12 Unpacking the Environmental Rights Clause in the Zimbabwean Constitution

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1 Introduction

The protection of the environment has become a key feature of national legal frameworks. States have established comprehensive governance regimes for environmental conservation that not only seek to address prominent threats to environmental integrity but also to protect people's right to a clean environment that is not harmful to their health. The momentum for the comprehensive environmental conservation legal frameworks also prominently derives from the global movement for environmental protection,[1] traceable as far back as the 1972 Stockholm United Nations Conference on Human Environment 'the Earth Summit' to the 2015 Paris Agreement on Climate Change.[2] Thus, it is not in doubt that environmental regulation will continue being a significant governance system for states in the foreseeable future.

Zimbabwe's 2013 Constitution entrenches an environmental rights clause[3] that reflects comparative approaches to environmental conservation.[4] A cursory glance at the environmental rights clause illustrates that the structure and terminology used derives from several norms and best practises in environmental conservation that have cascaded from the international environmental law framework. For Zimbabwe, the environmental rights clause mirrors the state's aspirations in environmental governance. It also establishes a concrete foundation for framework environmental law whose aim is to "define overarching and generic principles in terms of which sectoral-specific legislation is embedded",[5] as well as to establish an integrated environmental governance framework.[6]

From a constitutionalism perspective, the constitutionalisation of environmental rights as a specie of human rights is now embraced as part and parcel of what is now known as the Environmental Rule of Law (EROL). In essence, this is a concept that is linked to the broader concept of the rule of law. The concept is defined as:

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[1] *See generally* P.W Birnie and A. E Boyle, *International Law and the Environment,* 2nd edition (OUP Oxford, 2002).

[2] For a discussion, *see* R. S. Dimitrov, 'The Paris Agreement on Climate Change: Behind Closed Doors', 16:3 *Global Environmental Politics* (August 2016).

[3] Section 73 of the Constitution.

[4] The environmental rights clause is curiously similar to the same right as enshrined in section 24 of the Constitution of the Republic of South Africa, 1996.

[5] *See* J. Nel and W. du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental framework legislation', *South African Journal of Environmental Law and* Policy (2008) p. 1.

[6] *See* T. Murombo, 'Balancing Interests Through Framework Environmental Legislation in Zimbabwe', in M. Faure and W. du Plessis (ed.), *The Balancing of Interests Through Framework Environmental Legislation in Africa* (PULP, 2011) p. 566.

> Integrating the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritises environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective and unpredictable.[7]

Through the EROL, environment conservation can be mainstreamed in socio-economic activities and natural resources can be managed sustainably, transparently and accountably, thereby contributing towards sustainable development.[8] The EROL was first recognised in 2013 when the United Nations Environmental Programme adopted Decision 27/9 on Advancing Justice, Governance and Law for Environmental Sustainability.[9] Through the Decision, member states recognised the growing importance of the rule of law in environmental management to reduce violations of environmental law and to achieve sustainable development.

Interrogating the constitutional environmental right clause is also necessitated by several reasons. Importantly, environmental conservation is an important policy area in Zimbabwe's policy-making landscape. The major basis for this is that Zimbabwe's social and economic development model is essentially based on agriculture and natural resources extraction as well as other forms of industrial activity critically dependant on the environment. Indeed, each key economic activity in Zimbabwe's prominent economic sectors, namely agriculture, mining, industry, energy and tourism, pose significantly adverse impacts on the environment in terms of demands for energy, water and materials as well as production of waste, effluent and emissions. It is also estimated that about 70 per cent of Zimbabweans live in rural areas and are directly dependent on the environment for the sustenance of their livelihoods.[10] The urban environments are not spared either; they are the most polluted, exploited and consequently highly exposed to environmental degradation of all kinds. Accordingly, the environmental governance framework aimed at responding to these issues becomes a central policy area worthy of research and analysis.

