. It fails to acknowledge the rights and interests of communities that have conserved these resources over a period of time. This serves to undermine local management systems.
Fails to acknowledge the role of traditional leaders in the management of forest resources.	Local values are now widely recognised as important for achieving sustainable management practices (e.g. the Convention on Biological Diversity and the Convention to Combat Desertification). The failure to recognise traditional leaders undermines traditional rule systems.
Restricts the use of forest products in the communal areas by the local people to "own use".	Although the Act does not define what "own use" is, it has however in practice come to be interpreted by the relevant institutions as "domestic use" and to exclude commercial use. This fails to acknowledge the centrality of woodland resources within the rural economy and relegates communal inhabitants to a subsistence economy.
The right to utilise forest produce for "own use" applies only to a communal land inhabitant within the communal area of which he/she is an inhabitant	This prevents local level initiatives for resource sharing or resource exchange. This mitigates against exchange of fruit between areas and therefore, undermines an important drought management strategy within the communal areas.

Source: adapted from Mohamed- Katerere, 1996

Although the policy intends to confer managerial rights on the community, in practice this has not happened due to a lack of investment in skills development.[18] In terms of access to resources and fairness, the law does not provide for individual access. It is not the individual communities or the individual who enjoys "appropriate authority" but the rural district council. The question then arises whether access to resources is an individual or a community issue. It should be both.

The Parks and Wildlife Act provides that private landholders be custodians of wildlife on their land. It allows compensation for animals hunted on private land to go the landowners. Unfortunately for the landless majority, individuals cannot enjoy such rights.

Woodland resources in the communal areas may be managed in the communal lands with no reference to the inhabitants. (See Table 5.3.)

Consequences of inequitable resource rights

Implications of tenure

The tenure regimes are at the root of the increasingly complex social struggles Zimbabwe faces today. There are rising expectations of a growing population, high unemployment, increasing poverty, inequities to labour, finance and natural resources, recurrent droughts, threats of greater globalisation and environmental stress. Although social interventions in the fields of education and health are laudable, the fundamental issue of access to resources remains unresolved. This has been attributed to the past colonial legacy and, more recently, due to the inappropriateness of institutions (rules, laws, and regulations) that bestow entitlements on users of resources.[19] Organisations such as state agencies, village committees and traditional structures, on the other hand, have been frustrated by lack of clarity of roles in the pursuit of particular outcomes within prescribed rules and regulations.[20]

The present mechanisms with respect to land ownership and access to natural resources are inappropriate for a multiplicity of reasons, including the fact that they continue to generate conflicts between land users. Existing tenure categories are contested, there are a significant number of groups within the communal sector that assert tenure rights to commercial and state land.

The present mechanisms with respect to land ownership and access to natural resources are inappropriate for a multiplicity of reasons, including the fact that they continue to generate conflicts between land users. Existing tenure categories are contested, there are a significant number of groups within the communal sector that assert tenure rights to commercial and state land. These claims are most commonly based on historical claims. However, in a number of cases they are premised simply on a proximity to the resource. Although the state has in certain instances entered into agreements with these communities, it has dismissed the legality of these claims.[21] Despite this, many communities continue to assert these claims and their practice is often

based on these perceived rights. This has in many instances forced the legal owner to consult with these groups. The inequity created by these inappropriate tenure arrangements is aggravated by the unequal access to capital, technology and markets. The current arrangements marginalise the communal and resettlement inhabitants, particularly the rural poor and women.

Planning law

The current planning regime in both urban and rural areas alienates individuals and organisations of civil society from decision-making. The Regional Town and Country Planning Act,[22] the Rural District Councils Act[23] and the Urban Councils Act[24] govern the planning regime. These acts are based on conservative planning principles. Development is general viewed as being the prerogative of the state and consequently individuals have very limited rights.

Individuals have rights to object to development plans where their rights are affected. Thus the individual's participation is reactive rather than proactive. Additionally, the legal basis of objection necessarily excludes a number of social interests. The planning regime is, therefore, unable to adequately take account of the issues of environmental justice and fairness. The mechanism for ensuring participation is totally inappropriate. Both acts provide for publication and the display of development plans and invitations to object through a newspaper. These procedures are replicated almost entirely from their British versions and hence are inappropriate in the socio-economic context of Zimbabwe. (Also see the section on public participation in chapter 3.)

Planning processes remain highly centralised. New localised structures that are given a planning role such as the village and ward development committees (VIDCOs and WADCOs) are insufficiently empowered for them to be meaningful players. In urban communities, there is no attempt to create systems for community or expert involvement.

The planning regime for natural resources falls under specific sectoral acts. The rights of planning and management are a direct derivative of the tenure regime. Individuals and communities have no legal rights in respect of state resources, nor is there any legal basis for their participation. In addition, there are no legal requirements for the state to take account of their interests in management. Where individuals and groups are consulted, it is as a result of a policy position rather than a legal right. This situation has led to a certain amount of frustration and hostility to the state institutions among those living adjacent to these resources. Residents in Mutambara in Chimanimani,[25] for

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example, expressed concern about the restrictions imposed on them in relation to cultivating in watersheds while the forestry commission, a government institution, has plantations in such areas. Further, they point out that the plantations have had negative implications for water resources in the district as the exotics consume more water than indigenous trees.

The planning and administrative legal regimes are subject to very few limitations. Accountability is essentially upwards. The decision-making processes are not transparent, as people are not only excluded, but are also not privy to the reasons for the decisions or the information upon which the decisions are made.

Criminal law

The use of criminal law for environmental management is essentially limited by the creation of statutory crimes and is primarily the domain of the state. Under criminal law, an individual may institute an action for private prosecution where the state has declined to prosecute provided there is an established interest in the matter.[26]

Criminal sanctions have been extensively and, perhaps, disproportionately relied on in environmental management to protect the interests of the state, private landholders and to enforce environmental standards. Historically, criminal law has been used to reinforce the dispossession of the indigenous people and to validate contemporary resource and land tenure regimes. This is particularly evident in areas of forest and wildlife management. Although the overall intention of a criminal provision may be to protect and conserve a resource, the effect is to juxtapose the interests of the state against the interests of a community or part of it.

Historically, criminal law has been used to reinforce the dispossession of the indigenous people and to validate contemporary resource and land tenure regimes. This is particularly evident in areas of forest and wildlife management. Although the overall intention of a criminal provision may be to protect and conserve a resource, the effect is to juxtapose the interests of the state against the interests of a community or part of it.

The effectiveness of criminal law in protecting private and public environmental interests is highly questionable. Experience at the local, national and international level suggests that command-and-control strategies are largely unsuccessful given the massive institutional resources they require and the absence of incentives they create. This is particularly true where the criminal method is the primary mechanism employed. Research in Mhezi Ward, Makoni,[27] suggests that the imposition of a criminal sanction does not change managerial behaviour, it simply encourages people to conceal some uses.

The success of a criminal legal system is, to a large extent, determined by the expertise of the police, other monitoring agencies, and the courts. There are numerous instances where environmental offences are not successfully prosecuted because of insufficient evidence collected by the police or monitoring agency.[28] Further, the relevant agency may be unable to identify

that an offence has occurred.[29] Additionally, the impact of the criminal system, given its sanction structure, on the restoration of rights, appears to be minimal. The fine is the main criminal sanction utilised. The fine itself bears no direct correlation to the crime or the environmental consequences of the illegality. The fines collected do not go into an environmental fund.

The motivation behind various criminal offences may generally be limited to three areas: the protection of state property rights, private commercial interests or the ecosystem – the rights and interests of the local resource user does not feature. Given the neglect of the social factors, the criminal sanction and remedy posed, has had very limited impact on sustainability.

Civil law

Both the state and the individual may use civil law to challenge decisions by administrative bodies or actions of other persons that impact upon the environment, infringing upon legal interests. As individuals have no independent environmental rights, any such right they may have must stem from some other legal interest – typically, from an individual's property rights.

The legal system fails to recognise that individuals and communities have an environmental interest that should be capable of legal enforcement in circumstances other than where their property or health interests are affected. Therefore, it has failed to create a system for balancing private and public interests. The rules of standing are, therefore, narrowly defined.

The legal system fails to recognise that individuals and communities have an environmental interest that should be capable of legal enforcement in circumstances other than where their property or health interests are affected. Therefore, it has failed to create a system for balancing private and public interests.

A legal right or interest exists where there has been some financial or physical harm or damage or where there is a threat to health.[30] It is, however, not clear where there is a threat to one's enjoyment of an aesthetically pleasing environment that would give rise to *locus standi*.[31] It is not necessary that harm be suffered. A party may have *locus standi* where they have not suffered harm but where some other right is threatened. (See section on remedies and redress in Chapter 2.) Such as where there is a threat to existing civil liberties.[32]

The law in Zimbabwe recognises group or representative actions in only very limited circumstances. The Class Actions Act now generally governs this. (See Box 5.5.)

Box 5.5: *Locus standi*

The rules of *locus standi* denote the circumstances under which an individual is able to use the civil law remedies. For an individual to have standing:

- that person must have some legal right or recognised interest must be at stake;
- the right or interest must be direct; and
- the right or interest must be personal.

In respect of the Magistrates' Court, the common law applies.[33] In terms of rule 89, the person bringing the action must represent the group or class concerned. Further, all mem-

bers of the group must have the same interests. These do not mean similar interests. The parties must base their claims on the grounds and claim the same form of relief.[34] Further damages may not be claimed by way of representative action. Since the current law requires the plaintiff to be a member of the class or group, organisations unless personally affected, may not be the plaintiff. Given that the system fails to link private and public interests, issues pertaining to access to justice are inadequately addressed. The enforcement of environmental interests is either treated as the prerogative of the state or the individual directly affected.

ENVIRONMENTAL RIGHTS AS HUMAN RIGHTS

Conceptual framework for the development of environmental rights in international law

Environmental law derives from the common interest of humankind, as does the international recognition of human rights and freedom. Therefore, it is appropriate that a link between the two is recognised. As early as 1972, the Stockholm Declaration on the Human Environment stated:

> Man (sic) has the fundamental rights of freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[35]

Box 5.6: The Class Actions Act

Application for leave to institute class action:

1 Subject to this section, the High Court may on application grant leave for the institution of a class action on behalf of any class of persons.

2 An application for the institution of a class action:
- may be made by any person, whether or not he is a member of the class of persons concerned; and
- shall be made in the form and manner prescribed in rules of court.

3 The High Court shall grant leave in terms of sub-section (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so, the court shall take into account:
- whether or not a prima facie cause of action exists; and
- the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and
- the existence and nature of the class of persons concerned, having regard to:
  - i its potential size; and
  - ii the general level of education and financial standing of its members; and
  - iii the difficulties likely to be encountered by the members enforcing their claims individually; and
- the extent to which the members of the class of persons concerned may be prejudiced by being bound by any judgement given in the class action; and
- the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually; and
- the availability of a suitable person to represent the class of persons concerned; and
- any other relevant factor.

Thus, “the right to environment” was proclaimed at the beginning of the “environmental era” at a worldwide level. In addition, as it is formulated, it is clearly linked with human rights, both civil and political (freedom, equality, dignity) and economic social, and cultural rights. It also warns that everyone has a responsibility for protection and improvement of the environment. Finally, and this is new in human rights language, it also opens a time perspective by speaking of future generations. It propounds the concept of sustainable development and links social standards with environmental obligations.

Unfortunately, some of the most significant agreements on the environment, such as the Stockholm Declaration, are legally non-mandatory documents. So is the World Charter of Nature, solemnly proclaimed by UN General Assembly on October 28 1982, which elaborates further on the rights and duties resulting from the necessity to protect the environment. So too are the 1992 Rio Declaration and the internationally agreed upon programme of action, Agenda 21. However, legal provisions with mandatory character have appeared in a very significant way in regional conventions aiming at protection of human rights. The 1981 African Charter of Human and People’s Rights expressly recognises in Article 24 the rights of “all people” to a “generally satisfactory environment favourable to their development”. Another human rights protection system, the American Convention, in an additional protocol on Human Rights in Areas of Economic Social and Cultural Rights (Protocol of San Salvador), provides in its Article II that:

> “1 Everyone shall have the right to live in a healthy environment and to have access to basic public services.
>
> 2 The state parties shall provide protection, preservation and improvement of the environment”.[36]

...the “right to environment” has been recognised in positive international law. It has also been proclaimed in national legislation. At present, clauses related to environmental protection, either as a duty of state or as an individual right or both, figure in at least 45 national constitutions

Additionally, particular aspects of environmental rights are embodied within international conventions dealing with specific issues as well as in customary international law. Environmental rights are also embodied in other existing systems of international law, for example, in the UN Law of the Sea, international economic law, and international labour law. Therefore, the “right to environment” has been recognised in positive international law. It has also been proclaimed in national legislation. At present, clauses related to environmental protection, either as a duty of state or as an individual right or both, figure in at least 45 national constitutions, in that of a dozen state members of federal states and in general laws of several countries.

The human rights regime

Although "human rights" have been the subject of philosophical thought from almost the beginning of organised society[37], they did not receive concerted attention by much of the world until after the Second World War. Before then, the civil and political components of human rights had received legal articulation mostly after the French and American Revolutions. The issues of protecting human rights through constitutional means and mechanisms received some fairly focused attention after these revolutions.[38]

Given the adoption of the United Nations Charter in 1945, the philosophy of human rights passed into the jurisprudence of international law. Individuals gained rights under international law and, to some degree, the means of vindicating those rights in the international plane in five successive law-building stages:

- the assertion of international concern about human rights in the UN Charter;
- listing of those rights in the Universal Declaration of Human Rights;
- elaboration of those rights in the UN Charter;
- listing of those rights in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights; and
- adoption of an ever-increasing number of additional declarations and conventions concerning issues of special importance, such as discrimination against women, racial discrimination, and religious intolerance.

The binding nature of these founding human rights documents is no longer open to question. The UN Charter is a constitutional document of the highest status in the international system. The Universal Declaration of Human Rights is now considered to be an authoritative interpretation of the UN Charter, and along with the charter, is regarded as part of the constitutional structure of the world community and as part of international customary law.

Classification of environmental rights

A place for environmental rights?

Due to the wide sweep covered by environmental rights, they may fall within all three generations of rights. The right to environment is rooted in the right to an acceptable quality of life, which, in certain circumstances, extends to the right to life itself. The preamble to the UN Charter specifically refers to fundamental human rights, the dignity and worth of the human person as well as to better standards of life. In Article

1(3) of the charter, there is a reference to promoting and encouraging respect for human rights and fundamental freedoms. If the right to a healthy environment is treated as an aspect of the right to life, it can be founded on Article 3 of the Universal Declaration of Human Rights and in Article 6(1) of the International Covenant on Civil and Political Rights. The right to life in those provisions will need to be construed liberally, because in its narrow and strict sense, in the context in which the right appears, it would seem confined to the protection of the individual against physical death. In the Preamble to the 1972 Stockholm Declaration, the enjoyment of a healthy environment has been linked with the right to life.

Box 5.7: Classification of human rights

First or second generation does not imply that "second generation" rights supersede "first generation" rights. The expression "generation" is used to indicate a further distinct development in the domain of human rights. Both generations not only co-exist, but they also interact with each other. A new generation of international human rights, the "third generation" has evolved for filling a significantly important gap in the international law system of human rights. They are collective rights "exercised jointly by individuals grouped into larger communities, including peoples and nations". Third generation human rights are concerned with planetary or global issues such as peace, development, communication, common heritage and humanitarian assistance.

Under the general phrase, the right to a healthy environment, the following rights are important:

- right to be safe from harmful exposure – citizens have the right not to be exposed to harmful pollutants and toxic substances;
- right to know – citizens have the right to know what dangerous substances, such as pesticides are being transported through their areas;
- right to cleanup – citizens have the right to know whether measures are in place to clean up dangerous products such as petrol/diesel in the event of a spill;
- right to participate – individuals and communities have a right to participate in decision-making that affects their interests;
- right to compensation – citizens have the right to demand compensation if a toxic spill causes environmental damage;
- The right to prevention – citizens have the right to demand that all preventative measures be in place before high-risk projects are established, before resources are overexploited; and
- right to protection and enforcement – citizens are adequately protected from harmful substances and pollutants, and that adequate measures are in place to enforce any regulations deemed necessary to protect citizens' right to a healthy environment.

If the right to a healthy environment can be construed as implied in the provisions of the Universal Declaration and its

two Covenants, and the several international treaties and conventions that flow from them, it may be said that the right to a healthy environment can be exercised not only against other states, that is to say, for transnational environmental injury, but also against one's own state, for local environmental damage. If the right to a healthy environment can be traced to both the International Covenants of Civil and Political Rights and of Economic, Social and Cultural Rights, it can be exercised not only as a right against the state to ensure against environmentally harmful acts, but also as a right to call upon the state to provide the conditions for a healthy environment. It is thus both a negative right and a positive right.

There is, however, another aspect to environmental rights. These are generally rights that belong to groups of individuals. In certain cases, they may have a regional and even a global dimension. A nuclear fallout or acid rain may affect an entire region. The depletion of the ozone layer and the greenhouse effect could have consequences affecting the entire planet. Clearly, the regional or global dimension implied in the consequences would bring the right to a healthy environment into the list of "third generation human rights". Thus within international customary law, the development of the principle of good neighbourliness has emerged.[39] This principle recognises, not withstanding the sovereignty of nations, their environmental responsibilities to each other.