It is in view of this that the environmental rights clause enshrined in the Constitution must be interrogated. In this vein, the substance of this chapter is a critical appreciation of the meaning and scope of the constitutional environmental rights clause in Zimbabwe's 2013 Constitution. This chapter's primary aim is to: (1) provide a description and discussion of the constitutional environmental rights clause; (2) interpret the substantive norms, principles and concepts expressed in the

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[7] *See* Report of the Secretary-General on the Rule of law and Transitional Justice in Conflict and Post Conflict Societies (2004) p. 4.
[8] *Ibid.*, p. 2.
[9] United Nations Environmental Programme General Council Decision 29/9 (2013), p. 25.
[10] Government of the Republic of Zimbabwe. Ministry of Environment and Natural Resources Management. *Zimbabwe Environmental Outlook: Our Environment, Everybody's Responsibility. Executive Summary*, Unpublished (2016) p. 10.

constitutional environmental rights clause (these include the concept of sustainable development, the progressive realisation of environmental rights, the principle of intra-generational equity, among others); (3) illustrate the linkages between the norms embedded in the constitutional environmental rights clause and the standards in the framework legislation, the Environmental Management Act (EMA);[11] (4) and relay some final conclusions.

2 The Constitutional Environmental Rights Clause

Zimbabwe's 2013 Constitution has a constitutional environmental rights clause which is transfixed in its Declaration of Rights.[12] The relevant provision provides that every person has a right to:

> (a) an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations, through reasonable and 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 economic and social development.[13]

As with various other socio-economic rights, the environmental clause ends with a clawback clause; the state is obligated to take reasonable legislative and other measures, *within the limits of the resources available to it*, to achieve the progressive realisation of the rights set out in the clause.[14]

It must be stated that various features characterise this constitutional environmental rights clause. Of the several features, two key features stand out for iteration. Firstly, the right is available to 'everyone' and this entails foreign persons and citizens alike, and these can be corporate entities, juristic and natural persons, and even government departments or state-owned companies.[15] In as much as the clause makes these persons 'right-holders', it also creates responsibilities and obligations for them. In essence, what this means is that the right does not only create entitlements to natural or juristic persons to enjoy, it also obliges them not to create conditions or circumstances that would negate other persons enjoyment of environmental rights. The appropriate description for this is the horizontal application of the right. By application, this means that the right addresses not only the relationship between the state and a person 'vertical relationship', but also addresses the relationship between private persons 'horizontal application' and prohibits these private persons from acting in a manner that adversely impacts on each other's environmental rights. In this way, the environmental rights clause, as a

[11] Chapter 20:22.
[12] The Declaration of Rights is embodied in Chapter 4 of the Constitution.
[13] Section 73(1).
[14] Section 73(2).
[15] Various governments have established state owned enterprises as players in the economic sector. For Zimbabwe, various of these state-owned companies are in the mining and other sectors that impact on the environment.

part of the Declaration of Rights, *directly protects individuals against abuses of their rights by other individuals*.[16]

Another feature is that the constitutional environmental rights are constituted by five sub-elements, which could be read as its key norms. These are: prevention of pollution, intra-generational equity, sustainable development, the principle of wise use of natural resources, and, finally, the progressive realisation of rights. Clearly, these critical norms or principles are specifically mentioned for purposes of guiding the content and outputs of environmental laws;[17] all environmental laws must incorporate these principles and make them central, instead of negating them.[18]

Despite predating the 2013 Constitution which houses the constitutional environmental rights clause, there are direct linkages between the norms in the environmental rights clause and those in Zimbabwe's framework environmental legislation passed in 2002. The provisions of this framework legislation, called the Environmental Management Act[19] are significant. Without doubt, the EMA goes a long way in incorporating contemporary norms and best standards of environmental protection.[20] Indeed, the constitutional environmental rights clause is a refinement of the environmental right enshrined in section 4(1) of EMA. Section 4 provides as follows:

> (1) Every person *shall*[21] have a right to—
> (a) a clean environment that is not harmful to health; and
> (b) access to environmental information, and protect the environment for
> (c) the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that—
> i) prevent pollution and environmental degradation; and
> ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

The environmental rights in EMA fall under the title 'Environmental rights and principles of environmental management'. It must be observed that there are some differences in the aspects of the environmental rights in comparison to the key features in the constitutional environmental rights clause. This needs to be tidied possibly through amendment so that the legislative right is aligned to the constitutional right. The reason is that, in practice, a right that is recognised and granted by a Constitution needs to be given the same meaning and content by the implementing legislation. Confusion and ambiguity occur where the legislative right

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[16] *See* I. Currie and J. De Waal (eds), *The Declaration of Rights Handbook*, 6th edition (Butterworths, 2015) p. 41.
[17] *See generally* D. V. Cowen, 'Toward Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation', 52 *THRHR* (1989) p. 8.
[18] *See generally* UNEP, *Proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development, Document Series on Environmental Law No. 1 (*1993), p. 6.
[19] Chapter 20:22.
[20] T. Madebwe, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience', 15 *African Human Rights Law Journal* (2015) p. 110; Murombo, *supra* note 6.
[21] The use of the term 'shall' appear rather out of sync with the phrasing of rights in the 2013 Constitution. It is however argued that this must not be read as requiring a different understanding of the clear provisions of the section.

goes further in scope, normative content and meaning that the constitutional right. Of course, this must not detract from the significant environmental norms and principles explicit in the legislative right. These include public participation, sustainable management of resources, sustainable development, pollution prevention, intra-generational equity and access to environmental information.[22] Without doubt, since EMA is a framework legislation aimed at defining "overarching and generic principles in terms of which sectoral-specific legislation is embedded",[23] the principles enshrined in the Act are sufficiently comprehensive to guide sector-specific environmental legislation in Zimbabwe.

3 Interpreting the Constitutional Environmental Right Clause

The environmental rights clause is novel in Zimbabwean constitutional framework, having been absent in the Lancaster House Constitution that came with political independence. Between 1980 and 2013, several developments occurred which gave momentum to the environmental movement. As a consequence, environmental standards kept evolving, and the international environmental law system grew stronger. Various states strengthened their environmental governance frameworks and granted recognition to a stand-alone environmental right in either their constitutional systems or their legislative frameworks. The scope of the constitutional environmental clause in the 2013 Constitution testifies to these and other developments in environmental law over the past three decades.

In substance, various features emerge from the environmental rights clause. It must be noted that the term 'environment' is not defined in the 2013 Constitution, and this is left to the Environmental Management Act. The Act defines 'environment" as referring to:[24]

> (a) the natural and man-made resources physical resources, both biotic and abiotic, occurring in the lithosphere and atmosphere, water, soil, minerals and living organisms whether indigenous or exotic, and the interaction between them;
> (b) ecosystems, habitats, spatial surroundings and their constituent parts whether natural or modified or constructed by people and communities, including urbanised areas, agricultural areas, rural landscapes, and places of cultural significance;
> (c) the economic, social, cultural or aesthetic conditions and qualities that contribute to the value of the matters set out in paragraphs (a) and (b);

There is no doubt that this definition is the one that must be adopted in understanding the constitutional environmental right.[25] There is nothing in the Constitution that suggests that the term 'environment' must be understood differently from how it is

[22] There was no right to access to information in the Constitution when EMA was passed into law in 2002. The Constitution now entrenches such right in section 62.
[23] *See* J. Nel and W. du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation', *South African Journal of Environmental Law and* Policy (2008) p. 2.
[24] Section 2 of EMA.
[25] *See* the approach used by the Constitutional Court in *Zimbabwe Law Officers Association & Anor v. National Prosecuting Authority & Four Ors* CCZ 1/2019.

defined in the Act. It is argued that the definition proffered by EMA is comprehensive and in tandem with regional[26] and global understanding of the environment.

On the scope of the right, it is clear that the clause creates a substantive right for everyone 'to an environment that is not harmful to their health or well-being'. An immediate element in this is the possible link of the environmental right to the right to health. According to Kidd, "the term health must be construed as going beyond 'physical health' and possibly encompass aspects such as complete physical, mental and social well-being".[27] This is because the environmental right recognises the need for the environment to be conserved in a manner that does not endanger people's health or well-being.[28] From this, environmental conservation is done to the benefit of people's health and well-being and not the environment itself. Other scholars[29] describe this phrasing of the environmental right as also recognising the *right of the environment* not to be degraded. It is however contended that such an understanding of the environmental right cannot be applied to Zimbabwe since its environmental and constitutional jurisprudence does not create or recognise rights of anything other than people. In fact, the Constitution is clear that the rights and freedoms in the Declaration of Rights are binding and apply only to natural and juristic persons as well as the State and all institutions of government.[30]

To what extent does the environmental right accrue to corporate entities, or juristic persons? Do these entities also enjoy the right to a clean environment that is not harmful to health and well-being or this was intended only for natural persons? The Constitution defines 'person' as referring to an "individual or a body of persons, whether incorporated or unincorporated".[31] Apart from this, the Constitution provides that both juristic persons and natural persons "are entitled to the rights and freedoms" in the Declaration of Rights, albeit "to the extent that those rights and freedoms can appropriately be extended to them".[32] From this, it is clear that the environmental right clause is available to juristic persons or corporate entities. The Constitution is alive to the fact that some constitutional rights cannot be enjoyed by juristic persons but are available to natural persons only; juristic persons can benefit from these rights only "to the extent that those rights and freedoms can be appropriately be extended to them".[33]

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[26] *See for instance* section 1 of South Africa's National Environmental Management Act.