It is a system that is indivisible, it is incapable of dissection and separation into individual, independently operating parts of the whole. The intimate interaction and interdependence between its different parts requires that the environmental system be viewed from a holistic perspective as a single, indivisible, and closely integrated operating system.

The right to a healthy environment includes a large number of different facets and therefore, traverses and overlaps the first, second and third generation groups of human rights. Because of the nature of environmental rights, the several facets are members of a single environmental system. It is a system that is indivisible, it is incapable of dissection and separation into individual, independently operating parts of the whole. The intimate interaction and interdependence between its different parts requires that the environmental system be viewed from a holistic perspective as a single, indivisible, and closely integrated operating system.

Third generation rights include the right to nature conservation and to a clean, safe and healthy environment, the right to share in the common heritage of humankind, the right to peace and the right to development. Environmental rights have been conceptualised as falling squarely within this category of rights and are often referred to as green rights. Their aim is not to limit or stifle development but to ensure that developmental projects incorporate environmental criteria with a view to ensuring that

development is carried out within a framework that stresses the importance of environmental factors.

Constitutional environmental rights

Comparative municipal constitutional approaches to environmental rights

Environmental issues, concerns and problems are of relatively recent origin. Therefore, the articulation and refinement of environmental rights is also a relatively new phenomenon in legal discourse. Since environmental rights were not in vogue during the times when most of the world's oldest constitutions were crafted and drafted, it is not at all surprising that all such "old" constitutions do not contain any provisions relating to environmental rights. For example, the constitutions of the U.S., France and the Scandinavian countries do not have any specific and direct provisions dealing with, or relating to environmental rights. However, various countries which have in the recent past adopted new constitutions contain environmental rights provisions.

A survey of those constitutions which provide for some form of recognition of environmental rights reveals varied approaches to not only the formulation of the right but also to methods and styles of recognition and implementation. These approaches may be classified into eight related and sometimes overlapping and intersecting categories or forms of recognition of environmental rights. These approaches are summarised in (Box 5.8.)

First, there are those constitutional provisions, which simply confer an environmental right to each and every citizen or person mainly under the provisions of the bill or declaration of rights within the constitution. This approach is rare and examples of it are to be found in the Russian, Peruvian and Hungarian constitutions. The constitution of the Russian Federation in article 42 provides that:

> "Everyone shall have the right to a favourable environment reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations."

Second, there is the approach that does not confer an environmental right on citizens but merely places a duty on them to protect the environment. Again this approach is very rare.

Third, there are constitutions that simultaneously confer an enforceable environmental right on citizens and also place an obligation on them to protect, preserve and develop the envi-

Box 5.8: Categorisation of environmental rights

Eight approaches to environmental rights may be identified which:

- confer an environmental right to each and every citizen;
- do not confer an environmental right on citizens but merely place a duty on them to protect the environment;
- simultaneously confer an enforceable environmental right on citizens and also place an obligation on them to protect, preserve and develop the environment;
- grant an enforceable environmental right to citizens while simultaneously placing an enforceable or judicially unenforceable duty/obligation on the state to take appropriate measure to preserve, protect and develop the environment;
- require and/or oblige the state or the national government to protect and preserve the environment or natural resources either as part of the substantive seemingly binding parts of the Constitution or merely as part of a clearly unenforceable preamble or statement of guiding principles of state policy;
- place a duty, by way of directives of policy, on the state to protect the environment, with the placement of a duty on citizens;
- incorporate international agreements on environment into national law; and
- grant citizens a constitutional environmental right while simultaneously placing an obligation on both citizens and the state to protect and preserve the environment.

ronment. Such provisions are normally found within the bill or declaration of the rights and duties of citizens. Countries with such provisions include Bulgaria, Mozambique and Poland. The Constitution of Mozambique in Article 72 provides that:

> "All citizens shall have the right to live in and the duty to defend, a balanced natural environment".

Fourth, there is the approach that grants an enforceable environmental right to citizens while simultaneously placing an enforceable or judicially unenforceable duty and obligation on the state to take appropriate measures to preserve, protect and develop the environment. Constitutions that have adopted this approach include those of Mongolia, Nicaragua, Niger, Ecuador and South Africa. The South African Constitution provides in its Bill of Rights in Article 29 that:

> "Everyone has the right:
> - to an environment that is not harmful to their health or wellbeing; and
> - to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
>   - i prevent pollution and ecological degradation.
>   - ii promote conservation; and
>   - iii secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

This is a somewhat more comprehensive formulation, which not only recognises that the environmental right is for both present

and future generations, but also seeks to identify the major areas in which state intervention to protect and guarantee the right is required.

Fifth, there is the constitutional approach that requires and obliges the state or the national government to protect and preserve the environment or natural resources. This is either done as part of the substantive binding parts of the constitution or as part of a clearly unenforceable preamble or statement of guiding principles of state policy. Countries with provisions falling in this category include Nepal, Sri-Lanka, Namibia, Malawi, Austria, Switzerland, Greece and the Netherlands. The non-binding provision of the Namibian Constitution, which is also part of Principles of State Policy found in Chapter II of the Constitution, states:

> "The state shall actively promote and maintain the welfare of the people by adopting *inter alia* policies aimed at ... the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular the government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory".[40]

In a similar vein the Principles of National Policy in the Constitution of Malawi in Article 13 state that:

> "The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at the following goals:
>
> The Environment
>
> To manage the environment responsibly in order to:
>
> i prevent the degradation of the environment;
>
> ii provide a healthy living and working environment for the people of Malawi;
>
> iii accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
>
> iv conserve and enhance the biological diversity of Malawi".

The fundamental difficulty with this approach is that the constitutional provisions relating to the environment are essentially non-enforceable. Therefore, the utility value of such provisions as legal instruments, rather than political ideals, is virtually non-existent. They may, however, be a valuable political

yardstick to measure the successes and failures of a particular government and they may also be useful for those charged with planning and adopting relevant legislation under the constitution.

A sixth constitutional approach combines the fifth approach with the placement of a duty on citizens to also protect and preserve the environment. An intriguing example is to be found in the Constitution of India whose Article 48A states that:

> “The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”.

In theory, the utility value of this approach is as limited as that of the fifth approach and yet in practice, the Indian courts have adopted innovative ways of interpreting both national legislation and the Constitution, which have given practical value and meaning to the directives of state policy.

A seventh and somewhat unusual approach is found in Article 10 of the Declaration of Human Rights in the Constitution of Burundi which states that:

> “The rights and duties proclaimed and guaranteed by the Universal Declaration of Rights, the International Pacts relative to Human Rights, the African Charter on Human and People’s Rights and the Charter of National Unity shall be an integral part of this Constitution”

In fact, except for the African Charter on Human and People’s Rights, none of the international instruments mentioned and brought into the domestic law of Burundi by this article have any provision relating to environmental rights. The African Charter, in Article 24 provides that:

> “All peoples have the right to a generally satisfactory environment favourable to their development”.

The net effect of Article 10 of the Constitution of Burundi is to make this provision of the African Charter of on Human Rights part of the domestic law of Burundi and enforceable within the domestic plane.

The final and most comprehensive approach grants citizens a constitutional environmental right while simultaneously placing an obligation on both citizens and the state to protect and preserve the environment. Examples of this approach are found in the constitutions of Mali, Spain, Turkey, Portugal, and Brazil.

Box 5.9: Environmental rights in the Brazilian Constitution

Article 51 A(g) states:
"Everybody has a right to an ecologically balanced environment as it is a good for common use by the people, and as it is essential to a healthy quality of life; the public powers have thus an obligation to defend it, and the collectivity to preserve it, for present and future generations.

Para 1 To guarantee the effective implementation of this article, it is the responsibility of the public powers to:

- i Preserve and restore the essential ecological processes and promote ecologically sound management of species and ecosystems;
- ii Preserve the diversity and integrity of the genetic patrimony of the country and control activities in the field of genetic material research and manipulation;
- iii Determine, in all units of the Federation areas to be specially protected, together with their environmental components. Modifications or suppression of the protection of these areas may only be done by law, and any utilisation of these areas which would compromise their integrity shall be prohibited;
- iv Submit the installation or construction of facilities, which may cause significant degradation to the environment to an environmental impact assessment, which shall be prepared prior to their being initiated, and made fully available. (The siting of installations operating with nuclear reactors shall be decided by law);
- v Control the production, trade and use of techniques, processes and substances which may present a risk to life, to the quality of life, and to the environment;
- vi Promote environmental education at all teaching levels and promote the awareness of the public with regard to the preservation of the environment;
- vii Protect fauna and flora; prohibit by law actions that would put their ecological functions at risk, as well as activities that could lead to the extinction of species or expose animals to cruel treatments.

Para 2 Those exploiting minerals resources have an obligation to restore the environment thereby degraded in accordance with technical means determined by the competent public authorities and by law.

Para 3 Persons and institutions carrying out activities considered to be destructive of the environment, or behaving in such a manner, shall be liable to administrative and penal sanctions, in addition to their obligation to restore the damages caused.

Para 4 The Amazon Forest, the Atlantic Forest, the Serra do Mar, the Pantanal, and the Coastal Zone are National Patrimony and their utilisation and the use of their natural resources will be carried out as defined by law, and in such a manner as to ensure the preservation of their environments.

Para 5 The lands which are necessary to the preservation of natural ecosystems whenever they belong to the state, cannot be put to other uses".

The Brazilian Constitution perhaps offers the most comprehensive and detailed provisions. (See Box 5.9.)

In all the circumstances, it appears that the eighth approach is the most comprehensive, inclusive and appropriate since it grants an environmental right to citizens while at the same time obliging them, together with the state, to take positive steps to protect and preserve the environment.

Therefore, if Zimbabwe is to adopt constitutional protection of the right to the environment, it should proceed by way of the eighth approach, which consolidates and integrates the various approaches discussed above. Accordingly, it is critical that if and

when Zimbabwe's Constitution is amended to include an environmental right, the formulation of the relevant clauses should capture the aspect relating to the state of the environment (i.e. decent or healthy or safe environment). It should also capture the aspect relating to the right of the people to benefit from their natural resources.

LESSONS FOR ZIMBABWE

Examples of the constitutionalisation of environmental rights set by other countries, including Zimbabwe's neighbours, have somewhat defined the path Zimbabwe ought to follow in the development of its own jurisprudence on environmental rights. This is consistent with its international obligations. Article 30 of the Charter of Economic Rights and Duties of States of 1974,[41] member states of the UN are required and directed to take measures to protect the environment:

> "The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all states. All states shall endeavour to establish their own environmental and development policies in conformity with such responsibility.…"

Further, given the nature of the environmental problems Zimbabwe faces, it is fundamentally important that environmental rights in the country not only get constitutional recognition but also entrenchment and enforcement. Whatever constitutional environmental provisions are accepted and adopted, they could be greatly enhanced by enforcement models, which simplify and deformalise judicial procedures. This requires the introduction of other institutional enforcement and promotion mechanisms such as a revamped, independent and highly visible ombudsman, a human rights commission and an environmental commission. Of equal importance is also the adoption, through the Constitution, of an expansive and flexible *locus standi* approach. There should be mechanisms for ensuring environmental justice such are as provided in the South African Constitution and the Environmental Management Act.

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Finding the appropriate solutions is dependent upon an accurate understanding of the problem. Additionally, the intimate relationship between law, social and cultural systems, and institutions needs to be addressed, as the experience of the law does not only stem from its substantive content but how institutions interpret it and how it operates.[42] The experience of the law is linked to the social, cultural and economic conditions of its supposed beneficiaries. So the problems resulting from the inequitable access to resources

and administrative process cannot simply be resolved at the legal level but must be linked to the alleviation of poverty. The ability of the public to utilise the law is directly linked to these factors. The rights and fairness regime needs to be accessible in real terms. Therefore, a legal reform strategy needs to address this reality and be complemented by other strategies.

In summary, the problems and issues that the reform process must address are:

- inequitable access to natural resources, and in particular the lack of real rights and control local communities have to these resources;
- the lack of opportunities to participate in the formulation of administrative policy and practice;
- the absence of opportunities to contest administrative decision making;
- the right to institute actions in protecting environmental interests; and
- the nature of environmental rights.

Constitutional development versus statutory reform

Legal reform may be at three distinct levels – the constitution, statute law and regulations. In determining the best options for Zimbabwe, it is important to clearly establish the effect of statutory remedy as against the constitutional one.

It may be argued that the provision of a statutory remedy is problematic on the grounds that it excludes ordinary common law remedies.[43] This approach, which has been proposed in some South African cases, appears to be an incorrect interpretation of the law. Some environmental lawyers have relied on this, arguing that it is important for the legislature to specifically acknowledge the applicability of the common law remedies.[44] This, however, has not been the approach of the courts in Zimbabwe. Instead, it has been argued that it is more in keeping with principle and authority to state the canon of construction in the following terms: If it be clear from the language of a statute that the legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the statute would be cumulative. In certain circumstances, a remedy provided in a statute may limit the applicability of other remedies,[45] creating a presumption against the ousting of ordinary judicial remedies.

The constitution approach creates none of these difficulties. Further, given the multiplicity of legislation dealing with the environment in Zimbabwe, constitutional reform may speed up the reform process rather than attempting piecemeal legislative reform. The adoption of constitutional provisions creates the policy framework in which all legislation and administrative practice must take place. This derives from the status in Zimbabwe's law of the constitution as the supreme law. All legislation must be *intra vires* the constitution, meaning that those rights and interests protected in the constitution inform the spirit and interpretation of legislation.

While this would eliminate the urgent need to amend all legislation, it would necessarily require a process through which the effects of the constitution on practice are disseminated to the relevant parties. In any event, constitutional amendment in this area is important given the nature of the issues. Constitutional rights would have positive effects for:

- the settlement of disputes, as the constitution would provide the courts with explicit authority to consider environmental criteria in their findings;
- environmental protection. Environmental disputes typically reflect a juxtaposition of private rights against public interest. An environmental right would redress the traditional imbalance in Zimbabwe's legal system that favours private rights and interests over public interests;
- administrative justice;
- public participation; and
- government policy and practice, as it could potentially be an important check on such activities. This is important for good relations between civil society and government.

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Access to justice

A number of significant legal factors limit access to justice in Zimbabwe. These include narrow *locus standi* provisions that prevent a significant number of people from asserting their interests; the inability to obtain the relevant information to lay a successful claim; and an administrative process that does not require accountability.

The issue of access to justice is best dealt with at the constitutional level as it would be able to, in a single sweep, deal with public interest statutes, representative actions and so on. Given the similarity in the legal history and reality between South Africa and Zimbabwe, the constitutional provision dealing with standing adequately redresses these deficiencies. Section 38 of the South African Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
> - anyone acting in their own interests;
> - anyone acting on behalf of another person who cannot act in their own name;
> - anyone acting as a member of, or in the interests of, a group or class of persons;
> - anyone acting in the public interests; and
> - an association acting in the interests of its members.

Access to information
Access to information is essential for ascertaining whether one's rights have been violated, and legally establishing the unlawfulness of any given act or omission. In practice, information maybe required from both the public and the state. The South African and Zambian approaches are probably the best examples in southern Africa. Section 48 of the Zambian Constitution states:

> Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far such information is required for the exercise or protection of any of his or her rights or freedoms guaranteed by this Constitution.

Administrative justice
Administrative justice in the area of environment is poorly provided for in Zimbabwe. This stems from the nature of tenure rights to resources and the consequential lack of real rights people have in management. The administrative process is highly centralised, excludes people and lacks transparency. It is time that the administrative process is brought in line with government's political and social policy. It should be amended to create better standards of fairness and to support environmental rights.

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It is time that the administrative process is brought in line with government's political and social policy. It should be amended to create better standards of fairness and to support environmental rights.

The Constitution needs to establish clear and enforceable principles of administration. These include:
- transparency;
- accountability; and
- rights of public participation.

Further, the constitution should establish the legal right to just administration. A provision dealing with administrative justice should ensure that:
1 Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2 Everyone whose rights have been affected by the ad ministrative action to be given written reasons.
3 Everybody whose rights or interests will be affected by administrative action be consulted prior to such action.
4 Where anyone's fundamental rights, as provided by the Bill of Rights, are affected by an administrative action, that person shall grant their prior informed consent.
5 National legislation must be enacted to give effect to these rights and must:
   - provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;
   - impose a duty on the state to give effect to the rights in (1), (2) and (3); and
   - promote an efficient administration.

Introducing an environmental right in Zimbabwe

Rights are derived from the actual reality of people's lives. Rights identify those things a society holds dear: they are the values and aspirations of a given society. Their content may also be defined in relation to international legal developments and to this extent, reflect the values of the global community. The content of environmental rights has been addressed at both these levels.

Rights are derived from the actual reality of people's lives. Rights identify those things a society holds dear: they are the values and aspirations of a given society. Their content may also be defined in relation to international legal developments and to this extent, reflect the values of the global community. The content of environmental rights has been addressed at both these levels.