[27] M. Kidd, 'Environment', in Currie and De Waal, *supra* note 16, p. 519. Kidd makes reference to, and seemingly endorses the approach by the World Health Organisation.

[28] *See* discussion on how the term 'well-being' may be construed in Kidd, *ibid.*, pp. 520–522.

[29] *See* the arguments by C. Stone, 'Should Trees Have Standing? Revisited Towards Legal Rights for Natural Objects', *Southern California Law Review* (1972) p. 450.

[30] *See* section 45 of the Constitution. It provides as follows:
(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
(2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
(3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them."

[31] *See* section 331.

[32] Section 45(3).

[33] Section 45(3) of the 2013 Constitution.

Another feature of the environmental right is that the right recognises environmental conservation as necessary to benefit not only present generations, but also future generations, a principle known as intra-generational equity. In essence, this means that every person expects the state to undertake environmental conservation for both short term and long-term purposes. A person can thus approach a court if s/he is currently not exposed to environmental harm, but where there is a likelihood that despite current environmental integrity future generations will be exposed to environmental risks. From a procedural perspective, this means that a person not facing any environmental threat or harm still has *locus standi* to enforce the environmental right for the benefit of future generations. The *locus standi* provisions in section 85 of the Constitution must thus be interpreted broadly to envisage this position. In fact, it is arguable that section 85 of the Constitution is broad enough and various sub provisions must be considered as applicable for this purpose. For instance, a person seeking to litigate on behalf of future generations may found *locus standi* on the basis that they are "acting on behalf of another person who cannot act for themselves"; or that they are acting in "the public interest", or finally that they seek to act "in the interests of a group, or class of persons".[34]

A third feature of the environmental rights clause is that it establishes the key normative content for the national environmental conservation legal framework. In other ways, it establishes the norms that must characterise the Zimbabwean environmental conservation framework. Thus, the national environmental legislative framework must achieve prevention of pollution and ecological degradation, promote conservation, secure ecologically sustainable development, and secure the use of natural resources whilst promoting economic and social development.

It is argued that these norms must be mainstreamed in national environmental laws and policies, strategies and action plans. Indeed, environmental laws and regulations must be assessed to determine whether they incorporate these norms. Further, environmental conservation laws must be scrutinised to determine whether their substantive norms and administrative procedures promote the norms built in the constitutional environmental clause.

Finally, the limitations of the environmental right in the Constitution and environmental laws must not erode these normative principles since this would negate the 'true objective' of the right. In *Re Munhumeso v. Ors*[35] the Supreme Court stated that in interpreting a fundamental constitutional right, a Court must adopt a broad approach and must principally depart from an interpretation that reneges on the freedom in question. The Supreme Court held:

> All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and

[34] *See* section 85 of the 2013 Constitution.

[35] *See In Re Munhumeso v. Ors*, 1994 (1) ZRL 49 (S); *Rattigan and Others v. Chief Immigration Officer of Zimbabwe*, [1994] Cases No 45/94, 92/94; and *Smyth v. Ushewokunze & Anor*, [1997] 2 ZLR 544 (S).

> freedoms are not to be diluted and diminished unless necessity or intractability of language dictates otherwise.[36]

Despite predating the 2013 Constitution, the *In Re Munhumeso* case defines Zimbabwe's constitutional jurisprudence on the enforcement and interpretation of rights and freedoms as well as their limitations. The legal position in the *In Re Munhumeso* case was further echoed in the case of *Chimakure v. Attorney-General of Zimbabwe,*[37] which clarified the position regards the interpretation of limitations in terms of section 86(2) of the 2013 Constitution. In the *Chimakure* case, the Constitutional Court remarked that "[t]o control the manner of exercising a right should not signify its denial or invalidation."[38]

4 The Concept of Sustainable Development

It is necessary to briefly delve on the concept of sustainable development as envisaged in the constitutional environmental right clause. In specific terms, the clause protects every person's right to have the environment protected for present and future generations through measures that, *inter alia,* secure ecologically sustainable development and use of natural resources while promoting economic and social development.

Importantly, the concept of sustainable development now characterises both international and domestic environmental law frameworks.[39] In 1987, the World Commission on Environment and Development defined the concept of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[40] Since then, the definition of the concept have evolved to be broader. Scholars now agree that sustainable development incorporates the important environmental law principles of inter- and intragenerational equity, as well as the principle of integration.[41]

In general, sustainable development is based on three pillars, namely economic, social and environmental.[42] It is described as "a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource base on which human activity depends". [43] This understanding is echoed

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[36] *In Re Munhumeso v. Ors*, 1994 (1) ZRL 49 (S).
[37] *Chimakure v. Attorney-General of Zimbabwe*, Constitutional Application No. SC 247/09 (2014), 21.
[38] *Ibid.*, 21.
[39] *See* T. Murombo, 'From Crude Environmentalism to Sustainable Development Fuel Retailers', *South African Law Journal* (2008) pp. 491–492.
[40] WCED, *Our Common Future* (1987), at p. 43.
[41] *See* M. Kidd, 'Removing the Green-Tinted Spectacles: The Three Pillars of Sustainable Development in South African Environmental Law', *South African Journal of Environmental Law and Policy* (2008) p. 14.
[42] D. Hallowes and M. Butler, The GroundWork Report. The Balance of Rights – Constitutional Promises and Struggle for Environmental Justice (2004) p. 8.
[43] J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', *Case Western Reserve Law* Library Number 1 (1998) p. 3.

in the South African jurisdiction. In the *Fuel Retailers* [44] case, the South African Constitutional Court expressed its views on the meaning of the concept in the South African environmental legal framework. The words of Ngcobo JCC are apposite. The Judge held:

> Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.[45]

The Zimbabwean framework environmental legislation does not define the term 'sustainable development'. The Act however focuses on 'sustainable utilization' which it defines as "the use or exploitation of the environment which guards against the extinction, depletion or degradation of any natural resource and permits the replenishment of natural resources by natural means or otherwise".[46] The South African National Environmental Management Act[47] defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations".[48] Without doubt, this definition sheds much clarity and means that the South African jurisdiction has a settled position on this issue.

5 Progressive Realisation of Environment Rights

The environmental rights clause recognises that environmental rights in section 73 must be implemented in a manner that ensures the progressive realisation of the rights. Section 73(2) provides that the state must take "reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization" of rights in the provision. It is now accepted that progressive realisation of rights depends on the availability of resources. This position is common for all socio-economic rights that are distinguished from civil and political rights whose realisation is regarded as immediate.[49]

There are several disconcerting issues with regards to the concept of progressive realisation of human rights. Importantly, the concept of the progressive realisation is based on the minimum core content principle, which guides the realisation of the right. There are some minimum presumptive legal entitlements, which should be

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[44] *Fuel Retailers Association of Southern Africa v. Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, 2007 (6) SA 4 (CC). *See also HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, 2007 (5) SA 438 (SCA).
[45] *Ibid.*, para. 58.
[46] *See* section 2 of EMA.
[47] Act 107 of 1998.
[48] Section 1 of NEMA.
[49] Article 2 of the ICESCR.

non-derogable if the right is to be meaningful.[50] Further, the concept of progressive realisation does not mean inordinate delay by the government in taking steps. It requires the state to take steps expeditiously and such steps must be appropriate. These could either be legislative, provision of judicial remedies, policy and other administrative measures to make sure that the rights are implemented. The obligation to progressively realise does also not mean discretion on the state to defer indefinitely the full realisation of the rights. In fact, the state must set time limits and benchmarks, targets and indicators on the progressive implementation of the protected rights. In other words, the government must have a measurable plan for the implementation of the rights.[51]

The concern with most developing countries such as Zimbabwe is that governments may take advantage of the progressive realisation requirement to either indefinitely defer the realisation of the environmental right, or handle the fulfilment of the right without the required level of seriousness. This is very possible when one takes into account the economic challenges that the country is currently facing. There are several competing priorities and it is tempting for the government to regard environmental issues as peripheral when it comes to the allocation of resources despite the fact that they are now part and parcel of the Declaration of Rights.

Debate can be triggered on whether the environmental right should be understood as having both immediate and progressive realisation qualities. Can this debate be sustained? It is strongly contended that there is a basis to argue that the environmental rights clause has both immediate and progressive realisation qualities. This is supported by the concept of progressive realisation itself. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has described progressive realisation as requiring immediate and tangible progress towards the realisation of rights, and that consequently states cannot drag their feet. Indeed, states are required to begin immediately to take steps to fulfil their obligations.[52] Further, states have an immediate obligation not to pursue deliberate retrogressive measures.[53] From this context, it means that states have immediate obligations to fulfil and promote the realisation of the rights. This approach is in tandem with comparative approaches elsewhere and must therefore be followed in the interpretation and enforcement of the Zimbabwean environmental rights clause.[54]

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[50] K. G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *The Yale Journal of International Law* (2008) p. 115.