This approach grants citizens a constitutional environmental right while simultaneously placing an obligation on both citizens and the state to protect and preserve the environment. The issues that need to be incorporated in this right are the issues of access to natural resources, a healthy environment and cultural rights. A clause on environmental rights could provide that:

1 Everyone shall have the right to a healthy and ecologically balanced environment that is not detrimental to health or well being and shall have a duty to defend it;
2 Everyone living in close proximity to a resource shall be entitled to participate in the management of that resource and to be consulted in decision-making that effects their interest;
3 Everyone shall have the right to have the environment protected, for the benefit of the present and future generations; and
4 It shall be the duty of the state, acting through appropriate bodies, and having recourse to and taking support on popular initiatives, to:
   - Prevent and control pollution, its effects and harmful forms of erosion;

- Order and promote regional planning aimed at achieving a proper location of activities, balanced social and economic development, and resulting in biologically balanced landscapes;
- ensure that all development is subject to prior strategic environmental planning and zoning, assessing the ecological status of an area in which developers have an interest;
- ensure that all development is subject to prior environmental and social impact assessment;
- create and develop protected areas so as to ensure the conservation of nature and the preservation of cultural assets of historical and artistic interest;
- promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;
- preserve and restore the essential ecological processes and promote ecologically sound management of species and ecosystems;
- preserve the diversity and integrity of the genetic patrimony of the country and control activities in the field of genetic material research and manipulation;
- control the production, trade and use of techniques, processes and substances which may present a risk to life, to the quality of life, and to the environment;
- promote environmental education at all teaching levels and promote the awareness of the public with regard to the preservation of the environment;
- promote the use of indigenous knowledge systems and preservation of traditional knowledge in the management of the environment and conservation of the biodiversity; and
- any other matter, issue and so forth consistent with 1) and 2).

A critical aspect of human rights is their enforceability. Human rights may be elaborately defined, beautifully and elegantly formulated but they will remain pure paper rights having very little significance unless there are effective and accessible mechanisms and methods of enforcing and realising them for the mass of the people.

In this context it is important that the methods for the enforcement of environmental rights be accessible, simple, inexpensive, transparent and participatory. This means that the traditionally closed, alienated, technical and procedurally cumbersome nature of most legal systems are ill-suited to achieve effective and meaningful enforcement of an environmental rights in Zimbabwe.[46]

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Institutions for delivering environmental rights

Institutions whose primary functions are the protection and monitoring of human rights are essential for the realisation of such rights.

It is critical that the Parliament of Zimbabwe establishes a permanent standing committee on the environment whose responsibility would be to:

- assess the implementation of regional and international environmental conventions and their impact on the people of Zimbabwe's rights and fair access to resources;
- monitor and recommend legislative and policy changes, if necessary, to ensure that environmental laws and commitments are supportive of environmental rights and fair access to resources; and
- monitor and ensure that women in Zimbabwe also benefit from any environmental legislative reform by improving their access to resources. Gender issues are of paramount importance.

Box 5.10: Creating independent institutions

United Nations has set out the following requirements:
The composition of the national institution and the appointment of its members, whether by election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of social forces (of civil society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with or through the presence of representatives of:

i non-governmental organisations ... and concerned social and professional associations;
ii trends in philosophical or religious thought;
iii universities and qualified experts;
iv parliament; and
v government departments in an advisory capacity.

Source: Commission on Human Rights E/CN.4/1992/L.11/Add 4 pp27-28

While Zimbabwe has made great strides in trying to close the gap between men and women, more needs to be done to ensure that women have as much fair access to resources as men. It is, therefore, important that women as "resource managers" are involved at all levels of decision-making in terms of ensuring that Zimbabwe develops and strong environmental rights culture.

Inequitable access to resources in Zimbabwe is not only limited to classes and racial groups, but is also gender biased with tradition limiting women's access to resources. It is, therefore, important that the Constitution provides for the full participation of women in all spheres and full enjoyment of their environmental rights, including access to resources. Such a provision has been recognised in the Zambian Constitution whose Section 57 states:

1 Women shall have equal rights with men in the enjoyment of the rights and freedoms guaranteed by this Constitution and shall in particular:

have equal rights to acquire, administer, control, enjoy and dispose of property (including land) and shall enjoy the same rights with men with respect to inheritance;

2 all laws, customary practices, and stereotyped attitudes which are against the dignity, welfare or interest of women or which otherwise adversely affect their physical and mental well-being are prohibited.

An independent institution for environmental rights protection

An independent institution specifically concerned with the protection of environmental rights is critical. Such an institution may ultimately fall under a human rights commission if such a body were to be created. A specialised institution is important, given the centrality of environmental issues to the livelihoods of the majority. Further, it would provide an important opportunity to involve environmental specialists in the monitoring and enforcement of rights. This is clearly desirable over this function being carried out by institutions that (through no fault of their own) lack environmental expertise, such as the courts.

The human rights commission, which should be established by the constitution, should be tasked to report to the standing parliamentary committee on the environment. The commission's report to the committee should not only highlight issues of revenue and staff but also the number of environmental rights abuses reported and investigated annually, number of prosecution cases, the outcome of such cases, campaigns undertaken to educate the people on their environmental rights, for example.

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The proposed parliamentary committee and commission should in addition, assist the public to initiate public environmental policy debate unlike the case at the moment where all environmental policy initiatives are the preserve of state officials.

The commission's work should be conducted in all three of Zimbabwe's official languages – Shona, Ndebele and English. Similarly, materials should also be produced in those three languages. In order to close the inequalities between people in rural and urban areas, the commission should be as accessible in urban areas as in rural ones.

In undertaking constitutional reform, it may be important to take a leaf from the South African experience: making the document more relevant to the public than just to the lawyers. Only recognising or acknowledging environmental rights is in the constitution not enough. It is no better than a paper tiger if there are no attempts to make the people define and therefore, know their constitution, particularly the bill of rights, which should be as common as the national anthem. Once people know the bill

of rights, they are better placed to exercise their rights and to recognise violations whenever they happen.

In law, ignorance is no defence, but if that ignorance is promoted by institutional deficiencies which do not provide for the public to know, understand and exercise their rights, then environmental rights will always be a noble, even romantic, expression on paper only and never expressed or exercised by the people for whose benefit they are recognised. The exercise of one's rights, environmental or otherwise, is reflection of an individual's sophistication and understanding of the issues.

In respect of the monitoring and enforcement roles, it is envisaged that this body would have full investigatory powers, including the right:

- of entry and search;
- to interview affected parties;
- of access to information; and
- to subpoena witnesses.

It is important for the body to have real powers of enforcement. A board of hearing or alternatively a special environmental court, whose members have adequate legal qualifications, should be established to adjudicate upon disputes. It should have authority to make any order that the High Court can make. This should include the issuing of declaratory orders, interdicts, compliance and enforcement orders, among other things. The adjudication processes should be less formal and accessible to the public. Additionally, this body should have powers to establish a public inquiry into environmental matters. Further, it should be able to institute legal action in its own name. For such an institution to be successful adequate resources must be committed to it.

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27 These observations are based on field research of the authors.

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39 The doctrine of human rights has its roots in the theory of natural law and its emphasis on the individual as a bearer of natural rights in his state of nature (Locke (1632-1704) Locke postulated, on the basis of the equality of all, the entitlement, as a matter of natural right, of every individual to control his own life.
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CHAPTER 6

IMPLEMENTATION OF MULTILATERAL AGREEMENTS

By Bharat Patel and Jennifer Mohamed-Katerere

In Zimbabwe, the existing rules for the adoption of treaties are comprehensively set out in Cabinet Circular No. 2 of 1997.[1] This circular is designed to give effect to section 111B of the Zimbabwe Constitution and applies to every treaty entered into by the executive on or after 1 November 1993. The principal circular has recently been supplemented by Cabinet Circular No. 3 of 1999[2] which sets out guidelines on the procedures to be followed in the negotiation process. This circular covers the negotiation of multilateral treaties and conventions, bilateral or multilateral inter-state agreements, agreements with governmental and non-governmental international organisations and international financial and loan agreements.

APPROVAL OF TREATIES

The approval of treaties is a fairly lengthy process involving four separate stages of approval by the:

- Public Agreements Advisory Committee (PAAC);
- Cabinet Committee on Legislation (CCL); and
- Parliament.

The PAAC was established several years ago to ensure that every public agreement, including treaties and international agreements with non-state entities, is evaluated from every relevant perspective, in terms of legal format, diplomatic and financial considerations, and security or other political implications. The approval of treaties in principle by the CCL is required by cabinet practice. It enables the cabinet, in committee, to consider every treaty in detail before setting in motion the constitutionally stipulated requirements for ratification. As required by the Constitution,[3] executive functions generally, including those pertaining to the conclusion of treaties, must be exercised on the advice of the cabinet. Accordingly, the approval of treaties by the cabinet is explicitly dictated by the Constitution.

In terms of the Constitution, every treaty “shall be subject to approval by Parliament”.[4] This requirement, which was previously confined to treaties imposing fiscal obligations, was later extended to all treaties.[5] However, it does not apply:

- where the Constitution or an Act of Parliament provides otherwise;
- to pre-existing treaties;
- treaties within the executive prerogative;[6] and
- treaties exempted from the requirement by any resolution of Parliament – unless the application or operation of the treaty in question requires public expenditure or any modification of the domestic law.[7]

Signature and ratification or accession

Under the Constitution, the power to enter into a treaty is vested in the President or a minister duly authorised for that purpose.[8] In either case, the performance of this function must be exercised on the advice of the cabinet. In practice, the sponsoring ministry fulfils these constitutional requirements. The ministry prepares and submits a memorandum and cabinet minute through the cabinet office for approval by the President.

On the international level, treaties are normally concluded in one of three ways. The first involves execution by signature *simpliciter*, where the signature of a treaty suffices to bind the signatory state to the terms of the treaty. The second method requires signature followed by ratification in cases where signature denotes an intention to seriously consider the terms of a treaty and to refrain from any conduct calculated to defeat the objects of the treaty,[9] while the act of ratification serves to eventually bind the ratifying state. Finally, the process of accession enables a non-signatory state to adhere to a treaty, usually after it has already come into effect.

Cabinet Circular No. 2 of 1997 takes account of all three modes of adherence and subjects each stage of execution, whether it involves signature or ratification or accession, to the established practice for effecting executive decisions in conformity with the Constitution.

Instruments of ratification or accession

Together with the relevant cabinet papers, the sponsoring ministry is responsible for preparing the requisite instrument of ratification or accession. Following signature by the President (or authorised minister), it is submitted to the Ministry of Foreign Affairs for despatch to the other state party (in the case of a bilateral treaty) or to the designated depository (in the case of a multilateral treaty). For example, the depository for SADC protocols is the executive secretary while the United Nations secretary-general is the depository for UN conventions.

National depositories

The sponsoring ministry must also ensure that copies of the treaty are deposited with the designated national depositories. These include the sponsoring ministry itself, the Ministry of Foreign Affairs, the Attorney General's Office and the National Archives. The objective is to secure the maintenance of proper records as well as ready access to the authentic texts of treaties. In practice, the requirement has hardly ever been fulfilled, despite persistent reminders to the relevant authorities, largely because of the absence of any meaningful sanction for non-observance.

Public participation

The general public and even specialised interest groups are rarely involved in the adoption of treaties. Occasionally, interested parties may be invited to international conferences to participate as observers in the treaty-making process. Even then, however, it is most unlikely that the relevant officials, parties and groups will have adequately conferred in order to develop and present a properly concerted national position.

This closed system of treaty adoption is largely attributable to the ingrained practice of regarding the right to conclude treaties as an exclusively executive prerogative. The practice appears to have been followed without question and will no doubt continue without change in the absence of specific measures to liberalise the process of adopting treaties.

This practice clearly needs to change – if an environmental practice consistent with Agenda 21 and the Rio Principles is to be achieved. As Agenda 21 notes:

> "the major challenges facing the world community as it seeks to replace unsustainable development patterns with environmentally sound and sustainable development is the need to activate a sense of common purpose on behalf of all sectors of society. The chances of forging such a sense of purpose will depend on the willingness of all sectors to participate in genuine social partnership and dialogue, while recognising the independent roles, responsibilities and special capacities of each."[10]

The objective is to secure the maintenance of proper records as well as ready access to the authentic texts of treaties. In practice, the requirement has hardly ever been fulfilled, despite persistent reminders to the relevant authorities, largely because of the absence of any meaningful sanction for non-observance.

Increasingly, both soft law agreements and treaties recognise the need for public participation. Both Agenda 21 and the Rio Principles recognise the importance of public participation. Various other treaties, to which Zimbabwe is party such as the Convention on Biological Diversity and The Convention to Combat Desertification also recognise the value of public participation. Agenda 21 pays considerable attention to this issue – specific chapters address the role of different stakeholders,

including women, NGOs, the business sector, workers and trade unions and indigenous people. The Preamble provides:

> "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those, which potentially affect the communities, in which they live and work. Individuals, groups and organisations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures." [11]

Agenda 21 requires that rights of participation must be applied equally to all major groups.

Given these soft law agreements it is important that Zimbabwe moves to a more participatory system of decision-making including in the area of treaty making. Several opportunities for greater public participation could be seized:

- the first early stage at which treaties are negotiated and examined by state officials. One approach to public participation is to involve the public from the outset. This would include areas where public interest or rights are affected. Environmental instruments would almost invariably meet these criteria; and
- the second stage at which public consultation should be brought into play is when the treaty in question is laid before Parliament for its approval, in terms of section 111B of the Constitution. Intervention by public groups and individuals through their respective Members of Parliament is crucial to make parliamentary approval meaningful and not a mere rubber-stamping exercise. There should be a requirement that the text of the treaty or an accurate summary of its contents be published in the *Government Gazette* at some specified point before it is presented to Parliament.

Participatory approaches need to be tailored to suit the social and economic realities of the communities.

The question is whether the above measures should be entrenched as legal requirements or as administrative rules to be applied by the relevant authorities. The distinction is clearly

important in terms of defining the extent to which the measures can be enforced. The former option is obviously preferable in this respect and, if it is to be adopted in relation to environmental treaties, should be provided for in the proposed Environmental Management Act. As for the latter option, this would be best dealt with through the existing Cabinet Circular No. 2 of 1997, which should be suitably modified for that purpose.

Institutional supervisory mechanism

The domestic rules governing the adoption of treaties are designed to secure two principal objectives to ensure that all:

- treaties are duly scrutinised and approved by the relevant state authorities; and
- the constitutional requirements relative to the conclusion of treaties are substantially satisfied.

The failure to comply with these internal requirements does not ordinarily excuse non-observance of the treaty in question on the international plane.[12] It may, however, preclude the application and operation of the treaty within the domestic jurisdiction. The result would be to create the anomalous position where the treaty is internationally binding but internally inoperative.

Cabinet Circular No. 2 of 1997 constitutes the only formal administrative device for securing the objectives mentioned above. Although this instrument stands alone, strict adherence to its requirements in the case of every treaty would guarantee the fulfilment of its objectives. Regrettably, the prevailing practice is a somewhat haphazard situation where some of the procedures are fulfilled with respect to some treaties and then only by some ministries. Indeed, the responsible officials in several ministries are not even aware of the existence of the circular let alone its requirements. To date, only some treaties appear to have been subjected to the full gamut of the requirements prescribed in the circular. And even then, the general trend is that the processing of a single treaty may take an inordinately long time due to bureaucratic delay and oversight.

This is mainly due of a lack of institutional mechanism for supervising compliance with the circular. At present, each sponsoring ministry is responsible for ensuring that its own treaties are properly processed. However, there is no centralised agency charged with the duty of ensuring that every ministry adheres to the circular. It is imperative that this gap be filled by the designation of an appropriate authority to monitor and enforce expeditious compliance with the stipulated procedures for every treaty.

The failure to comply with these internal requirements does not ordinarily excuse non-observance of the treaty in question on the international plane. It may, however, preclude the application and operation of the treaty within the domestic jurisdiction. The result would be to create the anomalous position where the treaty is internationally binding but internally inoperative.

Another major problem in the present procedures relates to the implementation of a treaty after it has been adopted. There is no guidance on what needs to be done and by whom to make a treaty internally operational, whether by way of administrative action or by way of legislation transforming the treaty into domestic law.

INCORPORATION OF TREATIES

Domestic application of international law

Two divergent doctrines dictate the application of international law at the national level. These are of incorporation and transformation. Incorporation asserts that the rules of international law are automatically incorporated into, and form part of, the domestic law. Transformation, on the other hand, restricts the application of international law to rules that have been clearly transformed into the domestic legal system.

The position in most Commonwealth jurisdictions is that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. In contrast, the internal reception of treaty law is perceived as standing on an entirely different footing.

Under the arrangements prevailing in most Commonwealth countries, the constitutional separation of powers requires that the executive's treaty-making powers should not override Parliament's law-making functions. Accordingly, it is constitutionally necessary to subject the domestic application of treaties to the doctrine of transformation. A treaty does not form part of the domestic law except by virtue of enabling legislation, meaning that the mere ratification of a treaty does not incorporate its provisions into domestic law. Parliament must adopt legislation clearly designed to transform the relevant treaty provisions into rules of national law for the treaty to become effective in Zimbabwe.

The position in Zimbabwe

Given that the Zimbabwean constitutional system and attendant conventions are derived from the British model, it can be stated with certainty that Zimbabwean law has inherited the doctrine of transformation to the same extent as other Westminster jurisdictions. Accordingly, under the common law, a treaty only becomes part of the domestic law if enabling legislation is specifically enacted to give it internal effect.

Box 6.1: Judicial opinion on the status of International Law

In *Barker McCormac (Pvt) Ltd v Government of Kenya* 1983 (2) ZLR 72, at 77, the Supreme Court observed that international law formed part of the law of Zimbabwe except to the extent that it was in conflict with statute or prior judicial precedent. The principal issue before the court concerned the propriety of applying the restrictive doctrine of sovereign immunity. The reception of international law was not fully argued or analysed and the court's observation in that regard must accordingly be treated as being somewhat *obiter.*

In any event treaties concluded on or after the 1 November 1993,[13] this common law position has been codified and embodied in the Constitution, which now expressly provides that a treaty "shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament."[14]

Box 6.2: Section 111B of the Constitution: effect of international conventions

1 Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations:
- shall be subject to approval by Parliament; and
- shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

2 Except as otherwise provided by or under an Act of Parliament, any agreement:
- which has been concluded or executed by or under the authority of the President with one or more foreign organisations, corporations or entities, other than a foreign state or government or an international organisation; and
- which imposes fiscal obligations upon Zimbabwe;

shall be subject to approval by Parliament.

3 Except as otherwise provided by this Constitution or by or under an Act of Parliament, the provisions of subsection 1a shall not apply to:
- any convention, treaty or agreement, or any class thereof, which Parliament has by resolution declared shall not require approval in terms of subsection 1a; or
- any convention, treaty or agreement the subject-matter of which falls within the scope of the prerogative powers of the President referred to in Section 31H 3 in the sphere of international relations;

unless the application or operation of the convention, treaty or agreement requires:

i the withdrawal or appropriation of moneys from the Consolidated Revenue Fund; or
ii any modification of the law of Zimbabwe.

Modes of transformation

Legislation to effect treaty provisions in domestic law may take several forms:

- direct enactment of the whole or part of a treaty, either in the main body of the enabling statute or in a schedule forming an operative part of the statute;
- the enabling statute may employ its own substantive provisions to give effect to a treaty, so as to translate the provisions of the treaty, the text of which may be referred to but not directly enacted; or
- a treaty may be implemented by delegated legislation, the enabling statute empowering the executive to make regulations or take some other action giving domestic effect to the treaty.

Apart from these methods of intentional incorporation, there are many instances where the substantive requirements of a given treaty are already recognised and embodied in domestic legisla-

tion. In such cases, the enactment of further explicit legislation is clearly superfluous, and it may suffice to simply leave the existing law intact or to adjust or elaborate it slightly to fully conform to the treaty.

IMPLEMENTATION OF ENVIRONMENTAL CONVENTIONS

The pressing need for international cooperation in environmental management can be seen in the proliferation of international agreements designed to ensure the security of the global environment and its resources. It is generally recognised that traditional notions of national sovereignty must in certain significant respects, be modified to respect ecological interdependence. One customary international law principle that affects state sovereignty is the principle of state responsibility. State sovereignty denotes the state's right to act without outside interference whereas responsibility refers to its obligation not to act in a way that is harmful to other states.[15]

Over the past two decades, Zimbabwe has become a party to several crucial environmental treaties, conventions and agreements, and has implicitly undertaken to observe and comply with the environmental standards and requirements prescribed by these instruments. These include:

- Convention for the Protection of the World Cultural and Natural heritage, 1972;
- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973;
- United Nations Convention on the Law of the Sea, 1982;
- Vienna Convention for the Protection of the Ozone Layer, 1985 and the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (as amended at London in 1990 and Copenhagen in 1992);
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989;
- Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991;
- Convention on Biological Diversity, 1992;
- Framework Convention on Climate Change, 1992;
- Convention to Combat Desertification, 1994;
- Protocol on Shared Watercourse Systems in the SADC Region, 1995; and the
- Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997. (See Table 6.1.)

One customary international law principle that affects state sovereignty is the principle of state responsibility. State sovereignty denotes the state's right to act without outside interference whereas responsibility refers to its obligation not to act in a way that is harmful to other states.

Although domestic law covers the same subject matter as many of these treaties, it generally fails to create an enabling frame-

Table 6.1: Agreements to which Zimbabwe is a party

ABBREVIATED TITLE	SIGNATURE	RATIFICATION ACCESSION	ENTRY INTO FORCE
1972 Convention for the Protection of the World Cultural and Natural Heritage		16-08-82	16-11-82
1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora		19-05-81	19-08-81
1982 United Nations Convention on the Law of the Sea	10-12-82	24-02-93	16-11-94
1985 Vienna Convention for the Protection of the Ozone Layer		03-11-92	03-02-93
1987 Montreal Protocol on Substances that Deplete the Ozone Layer		03-11-92	03-02-93
1990 London Ozone Amendment		03-06-94	03-09-94
1992 Copenhagen Ozone Amendment		03-06-94	03-09-94
1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal		10-07-92	
1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa		10-07-92	10-10-92
1992 Convention on Biodiversity	12-06-92	11-11-94	11-02-95
1992 United Nations Framework Convention on Climate Change	12-06-92	03-11-92	21-03-94
1994 Convention to Combat Desertification	15-10-94	16-9-97	16-12-97
1995 SADC Protocol on Shared Watercourse Systems	28-08-95	03-09-98	28-09-98
1997 Convention on the Law of the Non-Navigational Uses of International Watercourses		Under consideration	

work for the realisation of the objectives of the different conventions. In most cases, conformity with international requirements necessitates the modification of national law, either by way of adapting existing legislation or by introducing new laws.

1972 Convention for the Protection of the World Cultural and Natural Heritage

This Convention seeks to establish an international system for the protection of outstanding cultural and natural heritage sites for all humanity and to ensure their protection through a closer cooperation among nations. It establishes a list of such sites.

According to the World Heritage Convention, "cultural heritage" is a monument, group of buildings or site of historical,

aesthetic, archaeological, scientific, ethnological or anthropological value. "Natural heritage" designates outstanding physical, biological, and geological features; habitats of threatened plants or animal species and areas of value on scientific or aesthetic grounds or of conservation.

UNESCO's World Heritage mission is to:

- encourage countries to sign the convention and ensure the protection of their own natural and cultural heritage; and
- encourage state parties to the convention to nominate sites within their national territory for inclusion on the World Heritage List.

The provisions of the National Museums and Monuments Act and the Parks and Wildlife Act are broadly compatible with these requirements. However, the functions of the board under the National Museums and Monuments Act[16] would need to be expanded to take into account the provisions of Article 4 of the Convention which requires the *in situ* identification, protection and conservation of cultural heritage.

The Parks and Wildlife Act deals with the protection and preservation of natural heritage. The act particularly provides for the establishment of national parks, *inter alia*, with a view "to preserve and protect the natural landscape and scenery therein" and "to preserve and protect wild life and plants and the natural ecological stability of wildlife and plant communities therein".[17]

Article 5 provides that each state party shall endeavour, in so far as possible, and as appropriate for each country, to:

- Adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- Set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- Develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- Take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

- Foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Zimbabwe needs to define a comprehensive policy as required by Article 5(a) in order to achieve full compliance. The current treatment of social and cultural values within the environmental sphere runs counter to the ethos of paragraph (a).[18] The requirements of Article 5(b) are adequately provided for in Part II of the National Museums and Monuments Act, and in Parts II and XVI of the Parks and Wildlife Act. These departments provided for by these laws are also engaged in research as required by paragraph (c). For full incorporation of paragraph (d), Zimbabwe needs to revise its environmental legislation so that it more effectively promotes conservation.

Article 5 also requires each state party not to take any deliberate measures, which might damage directly or indirectly the cultural and natural heritage. The question arises as to whether the protection level in the existing acts is adequate to achieve this. For example, Mana Pools is protected as a national park, however mining or prospecting do not constitute prohibited activities under the Parks and Wildlife Act. In order to achieve full compliance, sites listed under the Convention may require stricter national measures than currently exist. The principle act for the protection of cultural heritage does not create measures for safeguarding the heritage, instead the board may make bylaws for this purpose.

Article 29 of the convention requires parties to submit periodic returns determined by the General Conference of UNESCO. In this connection, the board reports which are to be submitted under the National Museums and Monuments Act[19] and the Parks and Wildlife Act,[20] could conceivably form the basis for compliance with Article 29.

1973 Convention on International Trade in Endangered Species of Fauna and Flora (CITES)

The objective of CITES is to protect endangered species through a listing system. Appendix I lists species threatened with extinction. Trade in this category is generally prohibited. Appendix II includes species which, although not necessarily threatened, may eventually be threatened if trade in such species is not strictly regulated. Appendix III includes all species, which any party identifies as subject to regulation within its jurisdiction, to prevent or restrict exploitation, and as needing the cooperation of other parties.

The objective of CITES is to protect endangered species through a listing system. Appendix I lists species threatened with extinction. Trade in this category is generally prohibited. Appendix II includes species which, although not necessarily threatened, may eventually be threatened if trade in such species is not strictly regulated. Appendix III includes all species, which any party identifies as subject to regulation within its jurisdiction, to prevent or restrict exploitation, and as needing the cooperation of other parties.

Taken as a whole, the relevant provisions of the Parks and Wildlife Act and its subsidiary regulations broadly conform with CITES objectives. Zimbabwe has adopted regulations implementing CITES. These are the Parks and Wildlife (General) Regulations, SI 362/1990, Parks and Wildlife (General) (Amendment) Regulations SI 114/1993 and Parks and Wildlife (Import and Export) (Wildlife) Regulations, 1998.

Part IX of the act, as read with the sixth schedule, deals with the position of specially protected animals. Such protected animals may not be hunted, kept, possessed, sold or otherwise disposed of without a permit.[21] In essence, Part IX of the act constitutes a system of control over the hunting of specially protected animals and the sale of the products thereof, to ensure the protection and preservation of particular species of wild fauna. Additionally, the list of protected species, as contained in the sixth schedule may be periodically updated by ministerial notice.[22]

Part X of the act addresses the situation of specially protected indigenous plants, which are listed in the Seventh Schedule. The act provides that no person may purchase or sell specially protected indigenous plants without a licence.[23] The act also empowers the responsible minister to prohibit persons from picking indigenous plants,[24] thereby protecting species listed under CITES.

In terms of section 129 of the act, the minister may make regulations, *inter alia*, for "the regulation, control or prohibition of the import or export of animals, fishes, plants and other organisms and trophies thereof, in order to preserve, conserve, propagate or control the wildlife, fish and plants of Zimbabwe or to comply with the obligations of Zimbabwe in terms of any treaty, convention or other international agreement."

Part III of the Parks and Wildlife (General) Regulations, 1990[25] deals with specially protected indigenous plants. The regulations provide for a system of registration of cultivators of plants.[26] Any person wishing to propagate, sell or transfer any specially protected indigenous plant is required to obtain a permit. Part IV of these regulations deals with the control of hunting, removal, viewing and sale of animals and their products. The regulations particularly prohibit the unlicensed manufacture of, or dealings in, trophies and ivory.[27]

Section 3 of Parks and Wildlife (Import and Export) (Wildlife) Regulations, 1998[28] provides that no person shall import into or export from Zimbabwe any wildlife, trophy or controlled

goods except in accordance with the terms of a permit or certificate issued in terms of section 5. Parts I-III of the second schedule to the regulations (dealing with wildlife) are equivalent to Appendices I-III, respectively, of CITES. Part I of the second schedule lists species considered to be threatened with extinction generally, though not necessarily within Zimbabwe. Part II lists species, which are not yet under threat, but could become endangered if trade is uncontrolled. Part III lists species, which are protected from exploitation within particular countries.

Box 6.3: Institutional systems

The regulations essentially replicate the institutional structure created under CITES. The convention establishes the office of the management authority. Under these regulations, the director of Department of National Parks and Wildlife Management (DNPWLM) is given primary responsibility to issue permits and certificates. This authority may be devolved to the controller of customs and excise. No scientific authority as provided for under CITES is specifically provided for, presumably because of the nature of the DNPWLM, which is capable of performing the duties of the scientific authority.

Any officer of the Department of Customs and Excise or the DNPWLM is an inspector for purposes of the regulations. Further the minister may appoint other inspectors who are authorised to collect or receive information in relation to an application for a permit or certificate. They may examine and extract from such records, and serve, or remove any records, which, in their opinion may be evidence of a contravention of the regulations. Further, an inspector may for the purposes of examination or as evidence, seize and remove, without payment, any sample or specimen of any controlled goods, wildlife or trophy.

Source: Mohamed-Katerere, 1996

1982 United Nations Convention on the Law of the Sea (UNCLOS)

The Law of the Sea Convention is a comprehensive regime of law and order for the world's oceans. It is an umbrella convention, which establishes rules governing all uses of the oceans and their resources. It embodies in one instrument traditional rules for the uses of the oceans, and introduces new legal concepts and regimes, and addresses new concerns. The convention provides the framework for further development of specific areas of the law of the sea.

The preamble states that its adoption is motivated by the desire to establish, with due regard for the sovereignty of states, a legal order for the seas and oceans to:

- facilitate international communication;
- promote the peaceful uses of the seas and oceans;
- the equitable and efficient utilisation of their resources;
- the conservation of their living resources; and
- the study, protection and preservation of the marine environment.

It deals with rights of access and use of coastal states, land-locked countries and islands. Additionally it deals with issues of passage and pollution. All states are bound to prevent and control marine pollution and are liable for damage caused by violation of their international obligations to combat such pollution. Although Zimbabwe has provisions to control domestic pollution,[29] it is questionable whether or not this approach is adequate to deal with transboundary and downstream pollution that ultimately contributes to marine pollution. Zimbabwe allows some pollution of its waters in terms of a permit. In issuing the permit, no specific requirement regarding consideration of its downstream impact is made.

1985 Vienna Convention (and protocols) for the Protection of the Ozone Layer

The relevant agreements are the Vienna Convention for the Protection of the Ozone Layer and its protocol, the Montreal Protocol (1987) as adjusted and amended by the second meeting of the parties (London, 27-29 June 1990) and by the fourth meeting (Copenhagen, 23-25 November 1992) and the seventh meeting (Vienna, 5-7 December 1995).

The Convention for the Protection of the Ozone Layer appears unexceptionable. Nations agreed to take "appropriate measures ... to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the Ozone Layer." However, the measures are unspecified. There is no mention of any substances that might harm the ozone, and CFCs only appear towards the end of the annex to the treaty, where they are mentioned as chemicals that should be monitored. The main thrust of the convention when it was adopted in 1985 was to encourage research, cooperation among countries and exchange of information. Nevertheless, the Vienna Convention set an important precedent. For the first time, nations agreed in principle to tackle a global environmental problem before its effects were felt, or even scientifically proven.[30]

The Montreal Protocol aims to reduce and eventually eliminate the emissions of human-made ozone-depleting sub-

Box 6.4 Ozone protection

The Ozone Layer is found in the stratosphere between 10-50km above the ground. Ozone molecules have three atoms of oxygen instead of the normal two. The ozone layer protects people from the harmful effects of certain wavelengths of ultraviolet (UV) light from the sun, specifically UV-B. Any significant decrease in ozone in the stratosphere would result in an increase of UV-B radiation reaching the earth surface.

Increases in levels of UV-B radiation can result in the increase in skin cancers, suppress the immune system, exacerbate eye disorders, including cataracts and affect plants, animals and plastic materials.

CFCs, which were invented in 1928, found many uses in aerosols, foams, refrigeration, air conditioners, solvents, and fire extinguishers. CFCs are persistent, reaching the stratosphere and causing ozone depletion. This ozone depletion has been dramatically confirmed through the Antarctic "ozone hole" discovered in 1985 and observations, since then, of ozone depletion in the middle and higher latitudes.

Source: http://www.unep.org/ozone/

stances. Article 2 establishes control measures while Article 4 deals with the control of trade in listed substances.

Article 5 deals with the special situation of developing countries. It provided a 10-year grace period to January 1999 to any developing country whose annual calculated level of consumption of the controlled substances in Annex A was less than 0.3 kgs per capita on the date of the entry into force of the protocol.

Section 3(3) of the Control of Goods Act provides that the President may by regulations empower such minister as may be specified in the regulations to make orders, *inter alia*, to control the import into or export from Zimbabwe of such goods or classes of goods as may be specified in the regulations. Effectively, Section 3(3) could, therefore, be used to empower the relevant minister to control the importation and exportation of ozone-depleting substances in line with Zimbabwe's schedule of commitments in terms of the international instruments. The act is, however, inappropriate if the objective is to cover all aspects of the regulation of such substances, embracing their importation, distribution, manufacture and use.

The Hazardous Substances and Articles Act probably constitutes the most appropriate regulatory framework for meeting Zimbabwe's ozone protection obligations. Section 15 provides for the declaration by notice of hazardous substances, while Section 38 enables the introduction of measures of "regulating, controlling or restricting the manufacture, sale, possession, storage, conveyance, importation or use of any such hazardous substance".