[51] *See ibid.*

[52] Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN4/ 1987/17, Annex, para. 21; reproduced in 1987 *Human Rights Quarterly* pp. 122–135. The Limburg pPrinciples have been a source of authoritative interpretation of rights at both the international and national levels.

[53] Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN4/ 1987/17, Annex, para. 21.

[54] *See for instance* General Comment No. 13, para 45; CESCR General Comment No. 15 – The Right to Water, UN Doc. E/C12/2002/11 (2003), para. 19; General Comment No. 18, para. 21. *See also* the African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 14 and *Government of the Republic of South Africa v. Grootboom*, 2001 1 SA 46 (CC), para. 45 (right to adequate housing in the context of an eviction).

It can also be argued that the value system of the 2013 Constitution supports an understanding of some of the socio-economic rights requiring both immediate and progressive realisation. Section 3 of the Constitution outlines the founding values and principles underpinning the Constitution. Relevant to this discussion is the principle of good governance, which encapsulates transparency, justice, accountability and *responsiveness*. Another equally important principle is the recognition of the inherent dignity and worth of each human being. In addition, principles of public administration specified in Chapter 9 of the Constitution supports timeous and expeditious actions by government and state institutions in discharging their functions. Under Chapter 9, the most relevant principle is the requirement for a timeous response to people's needs.[55] Finally, section 324 of the 2013 Constitution unambiguously is an injunction for implementation of all constitutional obligations "diligently and without delay".[56] To this extent, there is a clear inference that the implementation of rights must be expeditiously performed, rather than delayed.

In the same vein, it must be noted that the horizontal application of rights suggests that the state must swiftly move to protect people's rights against abuses by other private persons. To reiterate, this means that rights that are binding between private persons in their relationship with each other must not wait to be progressively realised, a state has an immediate obligation to ensure there is a law not only for the protection of persons' environmental rights, but also for the provision of appropriate remedies once such rights are violated. The absence of such a law cannot be justified on the basis of progressive realisation.

6 The Duty to Take Reasonable Legislative and Other Measures

In terms of the environmental rights clause, the state must take reasonable legislative and other measures to ensure the realisation of the environmental rights in section 73. Passing laws for environmental conservation is one important measure envisaged by this provision. In this vein, the Zimbabwean government has passed several laws for environmental conservation, and these include the Environmental Management Act, the Water Act,[57] the Forests Act,[58] the Rural District Council Act,59 the Traditional Leaders Act,[60] the Communal Lands Act,[61] among others. Apart from these strictly, environmental law statutes, this duty also entails legislation on non-environmental, but environmental impacting activities, such as laws on agricultural settlement, water catchment, disposal of effluent and industrial waste, among other such activities. It is further contended that other non-legislative measures include the formulation of policies, action plans, strategies, guidelines and establishment of

[55] Section 194(1)(e).
[56] The provision states: "All constitutional obligations to be performed diligently and without delay."
[57] Chapter 20:24.
[58] Chapter 19:05.
[59] Chapter 29:13.
[60] Chapter 29:17.
[61] Chapter 20:04.

monitoring and enforcement mechanisms for purposes of environmental conservation.

It is important to note that these measures must be reasonable. This means that a court scrutinising the 'reasonableness' of these measures has to delve beyond the law; the court must assess choices and decisions, as well as decisions about the allocation of the budget. In essence, this qualifying term 'reasonable' implies that there should be some standard against which government's socio-economic programmes can be measured. In the South African jurisdiction, this issue has been given much clarity. In the *Grootboom*[62] case, the Court held that the question to resolve this inquiry is whether the means chosen by the government are reasonably possible of facilitating the realisation of the constitutional right in question. The Court agreed that it is the prerogative of the legislature and the executive to decide on the precise contours of the measures that had to be adopted to fulfil the constitutional rights.[63] In summary, the Court stated that a reasonable programme must be comprehensive and coordinated in the sense that it clearly allocates responsibilities and tasks to all the spheres of government and ensures that appropriate financial and human resources are available;[64] it must be capable of facilitating the realisation of the right;[65] the measures must be reasonable both in their conception and its implementation;[66] they must be balanced and flexible in the sense that it makes provision for short, medium and long term needs;[67] and finally they must include a component that answers to the exigencies of those in desperate need.[68]