If Zimbabwe were to regulate ozone-depleting substances through this act, the government would need to introduce a new category of hazardous substances, i.e. Group V, dealing specifically with ozone-depleting substances. This would entail, *inter alia*, amendments to Sections 15 and 38 of the act and the framing of appropriate notices and regulations in terms of those sections. Thereafter, such notices and regulations could be modified whenever necessary, taking into account any new developments in the global control of ozone-depleting substances.

The act is, however, inappropriate if the objective is to cover all aspects of the regulation of such substances, embracing their importation, distribution, manufacture and use. If Zimbabwe were to regulate ozone-depleting substances through this act, the government would need to introduce a new category of hazardous substances, dealing specifically with ozone-depleting substances.

1992 Convention on Biological Diversity (CBD)

The Convention has three principal objectives:

- conservation of biological diversity;
- sustainable use of its components; and
- fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

Additionally, it recognises:
- that conservation and development are interdependent;
- state sovereignty;
- shared responsibility;
- inter-generational rights;
- the need for and desirability of cooperation;
- indigenous peoples' rights; and
- the need for public participation for successful conservation.

Although there are numerous legislative instruments in Zimbabwe that deal with biological diversity, it is difficult to claim that any of these effectively and comprehensively provide for the realisation of the objectives of the CBD or the specific requirements established under the treaty.[31]

The CBD affects virtually every aspect of biodiversity management and requires *inter alia* parties to adopt various measures in the planning; identification, and monitoring of *in situ* and *ex situ* conservation; the control of living modified organisms; the integration of the CBD objectives into national decision-making; incentive measures; research and training; public education and awareness; impact assessment; access to genetic resources and technology; and the handling of biotechnology and the distribution of its benefits.

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National strategies, plans and programmes

Article 6 requires parties to develop national strategies, plans and programmes for the conservation and sustainable use of biodiversity and to integrate conservation and sustainable use of biodiversity into sectoral and cross-sectoral plans, programmes and policies. In this regard, Zimbabwe has developed a national strategy and action plan to implement the conventions.[32] This strategy identifies Zimbabwe's priority areas for action and considers broad strategic approaches to addressing them.

Monitoring the components of biodiversity

Article 7 requires parties to identify components of biological diversity important for conservation and sustainable use, and to monitor biodiversity status; identify processes and categories of activities, which have or are likely to have a significant impact on biological diversity. None of the legislation, other than the Natural Resources Act, specifically addresses this issue. The legislation creating specialist technical bodies such as the Forestry Commission and the Department of Parks and Wildlife should define this as one area of responsibility.

In situ conservation

Article 8 requires parties to develop measures for *in situ* conservation. These include developing a system of protected areas;

promoting the protection of ecosystems, natural habitats and the maintenance of viable species in natural surroundings and promoting environmentally sound and sustainable development in areas adjacent to protected areas with a view to further protecting these areas; rehabilitate and restore degraded ecosystems; and promote the recovery of threatened species. Parties must ensure the control of alien species and respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities. Additionally, parties must establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms from biotechnology which are likely to adversely impact the environment.

Zimbabwe has legislation that provides for *in situ* conservation, for the control of alien species and recently adopted biosafety regulations.[33] The Research Act provides in section 10 that the Research Council must ensure that persons, animals, plants and the environment generally are protected from the effects of potentially harmful research or undertakings. These regulations provide *inter alia* for the establishment of a biosafety board and the control and monitoring of the use of genetically modified organisms.

Nevertheless, these systems can be improved to achieve full compliance. A system for protected areas management requires that distinct categories for protection should be established and each of these should have clear purposes. Although Zimbabwe has provision for the declaration of protected areas, the approach to designation is fragmented and covered under four different acts: the Parks and Wildlife Act,[34] the Forest Act,[35] the Communal Lands Forest Produce Act,[36] and the Museums and Monuments Act. Further, the distinction between areas is not always clear. Moreover the protected areas system is now out of step with current thinking on protected areas and the realisation of the CBD objectives.

The CBD makes the import step forward of linking protected areas to larger public concerns such as sustainable development, traditional knowledge, access to genetic resources, national sovereignty, equitable sharing of benefits, and intellectual property rights.[37] Today, "protected areas are not an end in themselves, but are part of humanity's most basic concerns. Simply stated, they are tools for development – a special kind of development that respects both people and nature; a development conceived to meet the needs of today without sacrificing the potential for tomorrow. Protected areas contribute to development in many ways – as a sustainable supplier of natural products, as a store of valued biodiversity, as protectors of vital water supplies, as centres for tourism, and as cultural assets.

The CBD makes the import step forward of linking protected areas to larger public concerns such as sustainable development, traditional knowledge, access to genetic resources, national sovereignty, equitable sharing of benefits, and intellectual property rights. Today, "protected areas are not an end in themselves, but are part of humanity's most basic concerns. Simply stated, they are tools for development – a special kind of development that respects both people and nature; a development conceived to meet the needs of today without sacrificing the potential for tomorrow.

"In the best cases the protected area can act as a motor for development, attracting to an area investment and expertise, the benefits of which spread out into the neighbourhood to help alleviate poverty."[38]

It is now widely accepted that the success of protected areas is dependent on the recognition of the multiple stakeholders and cooperation with and among them. Stakeholders include the public and commercial sectors, NGOs, research institutions and local communities. Unfortunately, the legislation in Zimbabwe does not recognise this.

Box 6.5: The IUCN protected area system

The World Conservation Union (IUCN) has developed a protected areas system which many countries have used as the basis for developing their national systems. It divides protected areas into six categories:

Category I	Protected Areas managed mainly for science or wilderness protection (strict nature reserves and wilderness areas).
Category II	Protected areas managed mainly for ecosystem protection and recreation (national parks).
Category III	Protected areas managed mainly for conservation of specific natural features (natural monuments).
Category IV	Protected area managed mainly for conservation through management intervention (habitat/species management areas).
Category V	Protected area managed mainly for landscape/seascape conservation and recreation (protected land/seascapes).
Category VI	Protected area managed mainly for the sustainable use of natural ecosystems (managed resource protected area).

The Parks and Wildlife Act provides for the protection of specific species. Part X, as read with the Seventh Schedule to the Act, relates to specially protected indigenous plants, which may not be picked except in terms of a permit issued by the relevant authority.[39] Part XI applies to the control of picking indigenous plants, which have not been declared specially protected. This part enables the responsible minister, in the interests of the preservation, conservation, propagation or control of any indigenous plants in Zimbabwe, to issue notices specifying the indigenous plants, which may not be picked or sold.[40]

Ex situ conservation

Article 9 of the CBD requires parties to promote *ex-situ* conservation. Part V of the Parks and Wildlife Act relates to the establishment of botanical reserves and botanical gardens. In particular, it states that the purpose of such botanical reserves is "to preserve and protect rare or endangered indigenous plants or

representative plant communities growing naturally in the wild, for the enjoyment, education and benefit of the public".[41]

National decision-making

Article 10 requires parties to integrate conservation and sustainable use in national decision-making; protect and encourage customary use of biological resources in accordance with traditional and cultural practices that are compatible with conservation and sustainable use; support local populations to develop and implement remedial action in degraded areas; encourage cooperation between sectors and government authorities.

Zimbabwe has made some important steps forward in addressing these provisions, including the adoption of a district environmental planning process and the CAMPFIRE programme. However it needs to translate these obligations into law.

The legislative system in direct contradiction of this section has disempowered traditional institutions and denied customary knowledge a role in management.[42] This needs to be redressed.

Control of use of biodiversity

Article 10 also requires each contracting party to adopt measures relating to the use of biological resources to avoid or minimise adverse impacts on biological diversity. In this respect, section 3 of the Control of Goods Act is appropriate insofar as it concerns measures to achieve the sustainable use of components of biodiversity through the control of trade – the importation, exportation, distribution, purchase and sale of such components.

Zimbabwe has made some important steps forward in addressing these provisions, including the adoption of a district environmental planning process and the CAMPFIRE programme. However it needs to translate these obligations into law. The legislative system in direct contradiction of this section has disempowered traditional institutions and denied customary knowledge a role in management. This needs to be redressed.

Article 19 requires parties to ensure that any person under its jurisdiction who handles any living modified organism to provide information about its safety and use. The Research Act provides for the establishment of safety boards to ensure the safety of potentially harmful research or undertakings generally or any class of potentially harmful research or undertakings.[43] As noted earlier, biosafety regulations have also been adopted.

Incentives

Article 11 requires parties to adopt economically and socially sound measures that act as incentives for conservation and sustainable use. Zimbabwe's environmental management system adopts a command-and-control approach. The draft environmental management bill redresses this to some extent by allowing the minister to introduce incentive measures. However, all environmental legislation needs to be revisited to address this issue.

Scientific research, education, training and public awareness

Article 12 requires parties to establish and maintain programmes for scientific and technical education and training and promote and encourage research, which contributes to the conservation and sustainable use. There are numerous initiatives in Zimbabwe that addresses this aspect. Nevertheless, it is still important for government to specifically recognise this obligation in legislation.

Article 13 requires parties to promote and encourage public understanding of the importance of, and the measures required for conservation of biodiversity. This is directly addressed under the Natural Resources Act.

Environmental impact assessment

Article 14 requires parties to introduce appropriate procedures requiring EIA for activities likely to have significant adverse impacts. This has been done through the adoption of an EIA policy. It is expected that this policy will be given the force of law when the Environmental Management Bill becomes law.

Access to genetic resources and transfer of technology

Article 15 of the CBD requires parties to adopt legislative and other measures that create conditions for access to genetic resources by other contracting parties. Such access must be on mutually agreed terms. The Research Act requires all foreigners undertaking research in Zimbabwe to register in terms of the act.[44] However, measures for the fair and equitable sharing of research and development benefits need to be developed. Zimbabwe does not have a system for ensuring this. The legislation dealing with intellectual property rights does not recognise farmers' rights or traditional rights. Section 3 of the Plant Breeders Rights Act provides for the protection of rights in respect of new plant varieties originating in Zimbabwe.

1992 United Nations Framework Convention on Climate Change (UNFCCC)

The ultimate objective of the Convention is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a timeframe sufficient to:

- allow ecosystems to adapt naturally to climate change;
- ensure that food production is not threatened; and
- enable economic development to proceed in a sustainable manner.[45]

The Convention is a framework agreement and is designed to allow parties to weaken or strengthen it in response to new scientific developments. For example, they can agree to take more specific actions (such as reducing emissions of greenhouse gases by a certain level) by adopting "amendments" or "protocols" to the convention.

Article 3 sets out key principles:

- inter-generational rights;
- precautionary principle; and
- the right to sustainable development.

Article 4 of the Convention requires States to promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of certain greenhouse gases. These

Box 6.6: Climate change

The Climate Change Convention focuses on something particularly disturbing: humans are changing the way energy from the sun interacts with and escapes from the earth's atmosphere. Among the expected consequences altering the global climate are an increase in the average temperature of the earth's surface and shifts in world-wide weather patterns. Other – unforeseen – effects cannot be ruled out.

Humans have changed, and are continuing to change, the balance of gases that form the atmosphere. This is especially true of such key "greenhouse gases" as carbon dioxide, methane, and nitrous oxide. (Water vapour is the most important greenhouse gas, but human activities do not affect it directly.) These naturally occurring gases make up less than one-tenth of one percent of the total atmosphere, which consists mostly of oxygen (21 percent) and nitrogen (78 percent). But greenhouse gases are vital because they act like a blanket around the earth. Without this natural blanket, the earth's surface would be some 30 degrees C colder than it is today.

The problem is that human activity is making the blanket "thicker". For example, when people burn coal, oil, and natural gas huge amounts of carbon dioxide are spewed into the air. When forests are destroyed, the carbon stored in the trees escapes to the atmosphere. Other basic activities, such as raising cattle and planting rice, emit methane, nitrous oxide, and other greenhouse gases. If emissions continue to grow at current rates, it is almost certain that atmospheric levels of carbon dioxide will double during the 21st century from pre-industrial levels. If no steps are taken to slow greenhouse gas emissions, it is quite possible that levels will triple by the year 2100.

The most direct result, says the scientific consensus, is likely to be a "global warming" of 1.5-4.5 degrees C over the next 100 years. That is in addition to an apparent temperature increase of half a degree Centigrade since the pre-industrial period before 1850, at least some of which may be due to past greenhouse gas emissions.

Just how this would affect humans is hard to predict because the global climate is a very complicated system. If one key aspect – such as the average global temperature – is altered, the ramifications ripple outward. Uncertain effects pile onto uncertain effects. For example, wind and rainfall patterns that have prevailed for hundreds or thousands of years, and on which millions of people depend, may change. Sea-levels may rise and threaten islands and low-lying coastal areas. In a world that is increasingly crowded and under stress – a world that has enough problems already – these extra pressures could lead directly to more famines and other catastrophes.

Source: http://www.unccc.org

include carbon dioxide, methane, nitrous oxide and the gases generated by the burning of fossil fuels. Specifically parties are obliged to:

- formulate and implement national and regional programmes to mitigate climate change;
- prepare national inventories on greenhouse gas emissions and on actions to remove them; and
- promote and cooperate in education, training and public awareness.

Zimbabwe has no specific programmes implementing the Convention. Environmental law in Zimbabwe does not, to any large extent, incorporate these principles. To a limited extent the Atmospheric Pollution Prevention Act could be used for incorporating the obligations assumed under the Convention. The control of greenhouse gas emissions could be effected through Section 38 of the Act, which permits regulations providing for, *inter alia*:

- classifying sources of pollution of the atmosphere;
- regulating the quality of fuels that may be used for heating, generating steam or electricity or any industrial process;
- prescribing the ambient or quality criterion to be used in controlling, regulating or prohibiting the emission of any air contaminant into the atmosphere; and
- generally regulating, restricting or prohibiting the emission of any air contaminant into the atmosphere from any source of pollution.

However, the act will need to be amended to include a precautionary approach and to provide for inter-generational rights.

Article 4 of the convention also requires states to promote and cooperate in the conservation and enhancement of sinks and reservoirs of all greenhouse gases, i.e. biomass, forests and oceans, as well as other terrestrial, coastal and marine ecosystems. Part IV of the Forest Act provides for the demarcation of protected forest areas and the protection of trees generally. It is possible to use this provision as a mechanism for the realisation of this objective. Additionally, part VIII contains provisions for the control of fires and the burning of vegetation. These provisions could be modified in order to minimise human activity, which impacts on carbon sinks and reservoirs.

1994 Convention to Combat Desertification (CCD)

The objective of CCD is:

> "to combat desertification and mitigate the effects of drought in countries experiencing serious drought

and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership agreements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development."[46]

Box 6.7: Desertification

Desertification is land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities. Desertification does not refer to the expansion of existing deserts. It occurs because dryland ecosystems, which cover over one-third of the world's land area, are extremely vulnerable to overexploitation and inappropriate land use. Poverty, political instability, deforestation, overgrazing, and bad irrigation practices can all undermine the land's fertility.

In the past, drylands recovered easily following long droughts and dry periods. Under modern conditions, however, they tend to lose their biological and economic productivity quickly unless they are sustainably managed. Today drylands on every continent are being degraded by overcultivation, overgrazing, deforestation, and poor irrigation practices. Such overexploitation is generally caused by economic and social pressure, ignorance, war, and drought.

Desertification undermines the land's productivity and contributes to poverty. Prime resources – fertile topsoil, vegetation cover, and healthy crops – are the first victims of desertification. The people themselves begin to suffer when food and water supplies become threatened. In the worst cases, they endure famine, mass migration, and colossal economic losses. Over 250 million people are directly affected by desertification, and some one thousand million (or one billion) are at risk.

Desertification is primarily a problem of sustainable development. It is a matter of addressing poverty and human well-being, as well as preserving the environment. Social and economic issues, including food security, migration, and political stability, are closely linked to land degradation. So are such environmental issues as climate change, biological diversity, and freshwater supplies.

Source: http://www.unccd.org

It recognises that in order to achieve this, long-term integrated strategies that focus simultaneously on improved productivity of the land and the rehabilitation, conservation, and sustainable management of land and water resources, are needed to improve living conditions, particularly at the community level.

The Convention emphasises a "bottom-up" approach and requires strong local participation in decision-making. Communities are put on an equal footing with other actors in the development process. Communities and their leaders, as well as NGOs, experts, and government officials are required to work closely together to formulate action programmes. For this innovative and complicated process to work, awareness campaigns may be needed to inform people about the new opportunities presented by this convention. Zimbabwe needs to do this but also to create more enabling legislation.

Affected parties undertake to:[47]

- give due priority to combating desertification and mitigating the effects of drought, and to allocate adequate resources in accordance with their circumstances and capabilities;
- establish strategies and priorities, within the framework of sustainable development plans and/or policies, to combat desertification and mitigate the effects of drought;
- address the underlying causes of desertification and pay special attention to the socio- economic factors contributing to desertification processes;
- promote awareness and facilitate the participation of local populations, particularly women and youth, with the support of non-governmental organisations, in efforts to combat desertification and mitigate the effects of drought; and
- provide an enabling environment by strengthening, as appropriate, relevant existing legislation and, where they do not exist, enacting new laws and establishing long-term policies and action programmes.

Zimbabwe has adopted a National Action Programme (NAP) as required under the Convention. The plan is intended to make

Box 6.8: National Action Programme

The Ministry of Environment and Tourism has been designated as the national co-ordinating mechanism for CCD. Further, an interagency national steering committee, the national task force has been established. It is comprised of representatives of the Ministries of: Environment and Tourism; Lands and Agriculture; Rural Resources and Water Development; Local Government, Public Works and National Housing; Finance and Economic Planning; National Affairs, Employment Creation and Cooperatives, NGOs, University of Zimbabwe and the private sector. The United Nations Development Programme represents donors as an observer.

The National Action Plan identifies a number of focal points. These are land resources (and energy resources), water resources, poverty alleviation and provision of alternative livelihoods, education, public awareness and capacity building, NAP environmental information System. The plan is intended to make policy interventions at the national level in these areas. At the local level the proposed focus is community project identification and implementation. These projects will focus on "curbing land degradation and minimising the effects of drought as well as alleviating poverty through the provision of alternative livelihoods."

At the national level, identified areas of intervention include:

- reform of land tenure;
- adoption of community based natural resource management initiatives;
- support for indigenous knowledge systems in managing land based resources;
- diversification of rural livelihood systems;
- building capacity of extension workers, farmers and resource users;
- supporting the DDF land reclamation programme;
- encouraging the development and dissemination of renewable energy;
- facilitating coordination in the energy sector; and
- assisting in the development of a national energy strategy.

The action plan does not identify specific strategies in these areas.

Source Mohamed-Katerere, 2000, 65

policy interventions at the national level in regard to land tenure, community based natural resource management, indigenous knowledge systems, capacity-building, land reclamation, renewable energy, coordination and in the development of a national energy strategy.

The Natural Resources Act provides for the conservation and improvement of the natural resources of Zimbabwe. "Natural resources" are widely defined to include the soil, waters and minerals of Zimbabwe, as well as trees, grasses and other vegetation.

Part V of the act provides for the establishment of intensive conservation areas. The holders of private land may establish conservation committees[48] to construct works and other measures for the conservation or improvement of natural resources in those areas. Part VI of the act deals with the conservation and improvement of natural resources in communal land. The act particularly enables the reservation of any communal land against human occupation or cultivation where such land has become despoiled or is deteriorating through overgrazing or other misuse.[49] However, communal inhabitants are not recognised as the driving force for conservation. Therefore, their participation as required under the convention is not provided for. This problem is evident with all natural resource legislation. The rights of communal residents in relation to all natural resources will need to be redressed.

> In Zimbabwe, it is now widely accepted that the land tenure system is a major factor in terms of poverty and the unsustainable use of natural resources in the most marginal areas. Zimbabwe needs to address this aspect if it is to fulfil its obligations under the Convention to Combat Desertification.

Effective implementation of the Convention requires widespread environmental law reform that creates an enabling environment for community participation, the realisation of long-term objectives and address the underlying cause of land degradation. In Zimbabwe, it is now widely accepted that the land tenure system is a major factor in terms of poverty and the unsustainable use of natural resources in the most marginal areas. Zimbabwe needs to address this aspect if it is to fulfil its obligations under the CCD.

Transboundary movement of hazardous waste

Two Conventions are relevant here – the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) and the Bamako Convention on the Control of the Import, Movement and Disposal of Hazardous Wastes in Africa (1991). Additionally chapter 21 of Agenda 21 also applies.

The main objectives of the Basel Convention are to:

- reduce transboundary movements of hazardous wastes and other wastes to a minimum consistent with their environmentally sound management;

Box 6.9: Environmentally sound management

Environmentally sound management means addressing the issue through an "integrated life-cycle approach", which involves strong controls from the generation of a hazardous waste to its storage, transport, treatment, reuse, recycling, recovery and final disposal.

Source: http://www.basel.int/pub/environsound.html

- treat and dispose of hazardous wastes and other wastes as close as possible to their source of generation in an environmentally sound manner; and
- minimise the generation of hazardous wastes and other wastes (in terms both of quantity and potential hazard).

The Basel Convention (adopted in the Swiss city of the same name) did not ban the international shipment of waste; instead it merely required that waste exporters must receive written consent from the receiving country. The Bamako Convention (adopted in the Malian capital, Bamako) was Africa's response and is by far the strongest control measure on wastes ever passed. It contains the following features:[50]

- Bans the import of hazardous waste, including radioactive waste, and declares such import a "criminal act." Given the hazardous waste import ban all parties shall take appropriate legal, administrative and other measures to prohibit the import of all hazardous wastes, for any reason, into Africa from non-contracting parties. Various procedures of reporting are created;
- Bans the import of hazardous substances that have been banned, cancelled or refused registration, or have been voluntarily withdrawn in the country of manufacture for human health or environmental reasons;
- Bans ocean dumping and ocean incineration as well as seabed and sub-seabed disposal of wastes;
- Imposes strict, unlimited, joint and several liability on hazardous waste generators; this means that a waste generator retains responsibility and legal liability for a generated waste. Anyone hurt by the waste need not prove that the generator of the waste was negligent. If several waste generators mix their wastes together (as in a dump), each one is individually liable for all damages caused by the whole mess; and
- Commits African nations to "strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, [among other things,] preventing the release of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The parties shall cooperate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions."

Zimbabwe has ratified Bamako but it is not yet in force. The government has also signed the Basel Convention, which has been ratified by the requisite number of signatories and is now effective.

The Hazardous Substances Act goes someway in addressing or creating an enabling framework to address the obligations under the Basel and Bamako Conventions. As already mentioned, Section 38 of the Hazardous Substances and Articles Act permits the framing of regulations in relation to, *inter alia*, the storage, conveyance, importation and exportation of hazardous substances. In the specific context of wastes, the responsible minister has recently enacted the Hazardous Substances and Articles (Waste Management) Regulations, 2000. Part VI of the regulations governs the import and export of hazardous wastes and waste oils. The term "hazardous waste" is broadly defined to cover a wide range of matter that represents a threat to human health or the environment.

Generally, the regulations prohibit the import and export of hazardous wastes and waste oils unless such movements are authorised by licence or permit.[51] In keeping with the procedures contemplated by the relevant international agreements, the import, export and transit of such wastes is further subject to prescribed notification and assent requirements.[52] As a whole, Part VI of the regulations is designed to be fully compliant with the requirements of the 1989 Basel Convention. To that extent, it also conforms to many of Zimbabwe's obligations under the 1991 Bamako Convention. However, the regulations do not address some of the requirements, which are peculiar to the latter convention, particularly the total prohibition of hazardous waste imports into Africa from non-parties. This is no doubt due to the inherent conflict in the scope of application of the two conventions.

However, the regulations do not address some of the requirements, which are peculiar to the latter convention, particularly the total prohibition of hazardous waste imports into Africa from non-parties. This is no doubt due to the inherent conflict in the scope of application of the two conventions.

Shared watercourses

In terms of water resources management, two instruments are directly relevant – the 1995 SADC Protocol on Shared Watercourse Systems and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

The SADC protocol creates the framework for the equitable utilisation of shared watercourses in the SADC area. It provides for equitable sharing, the relationship between conservation and development, exchange of information, water quality, notification of hazards and the control of alien species.

The Convention on the Law of the Non-Navigational Uses of International Watercourses is much more comprehensive and

covers issues of equitable and reasonable use of water and participation, obligation not to cause significant harm, obligation to cooperate, exchange of data and information, planning, protection, preservation and management, the right of non-discrimination and the settlement of disputes.

In respect of equitable sharing, member states have agreed that each state within the basin is entitled to the use of water systems in its territory, without prejudice to its sovereignty but in accordance with the other principles of the protocol. Accordingly member states have agreed to respect and apply the existing rules of general or customary international law, particularly to respect and abide by the principle of community of interests in the equitable utilisation of river systems. Further it is agreed that to utilise a shared watercourse in an equitable manner, it should be used with a view to attaining optimum utilisation and obtaining benefits consistent with adequate protection of the watercourse.

In determining equitable utilisation of bio-physical information, the social and economic needs of the member states concerned, the effects of use in one state on another, existing and potential uses, guidelines and agreed standards must be taken into account. The Convention goes further and sets out factors relevant to determining equitable and reasonable use. It is, therefore, not surprising that the SADC states signed in August 2000 the Revised Protocol on Shared Watercourses, which incorporates many of the provisions of the 1997 Convention. The revised protocol, which provides for compensation in the event of pollution by one party to the detriment of another, will eventually replace the 1995 protocol provided, of course, that all SADC states ratify it.

...it is agreed that to utilise a shared watercourse in an equitable manner, it should be used with a view to attaining optimum utilisation and obtaining benefits consistent with adequate protection of the watercourse.

Part IV of Zimbabwe's Water Act regulates the use of water generally. This part requires any person intending to abstract and use water for any purpose other than primary purposes to apply for and obtain a permit authorising such abstraction and use.[53] The act also recognises that the allocation of water rights needs to take account of, among other things, social and economic considerations. However, in allocating rights it does not consider the impact of its decision on downstream or neighbouring countries. The Zambezi River Authority under its empowering act is not required to consider the impact of its utilisation of the Zambezi on Mozambique. In this respect the Water Act and the Zambezi River Authority Act are inconsistent with the principle of equitable utilisation enshrined in the Convention for Non-Navigational Uses and the SADC Protocol. This maybe attributed to the fact that the

Water Act is principally designed to govern the internal water regime of Zimbabwe. It does not purport to address the transboundary context of river systems. Consequently, the act does not reflect any of the equitable utilisation principles, which apply in the inter-state regulation of shared water resources. This is an aspect that will require specific review in order to achieve conformity with Zimbabwe's international obligations.

Part II of the Water Act provides generally for water resources planning and development. The planning envisaged includes the declaration of river systems and the preparation of outline water development plans for every river system[54] "for the purpose of ensuring the optimum development and utilisation of the water resources of Zimbabwe". There are currently seven river systems that have been declared under the act.[55] In this respect, the Water Act reflects the general concept of unitary and integrated water systems embodied in the SADC Protocol and the Watercourses Convention.

Article 7 of the Convention requires that states shall "in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states." There are no such provisions in national legislation.

SADC member states have agreed to prevent the introduction of alien species into shared watercourses, which may have a detrimental effect on the ecosystem. No provision is made for this in domestic legislation. The SADC protocol recognises that "polluted watercourses threaten both human and environmental health and significantly lower the potential uses of shared watercourses. Consequently pollution must be controlled so as not to deprive other states of their right to use the watercourse. This effectively places a limitation on how member states may use shared watercourses."[56] Member states, have agreed to control pollution and in particular all discharges must be in terms of a permit issued by the state in whose jurisdiction such activity is taking place. Additionally, members agree to maintain and protect watercourse systems and related institutions so as to prevent pollution and environmental degradation.

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Part VI of the Water Act deals with water quality and pollution control. In particular, the act makes it an offence to discharge any organic or inorganic matter or any effluent or waste water into a public stream, except in terms of a permit and in conformity with prescribed quality standards.[57] Such standards are presently pre-

scribed in the Water (Effluent and Waste Water Standards) Regulations, 1977.[58] Additionally, part VI empowers the Zimbabwe National Water Authority to require polluters to take certain steps to control or prevent pollution.[59] It also imposes specific duties upon local authorities in relation to water pollution.[60]

CONSTRAINTS IN THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW

The problems

The weaknesses inherent in the effective application of international environmental law originate at the international level and are exacerbated at the domestic level. On the international plane, the enforcement of the law is confronted with a number of formidable obstacles of its own making. Of particular concern is the pervasive influence of the doctrine of state sovereignty and equality. Again, apart from the practical and evidentiary difficulties, which may arise in the process of establishing international responsibility, there may be additional hurdles presented by way of objections to the admissibility of claims. Finally, the adjudication of claims and disputes by any international tribunal cannot proceed in the absence of prior or *ad hoc* consent to submit to the jurisdictional competence of that tribunal. And even if the matter is eventually adjudicated, there is no assurance – given the absence of any supra-national executive authority duly empowered to enforce judicial decrees – that the decision of the tribunal will in fact be observed and implemented in compliance with its terms.

> On the domestic plane, the internal reception and application of international law is subject to significant qualifications and restrictions. The mere existence of a treaty provision does not, render that rule or provision internally operative. The extent to which international law becomes operative is invariably determined and governed by the domestic law itself.

On the domestic plane, the internal reception and application of international law is subject to significant qualifications and restrictions. The mere existence of a treaty provision does not, *ipso jure*, render that rule or provision internally operative. The extent to which international law becomes operative is invariably determined and governed by the domestic law itself. Moreover, even after the rule or provision has been duly internalised, its effective application may often be overtaken and frustrated by the operation of procedural technicalities. Again, from the standpoint of the right to complain against environmental harm, the notions of legal interest and legal standing may prove to be equally intractable. Many of these rules will only become really effective when citizen rights to bring actions are considerably increased and systems of administrative fairness are established.

The above-mentioned problems of application and enforcement are often presented in an even more acute form in the peculiar context of environmental norms. Thus, it may not always be possible in practice to attribute or accurately apportion respon-

sibility for environmental damage, particularly in cases of extra-territorial or trans-frontier damage. Finally, insofar as remedial measures are concerned, the traditional bias in favour of monetary compensation rather than restoration may operate to render somewhat illusory the prospects of applying a truly appropriate and adequate standard of reparation in cases of environmental damage.

The prospects

Notwithstanding these manifold conceptual and practical obstacles, it would appear that the harsh realities of ecological degradation, both globally and within national boundaries, have gradually broadened the previously blinkered perceptions of policy-makers as well as legislators and administrators. At the present time, it seems possible that the legal pendulum has begun to swing in favour of the environment, despite the pressures of economic and technological advancement, and the prospects for effectively applying and enforcing international environmental norms are now considerably brighter.

ENACTMENT AND IMPLEMENTATION OF ENVIRONMENTAL TREATIES

Legislative options

Having regard to existing environmental laws in Zimbabwe, it is appropriate to consider four distinct legislative options:

- Where the existing provisions are adequate, no change in the law is required, other than slight adjustments, if any, to clarify the legal position;
- Where the existing legislation is adaptable to specific international requirements, the law is to be modified accordingly, either by amending the relevant statute and/or through new subsidiary legislation made under that statute;
- Where there are no existing laws in place, entirely new legislation is to be enacted in order to meet specific international requirements; and
- Where there are no existing laws in place, provision for specific international requirements are to made in the proposed Environmental Management Act.

At the present time, it seems possible that the legal pendulum has begun to swing in favour of the environment, despite the pressures of economic and technological advancement, and the prospects for effectively applying and enforcing international environmental norms are now considerably brighter.

In Zimbabwe, it may be necessary to deploy all of the above options, depending upon the nature of the international requirement in question and the extent to which it is or is not provided for in the domestic law. In certain instances, it may be the case that legislative reform is quite inappropriate and that the international requirement will be better served by some suitable administrative measure or reform. In most instances, reform will probably entail the amendment of existing legislation as opposed to the enactment of new law. This is not only

inevitable, given the preponderance of statute law in the Zimbabwean legal system, but also preferable on the premise that legislative reform generally tends to be more acceptable and therefore less protracted if it involves modification of the old rather than creation of the new.

General principles and duties

From a broad perspective, the implementation of multilateral environmental agreements entails the application of the following general principles and duties:

- the standing obligation to initiate and enact such legislation as may be necessary to give effect to international environmental obligations;
- the duty to comply with or adhere to such international obligations, to the greatest extent possible, in the performance or exercise of any statutory duty or power; and
- the injunction to construe and apply the laws of Zimbabwe, except where they expressly or by necessary implication provide otherwise, in conformity with such international obligations.

Box 6.10: Provisions for domesticating international agreements

The adoption and incorporation of environmental treaties is a matter that was generally broached in the consultative process preceding the formulation of the Environmental Management Bill in early 1998. However, these issues appear to have been overlooked or inadequately addressed in the actual provisions of the Bill. The effective implementation of multilateral environmental agreements within the domestic system necessitates the insertion of additional provisions specifically dealing with this aspect.

These provisions should address the following:

- public consultation, prior to recommending adherence to any treaty, by way of requiring the executive to publish a notice of its intention to adhere to the treaty and inviting public comments in that respect;
- avoidance of administrative doubt and neglect carries the obligation to comply with the procedures prescribed in Cabinet Circular No. 2 of 1997 and other relevant administrative instruments, particularly as regards the requirement of Parliamentary approval;
- power and the concomitant duty to enact regulations incorporating and implementing the provisions of treaties, where so required, within a fixed period after they have been approved by Parliament; and
- declaration of general principles and duties, as elaborated above, to be applied by the State in relation to the enactment and observance of international environmental obligations.

These principles and duties delineate the general functional parameters of the state in the context of environmental treaties. In short, they prescribe the respective roles and functions of the legislature, the executive and the judiciary in the sphere of international environmental law. If properly applied, through appropriate statutory and administrative measures, they should operate to promote and ensure the due implementation of environmental treaties to which Zimbabwe subscribes.