Various other cases and scholarly analyses have more or less endorsed this reasoning.[69] For instance, the in the *Soobramoney* case, the Constitutional Court stated that it is essential that for them to be reasonable:

> measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advantage in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test[70]

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[62] *Government of the Republic of South Africa & Others v. Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).
[63] *Grootboom*, paras. 32–33.
[64] *Ibid.*, paras. 39–40.
[65] *Ibid.*, para. 41.
[66] *Ibid.*, para. 42.
[67] *Ibid.,* para. 43.
[68] *Ibid.*, para. 44.
[69] *See* K. Lehman, 'In Defense of the Constitutional Court: Litigating Socioeconomic Rights and the Myth of the Minimum Core', 22 *American University International Law Review* (2006) pp. 163–197; M. Wesson, '*Grootboom* and Beyond: Reassessing the Socio-economic Rights Jurisprudence on the South African Constitutional Court', 20 *SAJHR* (2004) pp. 284–308; A. Sachs, 'The Judicial Enforcement of Socio-economic Rights', 56 *Current Legal Problems* (2003) pp. 579–601.
[70] *See Soobramoney v. Minister of Health,* KwaZulu-Natal, 1997 (12) BCLR 1696, para. 44.

Without doubt, the reasoning in this judgment is difficult to resist. Indeed, a persuasive contention can be made justifying this South African approach being used as guide, albeit, with modifications, to give content to the phrase 'reasonable legislative and other measures' in the interpretation of the constitutional environmental rights clause of the Zimbabwean Constitution. This approach has been endorsed as practically logical and useful by various scholars,[71] including those from outside the South African jurisdiction. Most importantly, the Committee on Economic, Social and Cultural Rights has interpreted socio-economic rights implementation in a manner not very different from the approach suggested by the South African Constitutional Court.[72] For instance, the CESCR has stated that the measures to be taken by states "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State Party".[73] In addition, the CESCR has held that states have an obligation to permanently monitor the process of realisation of the rights and the problems encountered, and to devise strategies and programs for their implementation, such as detailed plans of action, with special attention for the vulnerable and disadvantaged groups in society.[74]

7 Other Environmental Principles

As mentioned above, an appreciation of the constitutional environmental rights clause illustrates the major principles that must underpin Zimbabwe's environmental law. Some of these principles are already embedded in the framework environmental legislation, namely EMA. The concept of sustainable development has been discussed above, and requires no further elaboration. One of the principles related to sustainable development concept is the principle of integration.

The principle of integration is central to the concept of sustainable development. It essentially entails the consideration of the three elements of social, economic and environmental factors in developmental issues.[75] Kidd provides an interesting analogue to illustrate its meaning:

This approach to sustainable development reflects the commonly-held view that sustainable development is analogous to a traditional African three-legged cooking pot. Without the three legs 'environmental, economic and social', the pot will be useless. Moreover, no one of the legs is more important than the others, or the pot will be unbalanced and topple over. Sustainable development, on the basis of this

[71] D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence', 19 *SAJHR* (2003) pp. 1–26.
[72] It must be noted that the South African Constitutional Court appear to reject the notion of minimum core obligation adopted by the CESCR. *See Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC), paras. 33–39.
[73] General Comment no. 9 (1998), the Domestic Application of the Covenant, UN Doc. E/C.12/1998/24, para. 5.
[74] General Comment no. 3, para. 11 and General Comment no. 1 (1989), Reporting by States Parties, paras. 3 and 4, contained in UN Doc. E/1989/22.
[75] *See Fuel Retailers* case, *supra* note 45, paras. 48–52.

view, thus regards the economic, environmental and social legs as all equally important – none of them ought to be regarded as a primary consideration.[76]

The Environmental Management Act does not grant isolated recognition of this principle. It however grants power to the minister of the environmental affairs to "promote the integration of conservation and sustainable use of biological diversity into relevant sectoral policies, plans and programmes".[77]

Apart from the above, EMA establishes a list of principles that "shall apply to the actions of all persons and all government agencies, where those actions significantly affect the environment".[78] Section 4(a) of EMA lists the principles, and one such principle recognises that "all elements of the environment are linked and inter-related, therefore environmental management must be integrated and the best practicable environmental option pursued".[79]