Administrative measures

It seems necessary to comprehensively plan and institute various administrative measures to effectively implement international environmental law (Box 6.10). Among other things, this involves:

- identifying and evaluating the practical implications of all the environmental treaties presently applicable to Zimbabwe;
- ensuring that the internal procedures for adoption and ratification have been complied with in respect of each treaty; and
- initiating and finalising the legislative and administrative actions required to incorporate and implement these treaties within the domestic legal system.

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ENDNOTES

1 Internal Procedures Governing the Adoption of International Agreements, Conventions and Treaties, issued in June 1997 (and replacing Cabinet Circular No. 5 of 1995)
2 Guidelines on Negotiation Procedures for International Agreements, issued in September 1999
3 Section 31H(5)
4 Section 111B(1)(a). (In Section 258 of the draft new Constitution of Zimbabwe, the rules governing Parliamentary approval are essentially unchanged, save that approval is to be effected through the proposed Senate)
5 By Act No. 4 of 1993 (which came into operation on the 1st of November 1993)
6 Viz. treaties dealing with war, peace and diplomatic relations
7 Section 111B(3)
8 Section 31H(1) as read with section 31H(4)
9 Cf. Article 18 of the Vienna Convention on the Law of Treaties, 1969
10 Agenda 21, Chapter 27.2
11 Chapter 23 .2
12 Article 27 as read with Article 46 of the Vienna Convention on the Law of Treaties, 1969.
13 Following the entry into force of Act No. 4 of 1993
14 Section 111B(1)(b). (This position is retained in virtually identical terms in section 258 of the draft new Constitution of Zimbabwe)
15 Mohamed-Katerere (2000) 20 Principles. This may also be referred to as the Principle of Good Neighbourliness
16 Section 4
17 Section 21
18 See Mohamed-Katerere on Customary Environmental Management Systems in this volume
19 Section 17
20 Section 14
21 Section 45
22 Section 44
23 Section 52
24 Section 57
25 Statutory Instrument 362 of 1990
26 Section 46
27 Section 66
28 Statutory Instrument 76 of 1998 – repealing and replacing the Control of Goods (Import and Export) (Wild Life) Regulations, 1982 (S.I. 557/1982)
29 Atmospheric Pollution Prevention Act [*Chapter 20:03*] and the Water Act [*Chapter 20:24*]
30 http://www.unep.org/ozone/vienna.htm
31 See Bharat Patel on Legal and Policy Framework for Environmental Management, Jennifer Mohamed-Katerere on Customary Environmental Management systems for further discussion on bio-diversity legislation, both in this volume
32 See Bharat Patel on Legal and Policy Framework for Environmental Management for a fuller discussion of this strategy
33 Statutory Instrument 20 of 2000
34 Part IV of the Parks and Wild Life Act [*Chapter 20:14*] provides for the designation of certain areas as national parks in order "to preserve and protect the natural landscape and scenery therein" and "to preserve and protect wildlife and plants and the natural ecological stability of wildlife and plant communities therein" (Section 21). In terms of Section 24 certain acts are prohibited within national parks in the interests of preserving the plant and wildlife resources therein. Part VI of the Act relates to the establishment of sanctuaries in order "to afford special protection to all animals or particular species of animals in the sanctuary concerned for the enjoyment and benefit of the public" (Section 30)

35 The Forest Act has three categories of forests that maybe considered as protected areas. These are demarcated forests, private protected forests and presidentially protected forests. Demarcated forests were originally general reserved for state exploitation rather than for conservation purposes, however current practice manages them with a view to conservation. Section 37 of the Forest Act allows the owner of private land to apply for protection of forest on his or her land. Additionally the President may, under Section 39, declare the whole or part of any forest as protected
36 Section 15 provides that the minister may declare any area of natural forest to be a protected forest area
37 McNeely, J.A., cited in IUCN 1999, p9
38 IUCN 1999, p8
39 Section 50
40 Section 57
41 Section 25
42 See Jennifer Mohamed-Katerere on Customary Environmental Management Systems in this volume
43 Section 28B
44 Section 27
45 Article 2
46 Article 2
47 Article 4
48 Section 36
49 Section 46
50http://rachel.enviroweb.org/rhwn257.htm
51 Sections 21, 22 and 23
52 Sections 22, 23 and 24
53 Section 34
54 Sections 11 and 12
55 In terms of the Water (River Systems Declaration) Notice, 2000 (S.I. 34/2000)
56 Imercsa, 2000
57 Sections 68 and 69
58 Statutory Instrument 687 of 1977
59 Section 70
60 Section 71

CHAPTER 7

DEVELOPING NEW ENVIRONMENTAL LAW

By Jennifer Mohamed-Katerere

NATIONAL OBJECTIVES AND GLOBAL COMMITMENTS

Environmental law development in Zimbabwe needs to take place in the context of international law. This is not only because of the increasing trend towards globalisation and the standardisation of management approaches but also because it represents a growing global consensus about environmental law development. International law includes not only treaties, which are legally binding on the parties, but also on the principles of customary international law.

Law development should go beyond tinkering with existing statutes if law is to assume its role as a tool for the realisation of conservation and development objectives. As outlined in chapter five, law has from the advent of colonialism been used to subjugate the peoples of Zimbabwe. But now it is time, at the dawn of this new century, for law to assume a new role, generally and particularly, in environmental management. New methods should be forged, and new tools and innovative strategies fashioned for securing, promoting and enforcing environmental values.

Most importantly environmental law development needs to be firmly located within the context of Zimbabwe's national objectives and priorities. The foremost national objective directly relevant to the environment is sustainable development which has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[1] This requires not only ensuring that development is environmentally sustainable but also that it is able to address the increasing problems of poverty. According to Gore et al,[2] the most critical aspect of this is redressing the entitlements regimes that have enforced inequitable access to resources and promote the environmental degradation-poverty cycle. Another important priority of Zimbabwe is poverty alleviation. At the economic level, Zimbabwe's focus is to achieve "Growth with Equity." This policy was first enunciated in the Transitional National Development Plan and was reiterated in the first and second Five Year National Development Plans, and the current Zimbabwe Programme for Economic and Social Transformation (ZIMPREST). Key aspects of this strategy are indigenisation, land reform, direct poverty alleviation, small-

scale enterprise development as well as mechanisms for investing in people through education, health and housing.

National priorities

The basic challenge for environmental law in Zimbabwe is to convert the rhetoric of sustainable development into appropriate legal instruments that can help make it a reality. One of the foremost concerns is to place people at the centre of the drive for conservation. Chapter one of Agenda 21 states:

> "Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill-health and illiteracy, and the continuing deterioration of ecosystems on which we are dependent for our well-being."

Developing countries have asserted that development is their overriding concern.[3] Principle 1 of the Rio Declaration provides that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

> Developing countries have asserted that development is their overriding concern. Principle 1 of the Rio Declaration provides that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Legislative reform needs to address:

- inequitable resource distribution;
- the structural divide between management systems for communal areas and those for privately owned areas;
- command-and-control systems;
- the conflict between regulation and incentives;
- centralised institutional systems and a move towards the recognition of the rights of a diversity of actors, making full provision for public participation. This necessarily includes the recognition of social and cultural values in planning and management;
- administrative accountability and provide more fully justice and fairness through the development of accountable decision-making. This may include placing an obligation on administrative authority to give reasons for its decisions and fully disclose relevant information. This will need to be complemented with citizen rights of access to information and the development of appropriate systems for contesting administrative decisions;
- the sectoral approach to environmental management, particularly the overlaps and conflicts this creates between institutions;
- problems pertaining to the inefficient use of natural resources, and develop appropriate mechanism for valuing natural resources, including pricing policies; and
- the revision of standards for management.

Reform of these areas should result in better incorporation of trends emerging at the international level. Additionally, law reform should create the appropriate administrative, monitoring and enforcement institutions. One important aspect of this is the creation of human rights institutions that are able to champion and protect people's rights.

Policy-making processes should be reformed and become more inclusive of all stakeholders. This should also extend to consultation prior to the adoption of treaties. The key issue for environmental law development is how conservation strategies maybe adapted to meet the national objectives of development, poverty alleviation and small enterprise development.

Developing an environmental approach

It is widely accepted that there is a need for an overarching environmental act that creates the framework for environmental management in Zimbabwe. This is important to deal with the problems of a sectoral approach to resource management as well as the problems of fragmentation. The government of Zimbabwe has already accepted this and embarked on a consultative process for the development of an Environmental Management Bill. This is likely to become law soon and will deal with many of the problems discussed.

It is important to deal with the problems of a sectoral approach to resource management as well as the problems of fragmentation. The government of Zimbabwe has already accepted this and embarked on a consultative process for the development of an Environmental Management Bill. This is likely to become law soon and will deal with many of the problems discussed.

The bill recognises the following principles:[4]

- environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment by pursuing the best practicable environmental option;
- the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation;
- environmental education, the raising of environmental awareness, the sharing of knowledge and experience must be promoted to increase the capacity of communities to address environmental issues and to engender in people values, attitudes, skills and behaviour consistent with sustainable environmental management; and
- the cost of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be met by polluters.

There are, however, other fundamental principles that should have been recognised and provided for if sustainable utilisation or management is to be achieved. These include:

- public trusteeship;
- rights of producer communities;
- principle of cooperation;
- principles of prevention and precaution;
- rights of access to environmental information;
- rights of participation;
- right to just administrative action; and
- rights of standing and rights to investigation.

The following management principles should also be recognised:

- conservation and sustainable use;
- adaptive management; and
- integrated and cooperative management.

For these reasons it is appropriate to amend the Environmental Management Bill. It would also be desirable to establish an overarching environmental policy.

Resource entitlements

The natural resource tenure system should be revised if key national objectives are to be met. Much empirical evidence exists to support the view that, "the lack of rights for rural communities to manage the natural resources with which they live, leads not only to degradation of the natural environment but prevents rural people from being able to sustain themselves and adopt more viable roots for development."[5]

It is clear that although community-based natural resource management has been an important step to addressing these objectives, it has not gone far enough. CAMPFIRE type programmes should be developed to address these national objectives.

It is clear that although community-based natural resource management has been an important step to addressing these objectives, it has not gone far enough. CAMPFIRE type programmes should be developed to address these national objectives.

It is clearly important that law begins to create the basis for partnership in conservation. This will not only address the better incorporation of commitments made under the Convention on Biological Diversity but may also contribute to sustainable use that can support development. Internationally, the trend is to look towards partnerships with local peoples in protected area management, forest management, fisheries and water. In Zimbabwe, this is a potentially valuable approach in redressing conflicts around resource tenure. Partnership should reverse the trend for conservation to impose losses on communities through denial of access to resources, and instead create new opportunities for development. This requires a proper classification of protected areas, as discussed in the previous chapter

that clearly sets out the objectives of each of the managerial regimes to be adopted.

Boesen and Rukuni[6] identify the following principles for developing secure tenure regimes, which may be used to develop appropriate legislation:

- Tenure security builds on a clear legal, regulatory and administrative framework that guides relationships, roles, rights and responsibilities between the state, local government, communities and individuals;
- A basic precondition for success seems also to be that establishment of secure tenure is mutually and officially negotiated and agreed by both state and community, simultaneously defining their respective rights and responsibilities. More important, is acknowledgement by the State that the community is a legitimate entity with rights over resources and ability to carry responsibility;
- Recognition of a community's right to define itself and its membership, the establishment of clear boundaries and an agreed exclusiveness in relation to outsiders; and
- Legitimacy of leaders, whether elected or customary, with clearly defined areas of authority, including rules on use and management of resources and the right to negotiate, acquire and use revenue, is also an important consideration.

Decision-making systems

Effective decision-making and planning systems are critical to the success of environmental legislation. Decision-making systems should move away from highly centralised approaches to ones that recognise the need for public participation. Not only is there a trend within international law towards recognising the need for public participation, but it also makes sense from a local conservation perspective. It is only by giving the public a stake in conservation, that they begin to value it. Public participation creates new opportunities for people to benefit from conservation but also to make it compatible with their own value systems and priorities.

Public participation should take account of the full diversity of stakeholders from business to rural people to researchers. It is important to recognise the valuable role NGOs have in development.

Public participation should take account of the full diversity of stakeholders from business to rural people to researchers. It is important to recognise the valuable role NGOs have in development.

Rights of participation and entitlement are closely linked to rights to determine how resources are managed and to determine the methods, values or rules to achieve this. Colonial legislation pushed local people out of resource management, denying them authority over resources. The disempowerment of

communities also meant that local practices, including custom, were denied a role in management.

Fair administrative processes

Creating a fair administrative process that is based on principles of fairness and administrative justice is essential. The administrative process should be transparent and establish systems of downward accountability. Additionally, the right to be heard and access to information on which decisions are made should be recognised. There needs to be an obligation on the decision-making authority to give reasons for its decisions.

An important aspect of this is the right to contest decisions. Existing legislation does not provide adequate opportunities for the public to contest environmental decisions that affect them. Appropriate institutional development needs to take place to support this. A quasi-judicial body with authority to hear and settle disputes should be set up and power to issue enforcement and protection orders. Additionally, human rights institutions with investigatory powers may be useful in assisting people to protect their interests.

> "It is important to move away from an over-reliance on command mechanisms and to create a system of management that addresses the causes of mismanagement. This demands a system that makes sustainable management a more attractive option than non-sustainable management. It is important that the legislation incorporates the issue of incentives throughout and as an integral part of management as opposed to an add-on or ministerial intervention."

Access to justice, through the judicial process, is often limited by access to financial and other resources. Consequently, reforming the law on *locus standi* and increasing the opportunity for organisations and other individuals to bring actions in the public interest may be an important step for the realisation of justice.

Incentives

Effective environmental management is dependent on achieving compliance with policy and legislation. In the absence of strong state monitoring and enforcement capabilities, incentives are an important tool for ensuring compliance. "It is important to move away from an over-reliance on command mechanisms and to create a system of management that addresses the causes of mismanagement. This demands a system that makes sustainable management a more attractive option than non-sustainable management. It is important that the legislation incorporates the issue of incentives throughout and as an integral part of management as opposed to an add-on or ministerial intervention."[7]

Incentives should be both economically and socially sound. Incentives also need to be circumstantially specific. They can take a variety of forms from cash or in-kind incentives. They can also be indirect and can be fiscal, service or socially based. Practically, the way forward is to think of what can be done to actively encourage sustainable management. Specifically one should pose a series of questions such as:

- What can be done for an appropriate authority to encourage them to invest in environmental management?
- What can be done so that the manufacturer wants to minimise pollution?

Suggested incentives include:
- tenure systems that allow users to maximise benefits derived from use;
- tax exemptions for investing in environmentally friendly technologies and practices;
- pricing policies that encourage environmental friendly consumerism;
- subsidies for environmental friendly products (e.g. biodegradable detergents, unleaded petrol) to make them more competitive; and
- establishing and promoting industry-driven products and manufacturing standards as the basis for marketing.[8]

Monitoring and enforcement

It is important to be realistic about the monitoring and enforcement capacity of the state, and to move increasingly towards self-monitoring systems. "International systems are increasingly relying on self-monitoring. This is now accepted by a variety of actors, for example, many private enterprises attempt to implement ISO 14000 standards. Additionally, communities are already involved in self-monitoring through community management and the development of bylaws at the district level. Legislation must be designed to support these initiatives.[9]

Sanctions

The courts should be given the opportunity to impose a wide range of sanctions, including cumulative sentences and other community obligations. A more creative approach to sanctions may lead more effectively to ensuring justice, which may be corrective, distributive and retributive.[10] Retributive justice imposes a punishment on a wrongdoer to achieve societal retribution. Distributive justice concerns the correct distribution of social goods (and ills). Distributive justice is about maintaining the status quo – for example, everybody's entitlement to a healthy environment. Corrective justice is about correcting the wrongs committed.

The courts should be given the opportunity to impose a wide range of sanctions, including cumulative sentences and other community obligations. A more creative approach to sanctions may lead more effectively to ensuring justice, which may be corrective, distributive and retributive.

Practically, for corrective justice to be realised the sanction must in some way address the harm caused. If the courts have wider discretion to determine the kinds of sanctions they can impose they would, for example, be able to require a polluter to develop a clean manual as a punishment.

Institutions

As illustrated before, the institutional framework is plagued with problems. It is currently highly fragmented and some institutions have overlapping or conflicting mandates. It is important to streamline this system. The institutional framework should be enabling, designed in such a manner as to facilitate more effective and sustainable environmental management. Aspects of such an enabling framework include systems of management that are consultative, transparent and incentive-based. There should be a clear separation of monitoring and management functions. Independent institutions responsible for investigation and monitoring should be developed.

Decentralisation of natural resource management is essential. Appropriate institutions, rights and processes should be created to allow communal residents to participate more effectively.

It is important to move away from antagonistic means of resolving disputes. Consultation and cooperation must be encouraged and should be the basis of the legislation. It is worth considering the development of new methods of conflict resolution.

It is important to move away from antagonistic means of resolving disputes. Consultation and cooperation must be encouraged and should be the basis of the legislation. It is worth considering the development of new methods of conflict resolution.

The means for resolving conflict should include legally binding and non-binding procedures, with a clear priority give to non-binding procedures, including negotiation, mediation and conciliation. In the event of a dispute (including disputes were the state is a party), a solution should be sought by negotiation. If the parties are unable to reach agreement, mediation procedures should be provided for and failing that, arbitration procedures. The courts should be the last resort.

A quasi-judicial or judicial body with a specific environmental mandate should be created. This could be along the lines of the Equal Opportunities Commission Tribunals in Britain or the Office of an Ombudsman.

A constitutional right to the environment

From the human rights domain, the "right to life" is an undisputed human rights norm. This right can be narrowly construed to mean the right not to have one's life physically terminated. Broader conceptualisations consider that the right to life includes the right not to be denied access to the basic resources to sustain physical rights. It may be asserted that a conservation ethic is simply an extension of a human rights ethic since it demands a right to a decent habitat that is capable of supporting human life.

The most fundamental human right recognised in most legal systems, is the right to life. It is a well known principle that the sanc-

tity of human life should be emphasised on all levels of juridical decision-making and that under almost all circumstances and in all branches of law, a particularly high premium should be put on that value and its edification, with the law openly being seen to enforce its protection within the hierarchy of values."

Box 7.1: Access to water may be considered as a human right

It is now widely accepted that a right to water can be derived from other human rights. It can, for example, be derived from the Universal Declaration of Human Rights in Article 25, which recognises that all people have a "right to a standard of living adequate for the health and well-being of himself and his family."

Water is essential to achieve this. Such access also requires that water be of a good quality. What the extent of this access may be is by no means clear. If the human right is simply "a right to at least sufficient water to sustain life", what constitutes "sufficient"? What does adequate imply? What is well being? Is such a right restricted to a right to drinking water and water for sanitation purposes? Glieck argues that such right is restricted to "basic needs" that is for drinking, cooking and fundamental domestic use.

This right to water is now explicitly recognised in the United Nation Convention on the Law of the Non-Navigational Uses of International Watercourses, which states in Article 10: "in the event of a conflict between uses of water in an international watercourse special regard shall be given to the requirements of vital human needs".

Thus, where water needs cannot be satisfied from internal waters, "a country is not permitted to exploit a shared water resource in a manner that deprives individuals in a neighbouring country of access to their basic human needs."

A statement of understanding of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, provides that "vital needs includes drinking water and water required for food production" so as to prevent starvation. (This is food for immediate subsistence and not for commercial purposes)

Source:

Recognising environmental rights in Zimbabwe is important for redressing issues of fairness and justice within the law. Additionally, it may help promote more effective national resource management systems. For this right to be meaningful, the rights to a fair and just administrative system and rights of access to information should be constitutionally entrenched.

INCORPORATING INTERNATIONAL LAW PRINCIPLES

Traditionally, international law did not concern itself with environmental protection – environmental management was seen to be within the domain of states. International law focused on the principle of sovereignty. Today, however, a number of important environmental principles and concepts recognised in international law exist:

- precautionary principle;
- originator principle;
- cooperative principle;
- principle of good neighbourliness;
- state sovereignty; and
- state responsibility.

Box 7.2: Developing a gender approach

Gender refers to the attributes and opportunities associated with being male or female, and the socio-cultural relationships between women and men. These attributes, opportunities and relationships are socially constructed and are learnt through socialisation. They are context-specific and changeable. In most societies, there are differences and inequalities between women and men in activities undertaken, access to and control over resources as well as decision-making opportunities. Adopting a gendered approach means focusing on both women and men, and their relationship with one another and natural resources.

Taking a gendered approach to environmental management is essential if such management is to be sustainable. Such an approach would recognise the very important role women have in management and the fact that often power and decision-making relationships are unequal. It is necessary that the modes of decision-making and consultation specifically address this issue and do not simply replicate or perpetuate unequal power relations.

It is essential that a commitment to gender equality and equity be strongly reflected in the Environmental Management Bill. Mainstreaming a gender perspective is achieved through a process of assessing the implications for women and men of any planned action, including policies or programmes, in any area and at all levels. This process makes women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and equitably, and that inequalities and inequities are not perpetuated.

To implement a gendered approach, management priorities and systems, including issues of decentralisation, organisational structure, culture and behaviour, will need to be addressed throughout the bill. This is particularly important in areas pertaining to consultation, participation and decision-making.

Source: Mohamed-Katerere, IUCN, Stewart and Ncube

Emerging principles include "sustainable development" as well as inter-generational responsibility, rights and equity. Additionally, new concepts are emerging in international law – these may only be relevant to specific treaties and not generally applicable. They have not emerged as general principles. These include shared but differential responsibilities, common concern for humanity and resource transfer.

The law reform in Zimbabwe should bring the values and norms of international agreements, and the spirit of the devel-

Box 7.3: Defining principles

A principle may be defined as "a general law adopted or professed as a guide to action." In this sense, principles may be seen as general guides for the development of specific rules that have a normative character.

A principle "states a reason that argues in one direction, but does not necessitate a particular decision." A principle may thus be overridden or its application modified by other principles. Where principles are in conflict, they are weighed against each other. For Bodansky, principles may have limited value because of their vague and indeterminate nature. Alternatively, this may be seen as their strength – they are intended to provide guidance as opposed to a command-and-control type regulatory standards. Given their generality, "they indicate certain types of response and contra-indicate others."

Source: Alder and Wilkinson

oping consensus into national law. National law should address the failure of international law to adequately create individual rights and benefits. Generally, the language in international conventions tends to be so vague that it merely creates an obligation on states to work towards the realisation of certain public interests rather than to immediately implement them.[11]

At the international law level, principles may be derived from treaties, custom, general principles as well as at a subsidiary level, from judicial decisions and the teachings of highly qualified publicists. These principles may be specifically applicable to the environment or may be drawn from a much larger body of law. Treaties only bind states where they have consented to being bound. In most, if not all southern African states, treaties are only incorporated through ratification and incorporation into law by an act of parliament. Customary international law by contrast applies to all countries.

It is now widely accepted that three key principles from most environmental laws have emerged at both the municipal and international level. These principles have also emerged in customary international law:[12]

- precautionary principle;
- originator principle; and
- principle of cooperation.

These should be incorporated into the national environmental management legal system.

Precautionary principle

The precautionary principle is in direct contradistinction to the obligation of reparation of damage. It generally requires that harm be avoided rather than redressed. At international law, the formulation of this principle varies from a strict precautionary approach bordering on prevention to a precautionary approach based on an assessment of risks. It may be interpreted to reconcile conflicting interests, for example the desire for development against that to avoid environmental damage. Nevertheless, it maybe considered as a principle of customary international law.

International custom is derived from state practice and *opinio juris* (state opinion as to the existence of a legal rule). Treaties are an indication of state practice. Although the rule may be varied through treaty, if it can be reduced to a set of common elements and it could be considered as a principle of customary international law.

In international customary law, the principle could be said to be where:[13]

- regulatory inaction threatens non-negligible harm;
- there exists a lack of scientific certainty on the cause and effect relations; and
- under these circumstances regulatory inaction is unjustified.

Given the different formulations, the principle must be interpreted in the treaty context. The required action may vary from doing nothing to a ban. As a general principle, it assumes the character of the minimum consensus or its common elements. Thus, the essence of the principle at international law is "risk analysis" as opposed to prescription, that is, consideration of appropriate action. At customary international law (and in some treaties) the "precautionary principle" does not occupy any hierarchical status, it is but one of several principles that are significant for environmental management. It must be interpreted in relation to other customary law principles. It may also be interpreted in the context of other priorities, such as "development".

There is considerable difference about whether or not the principle requires a shift in the burden of proof from the person opposed to a development activity to the proponent of development. Legally, questions arise as:

- When does this shift occur?
- What is the evidentiary burden? Is it on the balance of probabilities or beyond all reasonable doubt?

It is debatable whether such burden is simply to the extent of establishing a *prima facie* case or fully discharging the burden.

Where an action has unwanted consequences, the issue arises as to who should assume the costs associated with that action. Environmental law seeks to internalise these costs. In keeping with principles of criminal and civil liability, the originator principle demands that the person who initiated the action is responsible for its consequences. Zimbabwean law needs to fully incorporate this principle.

Originator principle

This is the cornerstone of environmental liability. Where an action has unwanted consequences, the issue arises as to who should assume the costs associated with that action. Environmental law seeks to internalise these costs. In keeping with principles of criminal and civil liability, the originator principle demands that the person who initiated the action is responsible for its consequences. Zimbabwean law needs to fully incorporate this principle.

However, it is not always easy to determine where the responsibility for costs should lie. It may be cost-effective to place this responsibility elsewhere, such as in a local authority. This has typically been the case where water suppliers have assumed responsibility for water quality and established, for example, municipal water purification systems. Where it is possible and

Box 7.4: Precautionary principle in treaty law

1 Declaration of the Second International North Sea Conference on the Protection of the North Sea, 1987 provides:

> "... in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolute clear scientific evidence."

Paragraph XVI provides that safeguarding the marine ecosystem through the reduction of emissions applies

> "especially where there is reason to assume that certain damage or harmful effects on the living resources of the sea are likely to be caused by such substances, even where there is no scientific evidence to prove a causal link between emissions and effects".

2 Rio Declaration, Principle 15 provides:

> "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."

3 Agenda 21, Chapter 17 on the Protection of Oceans approves a precautionary approach and provides in Paragraph 17.21 that:

> "A precautionary and anticipatory, rather than a reactive, approach is necessary to prevent the degradation of the marine environment. This requires, *inter alia*, the adoption of precautionary measures, environmental impact assessment, clean production techniques, recycling, waste audits... quality management criteria for handling of hazardous substances and a comprehensive approach to damaging impact from air, land and water. Any management framework must include the improvement of coastal human settlements and the integrated management and development of coastal areas."

4 Convention on Biological Diversity (in its preamble) states:

> "Noting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source,
>
> "Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for posting measures to avoid or minimise such risk."

5 CITES

The treaty itself does not specifically mention the precautionary approach/principle. However, The CITES resolution at Fort Lauderdale on the Criteria for Amendment of Appendices I and II (Com.9.24) proclaims:

> "Recognising that by virtue of the precautionary principle, in cases of uncertainty, the parties shall act in the best interests of the conservation of the species when considering proposals for amendment of Appendices I and II."
>
> "Resolves that when considering any proposal to amend Appendix I or II that scientific uncertainty should not be used as a reason for failing to act in the best interests of the conservation of the species."

The attached Annex 4 sets out precautionary measures to be applied in making this determination. It requires *inter alia* as a precautionary measure:

that species should not be downlisted from Appendix I even if they do not satisfy the criteria of Appendix I:

- unless its downlisting to Appendix II will not stimulate trade or enforcement problems; or
- where a trade demand exists, the range state has adequate management and enforcement systems; or
- an integral part of the amendment proposals is an export quota based on approved management and enforcement systems; or
- a ranging proposal is approved.

cost-effective to make the originator responsible, this principle comes into effect – polluter-pays.

Polluter-pays-principle

The polluter-pays-principle requires that: "the polluter is responsible for the environmental and economic effects of his or her polluting activities". The origins of this principle can be traced back to the Trail Smelter Arbitration (33 AJIL (1939) 182 and 35 AJIL (1941) 684 and the Corfu Channel ICJ Rep(1949) 1.

Various difficulties arise in determining the extent of the costs. National legislation would need to consider how to incorporate it. A series of questions need to be addressed:

- What kinds of pollution should be covered given that "all human activities involve emissions or waste of some kind?"
- Is pollution to be considered from an anthropocentric, bio-centric or eco-centric perspective?
- Should the principle, when applied to potentially damaging products, incorporate the cost of the uncertainty about ecological damages as well as the cost of known damages?

The incorporation of this principle would give producers a strong and immediate incentive to improve their environmental performance to reduce the size of the environmental bond and tax they would have to pay.[14]

There is, of course, the additional problem that this cost will simply be passed on to consumers. Given these difficulties, the polluter-pays-principle is by no means a straightforward and non-contentious issue.

However problems pertain to the difficulties in providing for cumulative and long-term costs. Additionally, problems may exist around the ability of communities to demand their rights and to enforce this principle. Consequently issues of *locus standi* need to be redressed. There is, of course, the additional problem that this cost will simply be passed on to consumers. Given these difficulties, the polluter-pays-principle is by no means a straightforward and non-contentious issue.

This is a challenge for national legislation. Its incorporation needs to ensure the realisation of justice. It has been argued that the "PPP contains elements of distributive justice because it asserts that between humans, the resources used to compensate for environmental damage must be the polluters' own and not taken from the common stock or other person." [15] Assuming a degree of distributive justice exists between people then corrective justice requires that the polluter pays for maintenance of that balance.[16] Whether corrective justice is achieved will depend on the degree of freedom that exists to expend the payments made.[17] In the case of preventative mechanisms (e.g. environmental bonds), the payment is necessarily used to correct the harm caused. However, in the law of delicts, the claimant may

use the compensation in any way he/she wishes and is not obliged to correct harm done.

Various mechanisms may be used to incorporate this principle:

- incorporation of the costs of possible damage in a fee for a permit to pollute;
- incorporation through compensation to affected downstream users, for example, public contract activities and community service;
- incorporation through reclamation work, for example, fines that are redirected into reclamation;
- strong sanctions for non-compliance such as enforced corporation dissolution;
- company disqualification from certain types of work, privileges, benefits and certification for polluting;
- compulsory stock dilution, for example, issuance of new shares to be invested in a compensation fund;
- imposition of an obligation on the developer to introduce anti-pollution measures; and
- taxation.

Box 7.5: Formulations of polluter pays principle in treaty law

The 1992 Rio Declaration, provides:

"States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage; they shall cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdictions or control to areas beyond their jurisdiction." (Principle 13)

"States should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the costs of pollution, with due regard to the public interest and without unduly distorting international trade and investment." (Principle 16)

Convention for the Protection of the Marine Environment of the North East Atlantic, Article 2.2 provides:

"The contracting party shall apply... (b) the polluter-pays-principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter."

Strict liability versions are imposed in:

- The International Convention on Civil Liability for Oil Pollution Damage, 1969, imposes strict liability on the owners of ships carrying persistent oil in bulk as cargo for damage caused by spillage.
- The Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960, imposes strict (albeit limited) liability for damage to persons or property onto the operators of such installations.

Principle of cooperation

This principle requires that as environmental damage, degradation and destruction cuts across national boundaries, there is a need for international cooperation to protect the environment. At the municipal level, collaboration between public and private arenas in attaining environmental goals is recognised in an

increasing number of international conventions and municipal legislation. Key aspects of this include emerging principles of "rights of participation" and rights of access to information.

Zimbabwe needs to rise to this challenge and find effective ways to ensure collaboration. Such collaboration should not simply be on the basis of the goodwill of the various actors but should be an enforceable requirement of the law. Recognising this principle requires that highly centralised approaches to environmental management that are based on command-and-control type legislation be disbanded. This requires substantial reworking of all the natural resource management legislation, including the Forest Act, the Parks and Wildlife Act and the Communal Lands Forest Produce Act. Additionally, legislation for planning should be modified to increase collaborative approaches.

Various international agreements address the issue of participation, which is key to establishing cooperation. These agreements include the:

- Stockholm Declaration;
- World Charter for Nature;
- Rio Declaration;
- Agenda 21;
- Framework Convention on Climate Change;
- Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests;
- Convention on Biological Diversity; and
- Convention to Combat Desertification.

From these agreements the following essential aspects of participation may be identified:[18]

- proactive representation;
- recognising the diversity of actors;
- linkage between authority and responsibility;
- recognition of indigenous knowledge systems;
- capacity building; and
- accountable and transparent procedures including access to information.

Prior informed consent maybe considered as an essential aspect of participation. It requires that requests made to local communities be accompanied by full disclosure in writing, or audio-visual transcripts in the local language of the following:[19]

- the purpose of the activity;
- the identity of those carrying out the activity and its sponsors, if different;

Box 7.6: Public participation

For example, Principle 10 of the Rio Declaration provides that:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

- the benefits for the people or person whose consent is being requested, and for the sponsors;
- the disbenefits for the people whose consent is being requested;
- possible alternative activities and procedures;
- any risks entailed by the activity;
- discoveries made in the course of the activity that might affect the willingness of the people to continue to cooperate;
- the destination of knowledge or material that is to be acquired, its ownership status, and the rights of local people to it once it has left the community;
- any commercial interest that the developers have in the activity itself; and
- in the knowledge or material acquired; and the legal options available for the community to say "no" to the activity.

In Zimbabwe, this requires a revision of the resource tenure system. Communities should be given the opportunity to manage and benefit from the resource with which they live. This must now go beyond CAMPFIRE and be incorporated in law as an enforceable right.

Many of the new environmental multilateral agreements recognise the special position of groups traditionally excluded from management and planning, including women, indigenous people, workers and trade unions, farmers, youth and children as well as the business and the scientific communities. This recognition of different types of actors is coupled with the acknowledgement that systems need to be created for mediating between the respective interests. Additionally, it is also acknowledged that meaningful participation of these groups may require special capacity-building initiatives, support, training or education.

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