Further, EMA provides for the principle of integration in section 4(2)(e), where it provides that "development must be socially, environmentally and economically sustainable". Further, EMA requires that national environmental plans must formulate measures and strategies for purposes of "generally ensuring an integrated approach to the maintenance and improvement of the environment so as to afford an acceptable quality of life".[80]

Several other principles of environmental law that relate to principles in the constitutional environmental rights clause are enshrined in the Environmental Management Act. For instance, EMA recognises the principle of inter-generational equity;[81] prevention, minimization and remediation of adverse environmental impacts;[82] anthropocentric nature of environmental conservation;[83] the polluter pays principle;[84] public participation principle;[85] and other principles.[86] EMA does not however outline all the key principles of environmental law, and this is a weakness. It is submitted that key principles such as the precautionary principle, the public trust doctrine and the environmental justice principle[87] detract from EMA. An argument can however be made that possible future amendments to EMA must consider the

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[76] *See* Kidd, *supra* note 41, p. 18.
[77] Section 116(1)(g).
[78] Section 4(2).
[79] Section 4(2) (a).
[80] Section 88 (g) of EMA.
[81] Section 4(1).
[82] *See* section 4(2)(g).
[83] Section 4(2)(b), which states that "environmental management must place people and their needs at the forefront of its concern".
[84] *See* section 4(2)(g). According to one scholar, this principle has a 'trilateral purpose', namely to institute obligations for the polluter to (i) prevent, reduce and regulate pollution and environmental damages; (ii) pay damages and compensation for damages suffered by the environment and humans as a result of pollution or environmental damage; and (iii) restore and clean up the environment where pollution or environmental damage has occurred. *See* L. Kramer, *EC Treaty and Environmental Law* (1995) pp. 56–57.
[85] Section 4(2)(c).
[86] *See generally* section 4(2) of EMA. *See also* discussion of these in Murombo, *supra* note 6, p. 568.
[87] Ibid.

inclusion of these principles since they add value to the constitutional environmental rights clause.

8 General Overview

There is no doubt that there is a lot of value in the constitutional environmental rights clause. The set of principles and norms integrated in the clause appropriately reflects the global and comparative understanding of environmental conservation principles. As a constitutional right still novel in the constitutional framework, a lot hinges on judicial interpretation to give practical reality to the promise implicit in the right. Apart from over-reliance with judicial reasoning, guidance must be provided by relevant governmental and environmental institutional agencies that implement the constitutional environmental clause in the context of shared constitutional interpretation approach.[88] However, there is no doubt that additional scholarly literature can shed much-needed clarity on the value and promise inherent in the constitutional environmental rights clause.

From the above rendition, it is clear that two key issues deserve reiteration. Firstly, the interpretive approaches to be adopted in relation to the constitutional environmental rights clause must be guided by human rights law. Only by so doing can the human rights agenda and objectives of the Declaration of Rights be met. Indeed, the Declaration of Rights identifies all the constitutional rights as 'fundamental human rights and freedoms.' This chapter has made reference to the general comments of the Committee for Economic, Social and Cultural Rights, which is a key treaty body whose 'comments' provide comprehensive guidance to the meaning and scope of human rights. Secondly, there is value in interpretations of environmental rights adopted by foreign, comparative jurisdictions. The South African environmental conservation framework has been widely referenced as a comparator for this purpose; the environmental jurisprudence developed by their judicial courts is more comprehensive than our youthful jurisprudence in environmental law. Of course, such guidance must leave room for modifications and departures so that the meaning and scope of Zimbabwe's environmental constitutional rights clause can be properly situated in the Zimbabwean context.

9 Conclusions

The constitutional environmental rights clause entrenched in Zimbabwe's Constitution has much promise. It provides a set of environmental principles and norms that can adequately guide sector-specific environmental legislation. By expression, the clause commands a progressive realisation of the rights. However, by interpretation, there are some obligations in the clause that must be immediately met by the state. To that extent, the state can implement the constitutional environmental clause expeditiously, based on international and comparative interpretations of environmental rights as human rights.

Without doubt, there is need to harmonise the normative content of sectorial legislation so that such legislation adequately embraces the normative principles in the constitutional environmental rights clause. This write-up attempts to provide an interpretive guidance on how this right must be interpreted. However, it is hoped that judicial interpretation can also play an important part in fleshing out the various other aspects of the clause in a manner that meets both the constitutional objectives and the human rights agenda underpinning the Zimbabwean Constitution.